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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON**

**CHEWELAH GOLF AND COUNTRY CLUB,
ASSOCIATION
Respondent**

V.

**WILBUR "WOODY" WILLIAMS,
Appellant**

NO. 317480

APPELLANT'S BRIEF

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II. ASSIGNMENTS OF ERROR

1. The trial court erred when it granted Chewelah Golf and Country Club Association's motion for partial summary judgment on the issue of a right to use Mr. Williams' property for golf play and maintenance. CP at 398-402.

2. The Trial court erred when it failed to grant Mr. Williams' motion for reconsideration of the summary judgment order. CP at 403-404.

III. INTRODUCTION AND RELIEF REQUESTED

This case involved a private golf course asserting a right to use private property, which it had no right, title, easement, or any other legal entitlement to use. In 2010, Respondent, Chewelah Golf and Country Club Association (CGCC or golf course) sued Appellant, "Wilbur "Woody" Williams, alleging, among other things, that CGCC had a right to use 35 feet of Mr. Williams' property for golf play. The trial court granted CGCC's motion for summary judgment and imposed an easement, covenant right, and equitable servitude upon Mr. Williams' property in favor of CGCC. In so doing, the trial court misapplied the law on

covenants, prescriptive rights, and equitable servitudes. In addition, there were numerous issues of material fact present in the case which made summary judgment inappropriate. Finally, the trial court impermissibly drew inferences in favor of the moving party, CGCC. For these reasons, Mr. Williams' requests that this Court reverse the trial court's summary judgment order which granted CGCC the right to use his property.

IV. STATEMENT OF THE CASE

Between 2003 and 2005, Wilbur "Woody" Williams purchased three lots on the Chewelah Golf Course. CP at 175. There were no out of bounds markers on any of these properties at the time of purchase. *Id.* In 2008, the golf course installed out-of-bounds markers on lots adjacent to Mr. Williams. CP at 171, 176. At Mr. Williams' request, they did not install the boundaries on his property. *Id.*

At no time prior to 2010, did anyone inform Mr. Williams that the golf course was claiming a 35 foot easement for golf play and/or course maintenance. CP at 176. When Mr. Williams purchased two of the lots, they were just undeveloped land. *Id.* No part of these properties was being used for golf play. CP at

176, 179. To this day, one of the lots remains overgrown and undeveloped. CP at 176. The third lot had a shed on it, but again, none of it was used for golf play. It is still not used for golf play. *Id.*

The lots Mr. Williams purchased are subject to protective covenants which were drafted by the Chewelah Golf Course and Country Club (CGCC). *See* CP at 82-89. These covenants do not contain language expressly granting a golf-playing or maintenance easement across Mr. Williams' properties. *Id.*

For the first several years that Mr. Williams lived on the course, he had no problems with golfers. CP at 176. Mr. Williams even served on the finance committee of the CGCC. *Id.* CGCC did not mow or fertilize any part of Mr. Williams' property. *Id.* Further, Mr. Williams landscaped and developed the lot where he resided to a degree that made it playable for golf, although that was not his intention at the time of the landscaping. At the time he purchased the lot, it was not playable. *Id.*

Beginning in 2007, Mr. Williams began having issues with the CGCC over its alleged ability to assess property owners along the course with annual fees for the benefit of the golf course. CP

at 176. The CGCC management then began harassing Mr. Williams about shrubs on his property. *Id.* The president of the Board told Mr. Williams that his landscaping was out of compliance with the covenants. *Id.* CGCC mowed down trees on Mr. Williams' property and attempted to move an irrigation pipe which Mr. Williams had placed on the property. CP at 176. The golf course settled the dispute over the mowed down trees by replacing some of the trees. *Id.*

While golfers had occasionally hit errant balls onto Mr. Williams' property, golfers now began hitting his home and automobiles frequently and more often. CP at 176. Golfers claimed the ability to hit balls out of Mr. Williams' yard, causing damage to his lawn. *Id.* Mr. Williams confronted some of the golfers. The police were called several times. *Id.*

On September 2, 2010, CGCC filed suit against Mr. Williams. CP at 3-12. They alleged the right to use Mr. Williams' property and claimed Mr. Williams' owed "money due on account." *Id.* Mr. Williams answered the CGCC's complaint and asserted counterclaims against the golf course. CP at 35-54. On June 12, 2012, CGCC moved for partial summary judgment on its

claims to the right to use Mr. Williams' property and submitted materials in support of its motion. CP at 55-145. Mr. Williams submitted materials in opposition to the motion. CP at 146-181. CGCC submitted a reply and additional materials. CP at 182-215. On August 13, 2013, the trial court heard oral argument on CGCC's summary judgment motion. CP at 220-249. The court orally granted CGCC's motion. CP at 247-248. After considering additional argument regarding the removal of trees, CP at 216-219, 250-251, the court issued a written order on September 24, 2012, CP at 252-257. Mr. Williams sought reconsideration of the ruling on summary judgment. CP at 258-265. The trial court denied the motion for reconsideration. CP at 306-308. On March 26, 2013, the parties stipulated to the dismissal of Mr. Williams' counterclaims. CP at 309-312. On May 20, 2013, the trial court granted Mr. Williams' motion for summary judgment as to the remaining claims in CGCC's complaint. CP at 414-415. This appeal followed. CP at 396-397.

V. LAW AND ARGUMENT

This Court reviews summary judgments de novo. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860 93 P.3d 108

(2004). Summary judgment is only appropriate if “there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” CR 56(c). “A material fact is one that affects the outcome of the litigation.” *Owen v. Burlington N. & Santa Fe R.R.*, 153 Wn.2d 780,789, 108 P.3d 1220 (2005). The party moving for summary judgment “is held to a strict standard. Any doubts as to the existence of a genuine issue of material fact is resolved against the moving party. In addition, [courts] consider all the facts submitted and the reasonable inferences therefrom in the light most favorable to the nonmoving party.” *Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn. 2d 506, 516, 799 P.2d 250, 257, (1990).

A. The trial court erred in ruling that the covenants granted CGCC an easement through Mr. Williams’ property for golf play and maintenance.

In order to establish a real covenant:

- 1) the covenants must have been enforceable between the original parties, such enforceability being a question of contract law except insofar as *the covenant must satisfy the statute of frauds*;
- 2) the covenant must “touch and concern” both the land to be benefitted and the land to be burdened;
- 3) the covenanting parties must have intended to bind their successors in interest;
- 4) there must be

vertical privity of estate, *i.e.*, privity between the original parties to the covenant and the present disputants; and (5) there must be horizontal privity of estate, or privity between the original parties.

Lake Arrowhead Cmty. Club, Inc. v. Looney, 112 Wn.2d 288, 295, 770 P.2d 1046 (1989)(emphasis added).

1. *The trial court erred in ruling that the purported easement satisfied the statute of frauds.*

Restrictive covenants create interests in land. *See Dickson v. Kates*, 132 Wn. App. 734 n.12, 133 P.3d 498 (2006). A deed conveying an interest in land must be in writing. RCW 64.04.020. To comply with the statute of frauds, the description of an easement interest must have a sufficiently definite description of the servient estate in order for the easement to be valid. *Berg v. Ting*, 125 Wn.2d 544, 551, 886 P.2d 564 (1995)(reference to future platting of property was insufficient to create an easement interest). Such a description “must be sufficiently definite to locate it [the easement] without recourse to oral testimony, or else it must contain a reference to another instrument which does contain a sufficient description.” *Id.*, 125 Wn.2d at 551 (*quoting Bigelow v. Mood*, 56 Wn.2d 340, 341, 353 P.2d 429 (1960)).

In the present case, CGCC argued that the Building and Landscaping Restriction No. 6 in the covenant it drafted gives CGCC the right to restrict Mr. Williams' ability to keep golfers off the 35 feet of his property facing the fairway of the golf course. This interpretation is flawed for several reasons. The first and most obvious defect is that nowhere do the covenants state anything regarding a "35 foot play area." No matter how many times CGCC repeated this phrase or has its agents claim that it existed, the covenants do not mention a "35 foot" anything.

What Restriction No. 6 actually states is "[t]he golf playing area of said front yard shall be marked." CP at 85. The covenant does not state who will do the marking. A reasonable interpretation of this restriction is that the homeowner will do the marking. This reading would be consistent with the rest of Restriction No. 6, which restricts the homeowner's ability to landscape their yard facing the fairway. Mr. Williams marked a golf playing area by placing a lot marker on his property line, planting trees, and laying plastic irrigation pipe along his property line. *See* CP at 159. The fact that this area is smaller than CGCC would like should not have given CGCC the legal right to take Mr.

Williams' property for its own purposes. For the purposes of summary judgment, the trial court should have resolved the ambiguity concerning who will do the marking of a play area in a front yard against CGCC and in favor of homeowners like Mr. Williams.

In addition to the ambiguity regarding who will mark the golf playing area, the covenants do not specify how large or small this area should be, or even if a golf playing area is required. CGCC knew how to reserve a specific amount of land for its own purposes. Building and Landscaping Restriction No. 10 states:

Easements for drainage, utilities, walkways, and golf cart use and access roads are reserved as shown on the face of the plat. There shall be a building setback of not less than fifty (50) feet on all lots bordering the golf course fairway. There shall be a five (5) foot side lot setback and a five (5) foot rear lot setback on all construction other than fencing.
CP at 86.

If CGCC had intended to reserve a 35 foot easement through the front yards of lots facing the fairway, it could have done exactly what it did in Restriction No. 10: directly grant itself an easement or impose a specific restriction. The fact that CGCC chose to do these things in one section of the covenants and chose

not to do them in the section of the covenants regarding a “golf playing area” is further evidence that a 35 foot easement was neither intended nor granted. As in *Ting*, the description of the interest allegedly conveyed in this case is insufficient to comply with the statute of frauds requirement that it be “sufficiently definite to locate it without recourse to oral testimony.” The purported easement is, therefore, void on its face. *See Ting*, 125 Wn.2d at 550.

2. The trial court erred in ruling that the intent of the covenants was to create an easement.

Courts interpret restrictive covenants to determine the intent of the parties. *Riss v. Angel*, 131 Wn.2d 612, 621, 934 P.2d 669 (1997). A covenant is “construed in its entirety.” *Id.* Where there is a dispute between the “maker of the covenant” and a “homeowner,” “strict construction against the grantor and in favor of the free use of land” applies. *See Id.*, 131 Wn.2d at 623 (where disputes are between homeowners and not involving the maker of the covenant strict construction does not apply); *see also, Burton v. Douglas County*, 65 Wn.2d 619, 622, 399 P.2d 68 (1965)(doubts

regarding restrictions in covenants “must be resolved in favor of the free use of the land”).

CGCC cited *Green v. Country Club*, 137 Wn. App. 665, 151 P.3d 1038 (2007) in its summary judgment materials for the proposition that covenants should be interpreted for the benefit of the homeowner’s which they restrict. *See* CP at 65. Mr. Williams agrees with this proposition. CGCC has interpreted the covenants for its own benefit, not the benefit of the homeowners.

Homeowners who purchased property along the golf course can reasonably expect that the occasional errant ball may land on their property. They cannot reasonably expect that the golfers will be allowed to play balls out of the homeowners’ yard, which the homeowners have landscaped and maintained at their own expense.

The trial court should not have allowed CGCC to obtain an interest in land indirectly where CGCC demonstrated that it could have acquired the interest directly and chose not to: probably because reasonable buyers would not have purchased the lots with such a restriction in place. The court should certainly not have allowed CGCC to acquire this interest without a trial and the right

to cross-examine CGCC's witnesses. In addition, the factual disputes regarding the size and method of marking of any alleged easement made this issue inappropriate for summary judgment.

B. The trial court erred in ruling that CGCC had established the elements of a Prescriptive Easement.

To establish a prescriptive easement, the party asserting the easement has the burden to prove “(1) use adverse to the owner of the servient land, (2) use that is open, notorious, continuous, and uninterrupted for 10 years, and (3) knowledge of such use by the owner at a time when he was able to assert and enforce his rights.” *810 Properties v. Jump*, 141 Wn. App. 688, 700, 170 P.3d 1209 (2007). Courts begin with the presumption that use of another's property is permissive. *Id.* “Prescriptive rights are not favored.” *Id.* (citing *Roediger v. Cullen*, 26 Wn.2d 690, 706, 175 P.2d 669 (1946)).

1. CGCC failed to establish the requisite 10 year period of adverse use.

At the time CGCC sued him, Mr. Williams had not owned the property through which the golf course alleges it has obtained a prescriptive easement for 10 years. CGCC failed to establish that its use prior to Mr. Williams' ownership was adverse to the prior

owners, or that it was entitled to tack that use on to Mr. Williams' period of ownership. The first purchase of Mr. Williams' lots from CGCC occurred in 1996. *See* CP at 195-200. Mr. Williams purchased his first lot in 2003. CP at 201. Because the golf course owned the property prior to 1996, its use of the property prior to that date could not be adverse and is thus irrelevant for the purposes of establishing a prescriptive right. In addition, use of vacant, undeveloped land by itself does not provide sufficient evidence that the use was adverse and with the knowledge of the owner. *Nw. Cities Gas Co. v. W. Fuel Co.*, 13 Wn.2d 75, 85-86, 123 P.2d 771 (1942). It is undisputed the main lot at issue in this case, Lot 16, was undeveloped before Mr. Williams purchased it in 2003. The golf course failed to provide any evidence that Mr. Williams' predecessors in interest had knowledge of the golf course's assertion that it could use a portion of the land for golf play and maintenance. For these reasons, CGCC's claim of prescriptive easement should have failed as a matter of law.

2. The golf course failed to establish that its use of the property was not permissive.

Mr. Williams did not object to golfers on his property until

2007. CP at 176. Thus, the golf course's use of Mr.

Williams' land prior to 2007 was presumed permissive.

Finally, there are significant factual disputes concerning whether the golf course mowed, maintained, or otherwise made use of the 35 feet of Mr. Williams' property through which the golf course now asserts it has a prescriptive easement.

The golf course claims that it maintained out-of-bounds markers on the 35 feet of property owners' land facing the fairways for over 30 years. This is demonstrably untrue. There were never any markers on Mr. Williams' properties. CGGC described plastic out-of-bounds markers on its course, and it implied they had been there for 20 years. *See* CP at 60. These markers were installed in 2008. CP at 171. The markers prior to 2008 were small wood markers, and these were often missing. CP at 167. In at least once instance, the golf course adjusted its out-of-bounds markers in response to homeowners' request. *Id.* CP at 171. This inconsistent application of its alleged right to access 35 feet of homeowners' property means that CGCC cannot establish that the use was "open, notorious, and uninterrupted." Rather, it suggests that the use was permissive. At a minimum, the

inconsistent application raised issues of material fact, which made summary judgment inappropriate.

While CGCC asserts that its golf course maintenance activities give it a prescriptive easement, Mr. Williams denied that the golf course has performed maintenance such as mowing and fertilizing on any of his properties. CP at 176. In addition, the golf course had a policy of stopping maintenance work when a homeowner objected. *See* CP at 171. These facts again suggest that rather than an open, notorious, and hostile use of property, the golf course's mowing, fertilizing, and irrigation, if any, was permissive. In any event, the factual dispute on this issue meant that summary judgment is inappropriate.

Finally, even if CGCC has a prescriptive easement for maintenance, which CGCC has not proven, it does not follow that the course has an easement for golf play. As in most cases involving prescriptive rights, summary judgment, granting this right was not appropriate in this case.

C. The trial court erred in ruling that CGCC had established the elements of an equitable servitude.

To acquire an equitable servitude or restriction a party must show:

between the original parties; (2) which touches and concerns the land or which the parties intend to bind successors; and (3) which is sought to be enforced by an original party or a successor, against an original party or successor in possession; (4) who has notice of the covenant.

Hollis v. Garwall, Inc., 137 Wn.2d 683, 691, 974 P.2d 836, 841, 1999 (1999).

In the present case, to establish the writing element the golf course relied on vague language in the covenants regarding a golf play area, the dimensions of which are not specified, to impute a 35 foot golf play and maintenance easement. However, the writing the golf course is relying on says nothing about a 35 foot area, it says nothing about maintenance, and it says nothing about restricting the rights of property owners to exclude people from the “golf play area.” Thus, the writing is not an enforceable promise as to these elements. The golf course also failed to establish the notice element. Mr. Williams testified that he had no knowledge of any assertion of a golf play or maintenance easement prior to 2010. CP at 176. At a minimum there were factual disputes as to whether CGCC had proven the elements of an equitable servitude; the trial court erred in granting summary judgment.

D. The trial court erred by drawing inferences in favor of CGCC, the party which moved for summary judgment.

In its oral ruling, the court discounted Mr. Williams' testimony that he never saw out of bounds markers on his property. The court stated that "He knew the in-play area. He knew where they were." CP at 247. The facts before the court and inferences taken in the light most favorable to Mr. Williams, do not support the conclusion that Mr. Williams knew "where" that area was. In fact, Mr. Williams testified that at no time prior to 2010 was he aware that the golf course was claiming an easement across his property for golf play or maintenance. CP at 176. Robert Hibbard testified that there were no markers near Mr. Williams' property prior to 2010. CP at 167. The court apparently discounted the Hibbard statement as being irrelevant because one could sight an out-of-bounds line from markers on adjacent lots. See CP at 246-247. Mr. Hibbard also testified that the nearest marker was located in bushes 50-60 yards away from Mr. Williams' property. *Id.* This is hardly visible or easy to sight. If there were no markers near Mr. Williams' lots prior to 2010, which the court must assume is true for purposes of summary judgment, this would prevent the easy

“siting between the markers,” which the court cited as a basis for imputing knowledge to Mr. Williams in 2003.

The court also dismissed as having “no bearing on this case” Mr. Williams’ argument that the golf course’s movement of out of bounds markers and stopping maintenance on his and neighboring properties shows permissive use of the landowner’s property. CP at 247. For the purposes of summary judgment Mr. Williams is entitled to the reasonable inference that if someone changes their behavior when asked, the party changing its behavior was not asserting an absolute right to that behavior. Contrary to the court’s contention, what CGCC did with other property owners, who were subject to the same covenants, as Mr. Williams, goes directly to CGCC’s intent with regard to Mr. Williams’ property. Because issues of permission and intent are factual determinations, Mr. Williams was entitled to a trial on these issues. This is especially true because prescriptive rights are disfavored. *See Jump*, 141 Wn. App. at 700.

The court also apparently completely disregarded Mr. Williams’ testimony that the golf course had never mowed or fertilized his land. CP at 176. The court is required to accept Mr.

Williams statements concerning mowing and fertilizing as true for the purposes of summary judgment. The court may not make credibility determinations at this stage of the litigation. *Balise v. Underwood*, 62 Wn.2d 195, 200, 381 P.2d 966 (1963).

Finally, while the court placed considerable emphasis on the fact that the golf course had placed markers on the course in 1982, there was evidence that those markers had deteriorated and had to be replaced in 2008. It is a reasonable inference that the markers had deteriorated by 1996 when Mr. Williams' property was first sold. Thus, even if one were to accept the court's legal conclusion that the markers are sufficient to establish notice of the parameters of the golf play area, there is an issue of fact as to whether Mr. Williams or his predecessors had actual knowledge of the whereabouts of the markers at the time they purchased the properties.

The trial court stated that it thought a trial would be a "waste of resources." *See* CP at 28. This is not the standard for summary judgment. Rather, the standard is whether there are genuine issues of material fact with all facts and reasonable inferences taken in the light most favorable to the non-moving

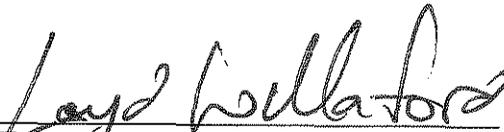
party. *See Atherton*, 115 Wn.2d at 516. In deciding the issue of whether CGCC had a right to use Mr. Williams' property, the trial court drew every inference in favor of CGCC, the moving party, and it failed to give proper weight and deference to the facts presented by Mr. Williams.

VII. CONCLUSION

The trial court misapplied the law on real covenants, prescriptive rights, and equitable servitudes in this matter. In addition, there were numerous factual disputes in this case. There was a factual dispute as to whether there were out-of-bounds markers visible in 1996 at the time Mr. Williams' property was first sold or in 2003 when Mr. Williams purchased the property. There was a factual dispute about the size of the alleged golf play area and who has the authority to mark it. There was a factual dispute as to the whether the golf course has regularly maintained a 35 foot boundary of out-of-bounds markers across Mr. Williams' property. And there was a factual dispute as to whether the golf course's alleged maintenance activities on Mr. Williams' property were sufficient to support a claim of a prescriptive easement. The legal errors and factual disputes meant that summary judgment was

inappropriate. Mr. Williams requests that this Court reverse the trial court's order granting summary judgment to CGCC on the issue of a right to use Mr. Williams property.

Submitted this 29th of August, 2013.



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CERTIFICATE OF SERVICE

I declare under penalty of perjury of the laws of the state of Washington that on August 29, 2013 I provided a true and correct copy of Appellant's Brief, served by the method indicated below, and addressed to the following:

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