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Division II  
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No. 54281-1-II

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

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JAMES KRELL AND MARCIA  
KRELL, husband and wife,

Appellants,

vs.

PORT LUDLOW TOWNHOME ASSOCIATION  
(PLTH), an entity formed under the laws of the  
State of Washington; KIRK BOYS and KIM BOYS,  
husband and wife,

Respondents.

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APPEAL FROM THE SUPERIOR COURT  
OF JEFFERSON COUNTY, WASHINGTON

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THE HONORABLE LAUREN M. ERICKSON, JUDGE

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BRIEF OF RESPONDENTS KIRK AND KIM BOYS

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## II. STATEMENT OF THE CASE

### A. The Properties and the Gate

Petitioners James and Marsha Krell (collectively, the “Krells”), and respondents Kirk and Kim Boys (collectively, the “Boys”) collectively own a townhome in the Port Ludlow Village community. Their properties are thus physically connected, much like condominiums. CP 72. The Boys and the Krells share a courtyard located between their front doors and the street. All parties agree this shared courtyard is owned by the Boys, and the Krells have easement rights in the courtyard. CP 65-66, 141. An illustrative photograph taken from the street, showing the gate at issue in this litigation, the courtyard beyond the gate, and the townhome building, is found at CP 81. The Krells’ property is on the left side (36 Heron Road), and the Boys’ property is on the right side (34 Heron Road).

The relevant facts with respect to the Krells’ claims against the Boys are fairly simple. During the summer of 2016, the Boys decided to formally submit an application to the Architectural Review Committee (the “ARC”) of the Ludlow Bay Village Association for permission to install a gate between the courtyard and the street, in order to keep their young grandchildren from running into the road. CP 232, 239. The ARC denied this application. CP 181.

At that time, the president of respondent Port Ludlow Town Home

Association (“PLTHA”) was Al Wagner. Mr. Wagner told the Boys he was going to submit a separate application to install a gate on behalf of the PLTHA. CP 240-1. The primary motivation for this decision was safety, and a secondary motivation was standardization of the community— the other nearby townhomes had courtyard gates, and the townhome owned by the Krells and the Boys did not. CP 315-6, 72-3. Mr. Wagner did so, and the Krells objected, asserting Mrs. Krell had an unusual medical condition which made it difficult for her to use a gate. The gate application was approved, provided that the gate was made ADA compliant. CP 149-51.

After the PLTHA installed its gate, the Krells commenced this lawsuit against both the PLTHA and the Boys in June of 2018, asserting essentially that the PLTHA’s gate unreasonably interfered with the Krells’ easement rights. CP 1-6.

**B. The Allegations and Causes of Action against Boys**

The Krells asserted very few factual allegations against the Boys in their Complaint, and most of the allegations were undisputed. The Krells asserted, and the Boys admitted in their Answer, that the Krells had an easement in their shared courtyard. CP 2 at § 3.2, CP 17 at § 6, CP 4 at § 3.13, CP 18 at § 17. The Krells also asserted, and the Boys admitted, that the Boys sought an application to install their own gate, but their

application was denied. CP 2 at § 3.3, CP 17 at § 7.

In fact, the only truly contested factual allegation against the Boys is found in section 3.5 of the Complaint, as follows:

PLTHA association president Al Wagner submitted an ARC application . . . on August 10, 2016 and ARC approved his request . . . effectively using the power of the homeowners' association *to apply on behalf of the Boys so that they could install a gate.*

CP 3 at § 3.5 (italics added). Hence, the Krells asserted that the PLTHA was acting as the Boys' agent when it applied for and then installed the PLTHA's gate. Of course, this would allow the Krells to assert that the Boys were vicariously liable for the actions of the PLTHA.

Aside from this agency claim, there were no other factual allegations in the Complaint suggesting the Boys had obstructed or may in the future obstruct the Krells' access easement rights. Nevertheless, the Krells asserted two causes of action related to the Boys. The first one was as follows:

4.2 Quiet Title: Plaintiff Krell seek an order that they have title in the access easement across the common courtyard for parcels TH-17 and TH-18 and that Boys are forever barred from blocking said easement.

CP 5. As to the first part of this cause of action, as explained above, all parties already agree that the Krells have an access easement across the courtyard. CP 17 at § 6, CP 18 at § 17. And the second part of this section seeks an injunction, even though the Complaint contains no allegations

that the Boys were blocking or may in the future block the Krells' easement rights.

The final cause of action related to the Boys was as follows:

4.3 Declaratory Judgment: Should the court not quiet title to the easement, Krell seeks an order declaring their rights to use the courtyard and their ability to enter freely without obstruction.

CP 5.

In summary, the Krells' Complaint only asserted one relevant factual claim related to the Boys: that they recruited the PLTHA as their common law agent to install the PLTHA's gate. Based on this singular claim, the Krells sought relief against the Boys as follows:

- An order quieting title in their easement (even though their easement rights were uncontested);
- A permanent injunction (even though there were no allegations the Boys were blocking or were going to block the Krells' easement);  
and
- A declaratory judgment establishing the Krells' easement rights (even though the Boys were not contesting the Krells' easement rights).

### **C. The Motion for Summary Judgment**

In June of 2019, both the PLTHA and the Boys brought motions for summary judgment. CP 20-42, 211. The Boys' motion specifically

challenged the Krells' agency claim, and sought to dismiss the Boys from the lawsuit because there was "no evidence that the Boys recruited the [PLTHA] to act as their willing agent to install the gate which the plaintiffs assert is hindering the plaintiffs' easement rights." CP 212.

In response to the Boys' summary judgment motion, the Krells argued there was evidence of an agency relationship. CP 276-77. In addition, the Krells argued dismissal was inappropriate even if their agency claim did not survive summary judgment. More specifically, the Krells argued their quiet title and declaratory judgment claims constituted independent causes of action against the Boys, and the Boys could not be dismissed because they were necessary parties. CP 277 at lines 7-10.

"For the Boys, a quiet title action and declaratory judgment regarding the easement is brought against them because they are necessary parties under RCW 7.28.010 and nothing in the Boys' motion is cause to dismiss these claims." CP 262, 275-6. The Krells also asserted the Boys could be held liable simply because they "allowed" the PLTHA to install the PLTHA's gate over the Krells' objection. CP 262, 276.

In their rebuttal, the Boys primarily addressed the Krells' quiet title and declaratory judgment arguments by submitting evidence demonstrating such relief was not warranted because there was no judicial controversy. CP 354-62, 363-73.

With regard to the agency issue, the trial court determined there was “no evidence to conclude that when applying for approval to install the gate, that the PLTHA was acting under the control of, or at the direction of the Boys.” CP 391. The trial court also found in favor of the Boys on the quiet title claim, since there was “no evidence to suggest that either defendant is disputing that the Krells have a valid access easement over the subject property; nor is there any dispute over the parameters or bounds of the Krell’s easement.” CP 389. With regard to the declaratory judgment claim against the Boys, the trial court determined there was “no justiciable controversy between the Boys and the Krells for the court to resolve.” CP 390. The trial court also rejected the Krells’ injunction claim because there was lacking a “specific set of facts showing a real possibility that the Boys plan to block the Krells’ easement in the future.” CP 389.

In dismissing Boys from the lawsuit, the trial court awarded reasonable attorney’s fees and costs to the Boys in the amount of \$28,493.94 on the basis of an attorney’s fees clause found in the applicable covenants which established the Krells’ easement rights. More specifically, section 19.1 of the covenants allowed for an award to a prevailing party in any litigation relating to the “amendment, construction, enforcement or interpretation” of the covenants. CP 525-9, 542.

The trial court also granted partial summary judgment in favor of

the PLTHA. CP 386-94.

As a result of these summary judgment orders, there remained only one issue to be determined at trial: whether the PLTHA's fence "overly burdens" the Krells' easement rights. CP 391. The trial court then allowed for this interlocutory appeal, CP 525-9, and the Krells appealed. CP 548.

### III. ARGUMENT

#### A. The Trial Court Properly Dismissed the Agency Claims against the Boys

1. *The Krells Failed to Submit Evidence Demonstrating the PLTHA was Subject to the Boys' Control*

Summary judgment was appropriate because the Krells submitted no evidence demonstrating the PLTHA was under the Boys' control when it applied for and then installed a gate. In support of their summary judgment motion, the Boys met their initial burden by submitting deposition testimony from themselves, Mr. Al Wagner, and the PLTHA secretary, Mr. Lewis Hale, all testifying that the PLTHA did not act as the agent of the Boys. CP 217-9, 233-4, 246-7, 250. The burden then shifted to the Krells to "set forth specific facts to show there [was] a genuine issue for trial." Sea Farms, Inc. v. Foster & Marshall Realty, Inc., 42 Wash. App. 308, 711 P.2d 1049 (1985). They failed to meet this burden.

To establish an agency relationship, the Krells had to produce evidence that the PLTHA was *controlled* by the Boys. Moss v. Vadman, 77 Wn.2d 396, 402, 463 P.2d 159, 164 (1969) (“a prerequisite of an agency is control of the agent by the principal”). More specifically, there must be evidence of “consent by one person that another shall act on his behalf *and subject to his control*, with a correlative manifestation of consent by the other party to act on his behalf and subject to his control.” Afoa v. Port of Seattle, 191 Wn.2d 110, 126, 421 P.3d 903, 912 (2018) (italics added).

In response to the summary judgment motion, the Krells produced no evidence the PLTHA was subject to the control of the Boys when the PLTHA decided to apply for and then install the PLTHA’s gate. The Krells relied primarily on the declaration of James Krell, and in this declaration, only paragraphs seven and eight addressed the Krells’ agency claims. CP 343-4.

Paragraph seven asserted, “[t]he following emails contain admissible facts and statement [sic] showing the Boys’ knowledge and or participation in the gate application.” Mr. Krell listed these emails, but failed to attach them as exhibits, or even describe their content. His failure to describe “specific facts” was clearly insufficient to avoid summary judgment. Meyer v. Univ. of Washington, 105 Wn.2d 847, 719

P.2d 98 (1986).

Mr. Krell then asserted in the second half of paragraph seven that the Boys “participated and advocated for” the installation of a gate during the hearing on the PLTHA’s application to install a gate. CP 343. The Krells also argue in their appellants’ brief that the “Boys participated in the Krells’ Master Application [sic] ARC appeal”, and “were advocating for the gate . . . .” Brief of Appellants at 19. But these assertions are irrelevant. Advocating for the approval of PLTHA’s application does not demonstrate the PLTHA were being controlled by the Boys as their agent.

Next, in paragraph eight of his declaration, Mr. Krell relied upon a statement in a Human Rights Commission (“HRC”) report indicating the PLTHA’s gate was installed at the request of the Boys. CP 344. This statement is double hearsay, and the Boys objected to its admission into evidence. CP 366-7. First, the entire report is hearsay because it contains assertions made by the authors of the report, rather than the declarant (Mr. Krell), and it was offered to prove the truth of those authors’ assertions. See ER 801(c). The entirety of the report also failed to adhere to CR 56(e), which requires affidavits opposing summary judgment to “be made on personal knowledge”, and that “[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.” The HRC report, which

was attached to Mr. Krell's declaration, was neither sworn nor certified.  
CP 350-2.

Second, the assertion itself, consisting of an alleged statement from Mr. Wagner that the PLTHA's gate was installed at the request of the Boys, was also hearsay, since obviously the authors of the report had no personal knowledge of this. Yet the Krells argue the statement is an admission of a party-opponent. See Brief of Appellants at 18. This is not correct. The party-opponent hearsay exception described in ER 801(d)(2) applies if a statement "is offered against a party and is [] the party's own statement . . . ." The party-opponent exception does not apply in this situation because the statement was made by the president of the PLTHA, not the Boys. See Desranleau v. Hyland's, Inc., 10 Wash. App.2d 837, 450 P.3d 1203, 1207 (2019).

But even if there was some evidence the Boys asked the PLTHA to apply for a gate, that fact alone is insufficient to establish an agency relationship. A homeowner's association's voluntary decision to accommodate a homeowner's request does not mean that the association was subject to the control of the homeowner. See Afoa at 126, 421 P.3d at 912. No doubt homeowner's associations throughout this state take actions requested by homeowners every day. Holding that an agency relationship is established simply because a homeowner's association

accommodates a homeowner's request would unjustly expose members to liability for the misdeeds of those associations.

The Krells next argue that Mr. Wagner, as president of the PLTHA, "knew he signed PLTHA's application as 'owner' even though PLTHA had no "ownership interest" in Boys' courtyard. Brief of Appellants at 18. Yet in the actual gate application, Mr. Wagner crossed out the word "owner" and wrote in "requestor". CP 149.

The Krells next argue the Boys knew about the PLTHA's application to install the gate, and the ARC determined the Boys would have to replace some landscaping following installation of the PLTHA's gate. Brief of Appellants at 19. This, of course proves nothing relevant. Of course the Boys should have received notice of the PLTHA's application, and the fact that they had to change some landscaping does nothing to demonstrate how the PLTHA was operating as the Boys' agent.

Finally, the Krells next reference CP 196-8 in support of their assertion that the "Boys accepted Wagner's endorsement and approval for PLTHA to pay for the gate on their courtyard." Brief of Appellants at 19. But these three pages are simply invoices; nothing therein indicates the Boys endorsed or approved anything.

In summary, the Krells failed to provide evidence of a common law agency relationship between the Boys and the PLTHA.

2. *The fact the PLTHA Had Independent Reasons to Seek a Gate Demonstrates Lack of Agency*

On the other hand, there was plenty of evidence the PLTHA had its own independent reasons to have a gate installed, which of course mitigates against the Krells' theory that it was solely acting under the Boys' control. The "prime factor" motivating the PLTHA to apply for the installation of a gate was safety. CP 315-6, 72-3. There was evidence of "close calls" where pedestrians were almost hit by vehicles. CP 307, 312. Of course, safety was both a general concern for the PLTHA, and a personal concern for the Boys. The Krells cannot reasonably argue the PLTHA had no legitimate independent interest in taking steps it perceived as necessary to mitigate the risk of harm to its homeowners, especially the risk of small children being run over.

A "secondary factor" motivating the PLTHA was the standardization of the community. CP 315-6, 72-3. The PLTHA wished to better conform the appearance of the townhome entrances on Heron Road, since the other nearby townhomes had gates, and the townhome owned by the Krells and the Boys did not. CP 72-3.

Citing to two specific deposition transcript pages (CP 239 and 241), the Krells next allege that Mr. Wagner planned to "make up a reason" to apply for a gate. Brief of Appellants at 17. But these

referenced deposition transcript pages do not indicate the PLTHA “made up” a reason. Rather, the PLTHA simply used their secondary standardization concern as the basis for their gate application in order to maximize the chances the application would be approved.

In summary, nothing in the record indicates the PLTHA was not operating under its own independent judgment in determining whether to apply for a gate, and certainly there is nothing in the record indicating the Boys exercised the necessary control over the PLTHA. For these reasons, the trial court correctly dismissed the Krells’ agency claim against the Boys.

**B. The Boys are Not Liable Simply Because they Failed to Remove the PLTHA’s Gate**

The Krells next argue the Boys are liable to the Krells simply because they did not take affirmative action to remove the PLTHA’s gate. Brief of Appellants at 39-43. Apparently, the Krells believe the Boys should have engaged in vigilante justice by tearing out the PLTHA’s gate and then risking the civil and criminal consequences for the destruction of the PLTHA’s property. But because the Boys chose the peaceful route of allowing the court system to determine whether the PLTHA’s gate should be removed, the Krells argue the Boys are liable to the Krells for their inaction.

In support of this novel legal argument, the Krells rely upon Zonnebloem, LLC v. Blue Bay Holdings, LLC, 200 Wash. App. 178, 401 P.3d 468 (2017). Neither the facts nor the holding in Zonnebloem, LLC supports the Krells' legal position. In Zonnebloem, LLC, the plaintiff argued the defendants interfered with its utilities easement rights by refusing to grant an express easement to Puget Sound Energy, which was necessary to reconnect a power line to the plaintiff's new building. Id. at 181-2, 401 P.3d at 470. Although Zonnebloem, LLC affirmed the trial court's dismissal of the easement interference claims, the court postulated in *dicta* that "there may be 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, 401 P.3d at 473. The Krells use this *dicta* in support of their argument that the Boys' failure to remove the PLTHA's gate constitutes easement interference.

This argument is a red herring because it ignores who actually installed the gate. It was the affirmative actions of the PLTHA, not the inaction of the Boys, which resulted in the gate's installation. The PLTHA decided to apply for a gate after the Boys' prior application was denied, and after approval was granted, the PLTHA paid for and installed its gate over the Krells' objections. And, as demonstrated above, the PLTHA was

not operating as the agent of the Boys, so the Boys cannot be held liable for the PLTHA's actions. Of course, the Krells' argument assumes the PLTHA's gate is an unreasonable burden on the Krells' easement rights, which of course is an unresolved issue.

Finally, the Krells' argument, if accepted, would put the Boys in an impossible position: risk a lawsuit from the Krells for failing to remove the PLTHA's gate, or risk association fines, civil liability and possibly criminal action for tearing out the PLTHA's gate. Washington law should not be construed to place the Boys in this impossible position.

**C. The Trial Court Properly Dismissed the Declaratory Judgment Cause of Action for Lack of a Judicial Controversy**

The trial court properly dismissed the Krells' declaratory judgment cause of action against the Boys because there was no justiciable controversy between the Boys and the PLTHA. Although courts have general powers to issue declaratory judgments pursuant to RCW 7.24, a prerequisite is that "a justiciable controversy must exist between the parties." Bloome v. Haverly, 154 Wash. App. 129, 140, 225 P.3d 330, 336 (2010). A justiciable controversy is:

(1) ... an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will

be final and conclusive.

To-Ro Trade Shows v. Collins, 144 Wn.2d 403, 411, 27 P.3d 1149, 1153 (2001) (quotations omitted). Hence, in order to demonstrate a viable declaratory judgment claim, the Krells had to present evidence that they were involved in an “actual, present and existing dispute” with the Boys regarding the PLTHA’s gate. The record contains no such evidence, and the trial court was therefore justified in dismissing this cause of action. CP 390.

Soon after the lawsuit was filed, counsel for the Boys issued a letter to counsel for the Krells acknowledging the Krells’ easement rights, and explaining that the Boys “have no interest in interfering with the Krells’ easement rights, however those rights are ultimately construed by the court, and they take no position on whether the [PLTHA’s gate] constitutes an interference with those easement rights.” CP 354-6.

This position of neutrality was maintained in this litigation. The Boys’ Answer to the Complaint acknowledged the Krells’ easement rights. CP 2 at § 3.2, CP 17 at § 6, CP 4 at § 3.13, CP 18 at § 17. Also, Mr. Kirk Boys explained in his deposition testimony that he would abide by whatever decision is reached with regard to whether the PLTHA’s gate should be removed. CP 357-8. Hence, the Boys made it clear they would allow the court to decide what should happen with the PLTHA’s gate.

Nevertheless, the Krells argue that the Boys' response to section 3.13 of their Complaint demonstrates the Boys were opposing the removal of the PLTHA's gate, and were therefore "contesting the scope of the easement." Brief of Appellants at 22-3, 33-5.<sup>1</sup> The Krells are incorrect.

Sections 3.13 of the Complaint asserted as follows:

An access easement exists across Boys parcel TH-17 for the benefit of Krell parcel TH-18. Said easement was expressly conveyed under Article 14.3 of the CC & R's. 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, Krell.

CP 4 at § 3.13. In their Answer, the Boys responded as follows:

In response to paragraph 3.13, defendants Kirk Boys and Kim Boys admit an easement exists in accordance with § 14.3 of the applicable amended covenants, and deny the remainder of the paragraph for lack of information.

CP 18 at § 17.

Because the Boys were not familiar with Ms. Krells' medical condition, as described in section 3.8 of their Complaint, they of course had no idea whether the PLTHA's gate constituted an unreasonable interference with the Krells' easement rights. CP 4 at § 3.8; CP 17 at § 12. In this context, the Boys' properly denied for lack of information whether the PLTHA's gate interfered with those easement rights. CP 4 at § 17.

Hence, the Boys' Answer did not demonstrate a fundamental shift in their

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<sup>1</sup> The Krells' argument is somewhat confusing because throughout their brief, the Krells merge the concepts of an easement's *scope* and its *interference*. This issue is described in more detail below.

position on whether the PLTHA's gate should remain or be removed. And the Boys' denial for lack of information does not give rise to "an actual, present and existing dispute." To-Ro Trade Shows at 411, 27 P.3d at 1153.

In summary, the record contains no evidence the Boys shifted their legal position and opposed the removal of the PLTHA's gate. They made their position clear right away in their counsel's written communications with the Krells' counsel, and later their position was confirmed in deposition testimony. The Krells failed to allege, and failed to submit evidence suggesting, that the Boys had done anything to interfere with the Krells' easement rights. Under these circumstances, the trial court properly determined there was "no justiciable controversy between the Boys and the Krells for the court to resolve", and dismissed the declaratory judgment action. CP 390.

**D. The Trial Court Properly Dismissed the Krells' Quiet Title Claim for Lack of Judicial Controversy**

Since the Boys never disputed the existence or scope of the Krells' easement rights, there was no also no judicial controversy to support the Krells' quiet title claim against the Boys.

As explained above, there was no evidence of an agency relationship between the Boys and the PLTHA, and the Krells have failed to allege the Boys have taken or will take any steps to interfere with their

easement rights. Nevertheless, the Krells argue the Boys cannot be dismissed from this litigation because they are owners of the subservient estate, and since the Krells' have asserted a quiet title cause of action, they are necessary parties. Brief of Appellants at 27-32.

The Krells' argument contains a fundamental error. Throughout their brief, the Krells improperly conflate the concepts of an easement's *existence or scope*, and its *interference*. See, e.g., Brief of Appellants at 10, 22, 24, 31-2 and 35. There is, however, a fundamental difference between, on the one hand, a controversy over whether an access easement exists and its scope, and on the other hand, a controversy over whether a gate interferes with those access easement rights.<sup>2</sup>

The facts of this lawsuit demonstrate why there is a logical difference between an easement's scope and its interference. The Krells have alleged that due to Mrs. Krells' unusual medical condition, an otherwise inconspicuous gate with a common latch constitutes an unreasonable interference with her access easement rights. CP 4 at § 3.8, CP 81. It is not the Krells' easement rights at issue; those are uncontroverted, and those property rights remain the same regardless of who the owners of the dominant estate are. But because one of the current owners of the dominant estate has a unique medical condition, it is

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<sup>2</sup> For a more complete explanation, see Brief of Respondent PLTHA at 14-7.

claimed that the PLTHA's gate unreasonably interferes with those easement rights. Hence, although the Krells characterize their claims as quiet title claims, at its root the Krells simply seek a judgment on the issue of whether the PLTHA's gate unreasonably interferes with Ms. Krells' access easement rights due to her medical condition.

Under these circumstances, the trial court correctly recognized the Krells' claims did not arise out of disputed easement rights, which would otherwise be proper for a quiet title action, and determined there was "no evidence to suggest that either defendant is disputing that the Krells have a valid access easement over the subject property; nor is there any dispute over the parameters or bounds of the Krell's easement." CP 389. This Court should do the same and determine the Krells' quiet title claims must be dismissed for lack of a genuine judicial controversy.

**E. The Trial Court Properly Awarded Attorney's Fees to the Boys**

The trial court correctly determined the Boys were the prevailing party, and awarded reasonable attorney's fees in accordance with the attorney's fees clause in the applicable covenants. CP 526-9. Section 19.1 of the covenants provides as follows:

In the event of any arbitration or litigation relating to the amendment, construction, enforcement, or interpretation of this Master Declaration, the prevailing party shall be entitled to recover from the nonprevailing party the prevailing party's reasonable attorneys' fees and costs, including fees and costs incurred on

appeal.

This Court need only apply this contractual provision to the result achieved by the Boys in the trial court.<sup>3</sup> First, it is clear this litigation related to the enforcement of the Krells' easement. The Krells alleged in their Complaint that the easement at issue in this litigation "was expressly conveyed under Article 14.3 of the CC & R's." CP 4 § 3.13. And all of the causes of action asserted by Krells were based on this easement. CP 5 §§ 4.1-4. *But for* the easement rights afforded by the covenants, the Krells would have no basis for their lawsuit against the Boys.

Second, the Boys were the prevailing party because they successfully defended all of the Krells' claims against them. The Boys demonstrated on summary judgment there was no evidence of an agency relationship between the Boys and the PLTHA. The Boys also persuaded the trial court to dismiss the remaining claims against them, including the quiet title and declaratory judgment claims. The result was the dismissal of Boys from this lawsuit. It is difficult to imagine how the Boys could have been more successful. For these reasons, this Court should uphold the trial court's award of reasonable attorney's fees.<sup>4</sup>

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<sup>3</sup> This Court need not, and should not, apply RCW 4.84.330, because Section 19.1 is not a unilateral attorney's fees clause. Peabody v. Tunison, 2020 WL 1696681, at \*7 (Wash. Ct. App. 2020).

<sup>4</sup> It should be noted that the Krells do not dispute the amount of attorney's fees awarded.

**F. The Boys are Entitled to an Award of Attorney's Fees and Costs on Appeal**

For the same reasons, the Boys should also be awarded their reasonable attorney's fees and costs incurred on appeal. As indicated above, section 19.1 of the covenants provides that an award of attorney's fees to the prevailing party should include "fees and costs incurred on appeal."

**IV. CONCLUSION**

For the reasons explained above, the Boys respectfully request that this Court affirm the trial court's order granting summary judgment and awarding attorney's fees and costs.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of June, 2020.



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Attorney for Respondent Boys

## DECLARATION OF SERVICE

WENDY S. BRYANT declares and states as follows:

1. On the date indicated below, I caused to be served a true and correct copy of the attached brief of respondents, through the automatic emailing of this document to the Court of Appeals for electronic filing, providing appellants' email addresses of shane@crosssoundlaw.com and to co-respondent PLTHA's email addresses of wagner@wscd.com and phares@wscd.com, for service through the Court of Appeals web portal.
2. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

SIGNED this 30<sup>th</sup> day of June, 2020 in Kingston, Washington.

  
\_\_\_\_\_  
WENDY L. BRYANT

**LAW OFFICE OF ISAAC A. ANDERSON, PS**

**June 30, 2020 - 11:24 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 54281-1  
**Appellate Court Case Title:** James Krell, et al., Appellant v. Port Ludlow Townhome Assn, et al., Respondent  
**Superior Court Case Number:** 18-2-00139-0

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