

**FILED**

**AUG 15 2016**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 345017

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

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KELLY S. DEAN and ANNA MARIE DEAN,  
Husband and wife, Respondents

v.

TIMOTHY MILLER and DIANE MILLER,  
Husband and wife, Appellants

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APPELLANT'S BRIEF  
August 11, 2016

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## **I. ASSIGNMENTS OF ERROR**

### Assignment of Error:

No. 1. The trial court erred in concluding the covenant complied with the statute of frauds.

No. 2. The trial court erred in concluding that the covenant was enforceable as an equitable servitude.

No. 3. The trial court erred in concluding that the covenant touched and concerned Lot 9, Deans' property.

No. 4. The trial court erred in concluding that the covenant was a running real covenant.

No. 5. The trial court erred by granting summary judgment to Dean.

No. 6. The trial court erred in concluding and ordering that the Declaration of Covenant is valid, binding and enforceable against the Millers.

No. 7. The trial court erred in concluding and ordering that the revocation of covenant recorded by the Millers was void *ab initio*.

No. 8. The trial court erred in permanently enjoining Millers from engaging in any activities restricted by the terms of the covenant other than rentals, including but not limited to the permanent injunction enjoining Millers from constructing any structure on Lot 10, which this the Millers'

property, beyond the single family dwelling and private garage presently on said Lot 10.

Issues Pertaining to Assignments of Error.

No. 1. Does a Declaration of Covenant that does not contain a complete legal description of a parcel of property comply with the statute of frauds, RCW 64.04.010 and 020, to be enforceable by the owner of the un-described lot against the owner of a described lot of real property? (Assignments of Error No. 1, 5, 6, 7 and 8).

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No. 4. Does a covenant touch and concern real property without evidence to show a specific benefit to the owner of the real property seeking to enforce the covenant in order for the property to be touched and

concerned? (Assignments of Error No. 3, 4, 5, 6, 7 and 8).

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No. 7. Can a trial court order injunctive relief to a party that has failed to demonstrate a clear legal or equitable right? (Assignment of error No. 8).

## **II. STATEMENT OF THE CASE**

On April 19, 1979, William J. Walsdorf and Mary Anne Walsdorf, husband and wife, obtained title to real property situate in Chelan County, more particularly described as follows:

Lot 9, Block 1, Darling Land Company's First Addition to Leavenworth, Chelan County, Washington, TOGETHER WITH strip adjoining said Lot 9 to the Wenatchee River on the North, according to the plat thereof recorded in Volume 2 of Plats, Page 71.

By Deed recorded under Chelan County Auditor's No. 798948, Exhibit "B" to the Complaint (CP 013-014). The property is hereinafter referred to as "Lot 9".

Although the pleadings and Clerk's Papers in the case do not contain a copy of the Deed, which was later filed in the Trial Court as an attachment to Dean's Reply in Support of Motion for Summary Judgment, William J. Walsdorf and Mary Anne Walsdorf, husband and wife, obtained title to real property situate in Chelan County, Washington, more particularly described as follows:

Lot 10, Block 1, Darling Land Company's First Addition to Leavenworth, Chelan County, Washington, according to the plat thereof recorded in Volume 2 of Plats, Page 71. ALSO a strip of land adjoining said Lot 10 and extending to the bank of the Wenatchee River on the North, and whose East and West boundary lines are determined by extending the East and West boundary lines of said Lot 10 to the Wenatchee River.

By Deed recorded under Chelan County Auditor's File No. 9101110002 on the 10<sup>th</sup> day of January, 1991. The property is hereinafter referred to as "Lot 10".

On September 30, 1993, under Chelan County Auditor's File No. 9309300058, Walsdorf conveyed Lot 10 to William L. Massey and Kathleen A. Massey, husband and wife, Exhibit "F" to the Complaint (CP 022).

On September 30, 1993, under Chelan County Auditor's No. 9309300059, Exhibit "G" to the Complaint (CP 023-025), a Declaration of Covenant signed by Walsdorf and Massey, describing Lot 10 was recorded. The Covenant does not contain a legal description of Lot 9, Exhibit "G" to the Complaint (CP 023-025). The Covenant describes Walsdorfs as the owners of Lot 10 and as Grantors.

The last paragraph on Page 2 of the Covenant states:

"These covenants shall run with the land and shall be binding on all parties, having or acquiring any right, title or interest in the land described herein or any part thereof, and shall inure to the benefit of each owner thereof."

William J. Walsdorf and Mary Anne Walsdorf, husband and wife, conveyed title to Lot 9 to Kelly S. Dean and Anna Marie Dean, husband and wife, by Deed recorded April 30, 2002, under Chelan County Auditor's File 2115804, Exhibit "A" to the Complaint, (CP 011-012). Kelly S. Dean and Anna Marie Dean, husband and wife, are for convenience purposes hereinafter referred to as "Dean".

Timothy Miller and Diane Miller, husband and wife, hereinafter for convenience purposes referred to as "Miller" through a series of Deeds, Exhibits "D" and "E" to the Complaint, (CP 018-021) ultimately acquired title to Lot 10, by Deed recorded December 23, 2013, under Chelan County

Auditor's File No. 2394550, Exhibit "C" to the Complaint (CP 015-017). The Deed to Miller contained 19 specific matters which Miller took subject to, including No. 6, the Covenant at dispute herein, No. 12, alleged Covenants in the document recorded under Auditor's No. 30613, No. 16, alleged Covenants contained in the Survey recorded under Auditor's No. 2197374 and the Survey recorded under Auditor's No. 2200060, and No. 18, a reference to alleged Covenants recorded on the face of the Plat of Darling Land Company's First Addition to Leavenworth. (CP 015-017).

The document referenced as No. 12 in the Deed does not contain the Covenants sought to be enforced herein. (CP 064-066).

The documents referenced in the Deed as Nos. 16 and 17 do not contain any Covenants sought to be enforced herein. (CP 68 and 70).

The plat referenced in No. 18 on the face of the Deed does not contain any Covenants within or upon the face of the plat. (CP 072).

Miller as the owners of Lot 10, revoked the Covenant by recording a Revocation of Covenant, recorded April 24, 2015, under Chelan County Auditor's No. 2416807, Exhibit "H" to the Complaint. (CP 026-027).

Miller proceeded to subdivide Lot 10 with the intent of constructing another house on the new lot. (CP 028-043).

On July 7, 2015, Dean filed a verified Complaint for Declaratory and

Injunctive Relief in Chelan County Superior Court. (CP 001-045).

Miller filed an Answer to the Complaint and a Counterclaim against Dean on August 20, 2015. (CP 046-049). Deans filed Dean's Reply to Defendant's Counterclaim. (CP 050-052). Deans filed Dean's Motion for Summary Judgment. (CP 053-060). Miller filed a Motion for Partial Summary Judgment. (CP 061).

The respective Motions for Summary Judgment and Partial Summary Judgment came on for hearing before Chelan County Superior Court, the Honorable T.W. Small on the 20<sup>th</sup> day of November, 2015 and Judge Small entered an Order on Summary Judgment the 16<sup>th</sup> day of December, 2015, (CP 073-075) denying Deans' Motion for Summary Judgment and granting Miller's Partial Motion for Summary Judgment. Dean filed a Motion for Reconsideration on December 28, 2015, seeking reconsideration of the portion of the Order on Summary Judgment denying Dean's Motion for Summary Judgment. The Motion for Reconsideration did not request reconsideration of the portion of the Order on Summary Judgment granting Miller partial judgment.

Dean did not present any evidence to establish Dean was aware of the covenant or relied on the covenant when Dean purchased Lot 9 (C( 110).

On March 9, 2016, the Honorable T.W. Small issued a Memorandum

of Decision granting reconsideration and the Order granting Dean's Motion for Reconsideration was signed and filed the 12<sup>th</sup> day of May, 2016. (CP 096-111).

Miller filed the Notice of Appeal on June 13, 2016, appealing the Order granting Dean's Motions for Reconsideration and granting Dean's Summary Judgment enforcing the covenant to restrict a further structure being placed on the property.

### III. ARGUMENT

A. Standard of Review. The Court of Appeals reviews the granting of the Summary Judgment and granting of the Motion for Reconsideration to grant Summary Judgment de novo.

*Ross v. Bennett*, 148 Wn. App 40 (2008) summarizes the standards for summary judgment as follows:

A motion for summary judgment may be granted when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). The burden is on the moving party to show there is no genuine issue of material fact. *Vallandigham v. Clover Park School Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). All facts and reasonable inferences are viewed in the light most favorable to the nonmoving party. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). "If the moving party satisfies its burden, the nonmoving party must present evidence that demonstrates that material facts are in dispute." *Id.* Summary judgment is proper if, in view of all the

evidence, reasonable persons could reach only one conclusion. *Vallandigham*, 154 Wn.2d at 26. This court reviews a trial court's summary judgment order de novo. *Folsom*, 135 Wn.2d at 663.

148 Wn.App at 49.

B. The Covenant does not comply with the Statute of Frauds as required to be an express covenant or a running real covenant. (Assignments of Error Nos. 1, 4 5, 6, 7 and 8; Issues 1, 3 and 5.)

The Covenant sought to be enforced by Deans and ordered as enforceable by the trial court does not comply with the Statute of Frauds and is unenforceable by the Deans because the Deans' property is not described in the Covenant at all or as a benefited property. See, *Berg v. Ting*, 125 Wn.2d 544 (1995); *Martin v. Seigel*, 35 Wn.2d 223; 212 P.2d 107 (1948); *Deep Water Brewing, LLC v. Fairway Resources Limited*, 152 Wn.App. 229 (2009).

In *Berg v. Ting, supra*, the Washington State Supreme Court stated:

Under RCW 64.04.010, "[e]very conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed . . .". Every deed "shall be in writing, signed by the party bound thereby, and acknowledged . . .". RCW 64.04.020. Although it is an incorporeal right, an easement is an interest in land. See *Perrin v. Derbyshire Scenic Acres Water Corp.*, 63 Wn.2d 716, 388 P.2d 949 (1964). An express grant of

easement is a conveyance within the meaning of the statute of frauds. E.g., *Ormiston v. Boast*, 68 Wn.2d 548, 550, 413 P.2d 969 (1966).

To comply with the statute of frauds, "a contract or deed for the conveyance of land must contain a description of the land sufficiently definite to locate it without recourse to oral testimony, or else it must contain a reference to another instrument which does contain a sufficient description." *Bigelow v. Mood*, 56 Wn.2d 340, 341, 353 P.2d 429 (1960). However, in the case of an easement, a "deed [of easement] is not required to establish the actual location of an easement, but is required to convey an easement" which encumbrances a specific servient estate. (Some italics ours.) *Smith v. King*, 27 Wn. App. 869, 871, 620 P.2d 542, 24 A.L.R.4th 1049 (1980) (citing cases). The servient estate must be sufficiently described. See *Seattle v. Nazareus*, 60 Wn.2d 657, 660-61, 374 P.2d 1014 (1962).

125 Wn.2d 544 at 551.

The Washington State Supreme Court has long held that reference to a platted property must be described by the correct lot number, block number, addition, county and state. *Martin v. Seigel*, 35 Wn.2d 223; 212 P.2d 107 (1948).

The Supreme Court stated:

In the interests of continuity and clarity of the law of this state with respect to legal descriptions, we hereby hold that every contract or agreement involving a sale or conveyance of platted real property must contain, in addition to the other requirements of the statute of frauds, the description of such property by the correct lot number(s), block number, addition, city, county, and state. In so far as the

Thompson case, *supra*, conflicts with this rule, it is hereby overruled.

*Martin v. Seigel*, 35 Wn. 2d, 223, at 229, 212 P.2d 107 (1949).

In the case before the Court, the Covenant does not describe Lot 9, Dean's property, as a benefited property and only casually references Lot 9 in Paragraph B without block number, addition, county or state. (CP 023-025) The Covenant fails to distinguish Lot 9 in the casual reference on Page 1 of the Covenant Subparagraph B (CP page 23) from any other Lot 9 throughout the county or state. The Covenant fails to describe Lot 9 as the benefited property and the express terms of the Covenant, only benefits and burdens Lot 10. The trial court erroneously concludes, without any evidence as to intent or benefit to Lot 9, that since Lot 9 was owned by the Walsdorfs at the time of their conveyance of Lot 10, they must have intended Lot 9 to be a benefited property. The trial court states that oral testimony is not required to make this conclusion, however, the statute of frauds clearly requires a more complete description and does not allow the Court to reform an inadequate legal description without a request for reformation or evidence to support a reformation. See *Halvert v. Forney*, 88 Wn.App. 669; 945 P 2d 1137 (1997). The trial court essentially reformed the Covenant by drawing

the conclusion that the parties intended Lot 9 to be benefited without any evidence to establish a mutual mistake, a scrivener's error or any other grounds for reformation listed in *Halvert v. Forney, supra*. The trial court's reasoning ignores the law on the statute of frauds and complete legal descriptions, *Martin v. Seigel*, 35, Wn.2d 223; 212 P.2d 107 (1949); *Halbert v. Forney*, 88 Wn.App. 669; 945 P.2d 1137 (1997). In both of the cases, *Martin v. Seigel, supra*, and *Halbert v. Forney, supra*, the purchase and sale agreements contained the address of the proposed Sellers' properties but no legal descriptions. In each case enforcement of the agreements was not allowed because the agreements did not contain an adequate legal description even though the facts were undisputed that the addresses were for the property owned by the respective Sellers and intended to be sold.

The trial court's ruling in the present case stated that since Walsdorf owned Lot 9, Walsdorf intended to benefit Lot 9 and the statute of frauds requirements have been met (CP 107). The Washington State Supreme Court and the Court of Appeals have expressly repudiated the trial courts analysis in *Martin v. Seigel, supra*, and *Halbert v. Forney, supra*. Both cases clearly identified by address the property owned by the Seller and intended to be sold. However, the agreements were unenforceable because of the lack of a complete legal description.

The last paragraph of the Covenant specifically states that the Covenant shall be binding on parties acquiring any right, title or interest in the land described herein or any part thereof and shall inure to the benefit to each owner thereof. (CP 24) The Covenant does not adequately describe Lot 9 and, therefore, does not run with Lot 9 or inure to the benefit of any owner of Lot 9. To the extent that Deans seek to enforce the covenant, the covenant fails to comply with the Statute of Frauds to provide the owner of Lot 9, standing to enforce the covenant and the covenant does not comply with the Statute of Frauds to inure to the benefit of the owner of Lot 9.

*Deep Water Brewing, LLC v. Fairway Res. Ltd, supra*, one of the cases relied upon by Deans and the trial court, clearly requires the covenant comply with the Statute of Frauds. The Washington State Court of Appeals stated:

(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.

*Leighton v. Leonard*, 22 Wn. App. 136, 139, 589 P.2d 279 (1978) (footnote omitted) (citing William B. Stoebuck,

*Running Covenants: An Analytical Primer*, 52 WASH. L. REV. 861 (1977)).

*Emphasis added.* 152 Wn.App. 229 at 257.

The Washington State Courts in the cases cited hereinabove, have consistently required compliance with the Statute of Frauds, RCW 64.04.010, et seq., in order for an express covenant or a running real covenant to be enforceable. Deans lack standing to enforce the covenant as a covenant benefiting the un-described Lot 9. The trial court's reasoning that Walsdorf's intent must have been to benefit Lot 9 violates the statute of frauds by using a presumed intent without any evidence of intent contrary to *Hollis v. Garwall*, 137 Wn 2d 683, 974 P.2d 836 (1999).

Adjoining property owners whose legal description are not described as the benefited property lack standing to enforce a covenant encumbering and benefiting adjoining property, *Save Sea Lawn Acres v. Mercer*, 140 Wn.App. 411 (2007). In *Save Sea Lawn Acres v. Mercer, supra*, the common owner of real property recorded two separate plats in April of 1951. Plat 1 was recorded on April 11, 1951 and Plat 2 was recorded April 27, 1951 by the common owner. The 2 plats had identical but separate covenants. Both sets of covenants said that they were binding on all lots within "said plat".

The owners of Plat 2 recorded a revocation of covenant as to Plat 2 in

September of 2005 and the owners of Plat 1 sought to enjoin the revocation alleging a common development scheme. The Court of Appeals denied the relief because the express terms of the covenants indicated that the covenants only applied to the lots within the specific plat and not to any other plat. The owners of Plat 1, who collaterally benefited from the covenants and sought to enjoin the revocation of the covenants on Plat 2, lacked standing to enforce those covenants or prevent the revocation of those covenants.

The case before this court is similar in that the express terms of the covenant applied to and benefit only Lot 10. Lot 9 is not described as a benefited parcel or adequately described at all. The Deans herein are in the same situation as the Plaintiffs in *Save Sea Lawn Acres v. Mercer* and are merely an adjoining property owner without any right to enforce the covenants.

The trial court erred in concluding the covenant complied with the statute of frauds and was enforceable as a express covenant, running real covenant or equitable covenant.

C. The Trial Court's granting of an equitable servitude ignores the facts and the law. (Assignments of Error Nos. 2, 5, 6 and 8; Issues Nos. 2 and 5).

Deans sought to circumvent the failure of the covenant to adequately describe Lot 9 as the benefited property and, therefore, to avoid the statute of frauds by asserting that the covenant was an equitable servitude. The trial court concluded as an alternative means for granting summary judgment, that the covenant was an equitable servitude. (CP 096-111). Deans relied on *Riverview Community Group v. Spencer & Livingston*, 181 Wn.2d 888, 337 P.3d 1076 (2014) and *Johnson v. Mt. Baker Park Presbyterian Church*, 113 Wash. 458, 194 P. 536 (1920). However, Dean's recitation and analysis ignores the basic premise of each of those cases that equitable estoppel and equitable principals, absent in the present case, apply to prevent injustice. Neither case was decided as a running covenant or as a real covenant. The present case lacks any evidence supporting relief under equitable estoppel or equitable principals because there is no evidence to establish that Deans or their predecessors relied on the covenant and changed their position or were induced to sell or buy in reliance on the covenant.

In *Johnson v. Mt. Baker Park Presbyterian Church*, *supra*, the

developer of the plat, advertised the property for sale representing the neighborhood as a “strictly high-class residence section” that “would not permit any building other than residences.” The Deeds to most but not all of the lots included language restricting the lots for use as “single-detached residences”. The trial court specifically found that the restrictions and representations increased the value of all the lots of the subdivision by 15% to 20%. The Supreme Court enforced the restrictions on equitable principals and not as either an express or running covenant and viewed the representations of the improvement company to impose use restrictions which the company could not violate. The decision of the court expressly declined to find a covenant that ran with the land but held that equitable principals estopped the development company and the church that purchased from the development company from violating the equitable servitude. The majority opinion stated:

“By its conduct and representations, the improvement company imposed on its remaining lots certain use restrictions which it may not now violate”.

113 Wash. 458 at 465-66.

Similarly in *Riverview Community Group v. Spencer & Livingston*, *supra*, the developers were alleged to have marketed the properties involved as a golf course community which would permanently have an operating golf

course as part of the community. There was evidence in the record provided by the Plaintiffs therein of actual and implied representations of those facts. The case also involved evidence that the parties were induced to purchase their residential lots by the representations that a golf course would be part of the development. The Washington State Supreme Court reversed the decision of the Court of Appeals and remanded for further proceedings. The Court stated:

We find that Riverview has presented sufficient evidence to survive summary judgment under *Johnson*. The evidence presented creates a material question of fact of whether those with the power to burden the property induced purchasers to purchase lots on the promise that the golf course would remain a permanent fixture of the community. Under *Johnson*, both equitable and injunctive relief may be available. 113 Wash. At 464-65

181 Wn.2d 888 at 899.

The Deans have failed to present any evidence to support an equitable estoppel claim or an equitable servitude based on equitable principals. The record is devoid of any representations or admissible evidence of intent to contradict the express terms of the covenant. The express terms of the covenant do not describe Lot 9, Dean's parcel as a benefited property. The express terms of the covenant only describe Lot 10 as a benefited property. The Deans have failed to present any evidence to support a claim of equitable

estoppel justifying an equitable servitude for the benefit of Lot 9. Unlike the cases discussed hereinabove and relied upon by Deans and the trial court, there is no evidence of any representations to induce the owner of Lot 9 to do anything or evidence that the owner of Lot 9 changed its position to buy or sell based on the covenant. The trial court incorrectly mixed the equitable servitude cases with the running real covenant cases. The equitable servitude cases and law clearly require a showing that the party seeking to enforce was induced to buy or sell in reliance on the covenant. No such evidence was presented.

The trial court's conclusion that the covenant is an equitable servitude was error.

D. The Covenant does not "touch or concern" Lot 9, Dean's property. (Assignments of Error Nos. 3, 5, 6 and 8; Issues Nos. 2, 3 and 4).

The Covenant provides a legal description for Lot 10 only and does not provide a legal description for Lot 9, the final paragraph binds the owners of the "land described herein", Lot 10, for the benefit of each owner of the "land described herein", Lot 10. (CP 24) Lot 9 is not described as benefited or encumbered and therefore the covenant does not "touch and concern the land" as to Lot 9. There is not any evidence in the record or admissible

evidence to prove that Lot 9 was benefited by the covenant.

Deans sought to gloss over the touch and concern element of a running real covenant by citing *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 974 P.2d 836 (1999). The trial court concluded that the Deans were correct also relying on *Lake Limerick Country Club v. Hunt MFG. Homes, Inc.*, 120 Wn.App. 246, 84 P.3<sup>rd</sup> 295 (2004) citing *Hollis v. Garwall, Inc.*, *supra*. *Hollis v. Garwall* is factually and legally distinguishable from the present case in that all of the benefited property and all of the encumbered property in that case were legally described in the recorded document, a plat. In *Hollis v. Garwall* all of the property was described and all of the property was equally benefited and burdened and, therefore, the court correctly concluded that the covenant in that case did touch and concern all of the land. In *Hollis v. Garwall*, the owners of 360+ acres filed a plat in January of 1981 dividing the property into 18 separate parcels. The plat contained complete legal descriptions of all 18 parcels. All 10 of the owners of the 360+ acres signed a plat certificate that acknowledged each owner's consent to the plat. Page 3 of the Plat contained "restrictions". Paragraph 3 of those restrictions stated: "3. This plat is approved as a residential subdivision and no tract is to have more than one single family residential unit. \*\*\*\*"

In 1995, Garwall, Inc. along with other entities cleared one of the

parcels and commenced a mining and rock crushing operation on one of the 18 parcels. Other property owners sought to enjoin the mining and rock crushing operation as a non-residential use. The Supreme Court found that the restriction applied to all of the land as evidenced by the owner's intent set forth on the face of the plat. The Supreme Court also said that such a covenant touched and concerned the land described within the plat.

Distinct from *Hollis v. Garwall* the covenant, the written document sought to be enforced herein, does not contain language or evidence to establish the covenant touches or concerns Lot 9 as either a benefited or encumbered property since Lot 9 is not part of "the land described herein". *Hollis v. Garwall* involved complete legal descriptions of all the properties.

The trial court's decision reached various conclusions regarding intent and benefits and concluded at page 9 of the Court's Memorandum Decision (CP 107), that Deans predecessors in interest obviously intended the covenant to benefit Lot 9 and the statute of frauds was satisfied by that intent. However, *Hollis v. Garwall* is instructive to establish restrictions on admissible evidence as follows:

Under Berg and cases interpreting Berg, extrinsic evidence may be relevant in discerning that intent, where the evidence gives meaning to words used in the contract. *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 189, 840 P.2d 851

(1992) (extrinsic evidence illuminates what was written, not what was intended to be written). However, admissible extrinsic evidence does not include:

Evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term;

Evidence that would show an intention independent of the instrument; or

Evidence that would vary, contradict or modify the written word.

137 Wn.2d 683 at 695.

The trial court erroneously mixed the equitable servitude and the real covenant standards switching back and forth as needed to reach the conclusion that the statute of frauds was satisfied or that it was a running real covenant. The trial court originally in the Order on Summary Judgment, (CP 073-075) concluded that the covenant was not an equitable servitude by applying the correct tests and requiring proof that equity must intervene only to avoid Deans suffering from Deans reliance on the covenant. There was no such proof as discussed herein above and, therefore, summary judgment was denied. In the trial court's reconsideration, the trial court mixed the equitable servitude requirements to avoid the statute of frauds and then applied the running real covenant standards which clearly required compliance with the statute of frauds rather than the equitable servitude standards. The trial court

concluded that no proof invoking equity was necessary for the equitable servitude or running real covenant even though the trial court was under the mistaken impression that a running real covenant did not require proof of compliance with the statute of frauds.

Since the covenant does not touch or concern Lot 9, not described in the covenant, the covenant is not enforceable by Dean.

Covenants or agreements that do not “touch or concern” the land are not enforceable by or against successors in interest to the original parties, *Bremmeyer Excavating v. McKenna*, 44 Wn. App. 267 721 P. 2d 567 (1986), even if the agreement states that it “runs with the land”, *Feider v. Feider*, 40 Wn. App. 589, 699 P.2d 801 (1985).

The trial court’s conclusion that the covenant touched and concerned Lot 9 and was enforceable as an equitable covenant or running real covenant was error.

E. The Covenant is not a running real covenant enforceable by Lot 9, Dean’s property. (Assignments of Error Nos. 4, 5, 6 and 8; Issues Nos. 3, 4 and 5).

The elements of a running real covenant are set forth succinctly in *Deep Water Brewing, LLC v. Fairway Res. Ltd*, 152 Wn.App. 229, 215 P.3d

990 (2009), as follows:

(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.

*Leighton v. Leonard*, 22 Wn. App. 136, 139, 589 P.2d 279 (1978) (footnote omitted) (citing William B. Stoebuck, *Running Covenants: An Analytical Primer*, 52 WASH. L. REV. 861 (1977)).

*Emphasis added.*

152 Wn.App. 229 at 257.

Element No. 1 requires the covenant to satisfy the Statute of Frauds. As discussed in Section B, hereinabove, the covenant does not satisfy the Statute of Frauds.

Element No. 2 requires that the covenant must touch and concern both the land to be benefitted and the land to be burdened. As discussed in Section D, hereinabove, the covenant does not touch or concern Lot 9, Dean's property.

Element No. 3 requires that the covenanting parties must have

intended to bind their successors in interest. Element 3 also requires that the document provide notice to the person whom against the covenant is to be enforced that the covenant bound that person's property and benefited another parcel of property. See *Deep Water Brewing, LLC v. Fairway Res. Ltd., supra*, and *Leighton v. Leonard*, 22 Wn.App. 136, 589 P.2d 279 (1978).

Miller had notice of the existence of the covenant since it was listed as Subject to No. 6, on the face of Defendant's deed, Exhibit "C" to the complaint. (CP 015-017) However, the notice was not effective to notify the Defendant that any property other than Lot 10, Miller's property, was benefited by the covenant. Lot 9 was not described as the benefited property.

The deed obviously contained boilerplate "subject to" in that it went on to list the other "covenants" recorded in the document recorded under Chelan County Auditor's No. 30613 (CP 064-066), the survey recorded under Auditor's No. 2197374 (CP 068) the Survey recorded under Auditor's No. 2200060 (CP 70) and the face of the plat of Darling Land Company's First Addition to Leavenworth (CP 72). While the deed sets each of these documents forth as a covenant binding Lot 10, an examination of those documents indicates that there are no such covenants binding Lot 10.

The covenant herein by its express terms does not describe Lot 9 as a benefited property and, therefore, Defendants were not on notice that Lot 9

had any enforceable interest in and to the covenant or that the owners were bound to comply with the wishes of the owner of Lot 9 or the covenant.

The Dean's case fails to establish any benefit to Lot 9 or the other essential elements of a running real covenant. The trial court incorrectly relied upon *Johnson v. Mt. Baker Park Presbyterian Church*, 113 Wash. 458, 194 P. 536 (1920) pages 10, 11 and 12 of the Memorandum of Decision (CP 108-110). *Johnson v. Mt. Baker Park Presbyterian Church*, *supra*, as discussed hereinabove in Section III, was an equity case wherein the Supreme Court concluded the development plan increased the value of all the lots in the subdivision by 15% to 20% and that the purchasers of the property had relied on that development plan in purchasing property within the subdivision. The present case as noted by the trial court in its Memorandum Decision clearly does not involve any evidence that the Deans relied upon this covenant or were even aware of this covenant in deciding to purchase their property. Therefore the case relied upon by Dean and the trial court do not support the trial court's decision. The trial court went on to erroneously conclude that the covenant touched and concerned Lot 9 because, without any evidence of such, the Plaintiff's predecessors had relied upon the restrictions (Trial Court's Memorandum page 012), (CP 110) and page 8 of

the Trial Court's Memorandum, CP 106), stating "the other restrictions relating to cleanliness and use of the Miller property also make the Dean property, as the neighboring property, more desirable". In the present case, the trial court ordered enforcement of a covenant prohibiting the building of a second residential structure on the property. The record is devoid of any evidence that the use and enjoyment of the Dean property, Lot 9, or the value of the Dean property would be reduced by the building of a second structure on the Miller property. Therefore, the court's decision to conclude that the property touches and concerns Lot 9 was error since the covenant does not meet the requirements of a running real covenant or equitable covenant.

F. The covenant merged into Miller's title and the Revocation by Defendants was valid. (Assignments of Error Nos. 5, 6, 7 and 8; Issue No. 6).

Once Miller and Miller's predecessors in interest owned both the dominate and servient estates, benefited and encumbered by the covenant, the covenant merged and terminated by operation of law, *Schlager v. Bellport*, 118 Wn.App. 536, (2003). As discussed herein, Lot 10 was the only described benefited and encumbered property. The merger of title extinguished the covenant.

Defendants as the owners of Lot 10, the property described as the benefited and burdened property in the covenant, signed, acknowledged and recorded a revocation of the covenant, Exhibit "H" to the Complaint in order to remove the merged and extinguished covenant from Defendant's chain of title to prevent the boiler plate encumbrance from continuing to be noted by title companies. The Defendants as the owners of Lot 10, were free to terminate the covenant since by the express terms of the covenant the owners held both the benefited interest in the covenant and the encumbered interest in the covenant. See, *Save Sea Lawn Acres v. Mercer*, 140 Wn.App. 411 (2007).

In *Save Sea Lawn Acres v. Mercer*, *supra*, the Court of appeals upheld the right of owners of the lots within a plat to revoke covenants benefiting and encumbering said plat and rejected the attempts of the adjoining plat owners to enforce the covenants and void the revocation. The two plats involved therein were platted by a common owner in April of 1951, Plat 1 on April 1 and Plat 2 on April 27, respectively.

The two plats had identical but separate covenants. The covenants each said that the covenants were binding on all lots within "said plat".

The owners of Plat 2 recorded a revocation of covenants as to Plat 2 in September of 2005, the owners of Plat 1 who were benefited collaterally

by the covenants on Plat 2, sought to enjoin the revocation alleging a common development scheme. The Court of Appeals denied the relief because the express terms of the covenants only applied to the lots within a specific plat and not any other plat. No other plat was described in those covenants.

The case before this Court is similar in that the express terms of the covenant applied to and benefited only Lot 10, failed to describe Lot 9 and, therefore, do not benefit Lot 9. The revocation was valid. The trial court's order that the revocation was void was error.

G. Injunctive relief against Miller was not appropriate.

(Assignment of error No. 8; Issue No. 7).

The trial court permanently enjoined Miller from violating the covenant particularly by building another structure on Lot 10 (CP 97, paragraph 6). The legal basis for the issuance of a permanent injunction are set forth in *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 974 P.2d 836 (1999) as follows:

To establish the right to an injunction, the party seeking relief must show **(1) that he or she has a clear legal or equitable right**, and **(2) that he or she has a well-grounded fear of immediate invasion**

of that right. *Hagemann*, 56 Wn. App. at 87; *Metzner*, 125 Wn.2d at 450.

*Hollis v. Garwall*, 137 Wn.2d 683, at 699-700, emphasis added.

As discussed in Sections A through F herein above, the Deans have failed to establish an enforceable covenant. Therefore, the Deans have failed to establish a clear legal or equitable right as a basis for issuance of an injunction. The trial court's issuance of injunctive relief was error.

#### **IV. CONCLUSION**

Defendant respectfully requests that the Court of Appeals conclude as follows:

1. The Declaration of Covenants sought to be enforced herein and found to be enforceable by the trial court does not comply with the statute of frauds;

2. The Declaration of Covenants sought to be enforced herein and found to be enforceable by the trial court is not an express or real covenant:

3. The Declaration of Covenants sought to be enforced herein and found to be enforceable by the trial court is not an equitable servitude;

4. The Declaration of Covenants sought to be enforced herein and found to be enforceable by the trial court is not a running real covenant;

5. The Declaration of Covenants sought to be enforced herein and found to be enforceable by the trial court do not touch and concern Lot 9;

6. The Declaration of Covenants sought to be enforced herein and found to be enforceable by the trial court merged into Miller's title and were properly revoked by Miller;

7. The trial courts order granting Dean summary judgment was improper and not supported by the facts or the law;

8. The Court herein reverse the trial court's granting of summary judgment to Dean and the trial court's order granting injunctive relief against Miller;

9. The Court herein order that injunctive relief was improper; and

10. The Court herein order the trial court to deny summary judgement to Dean, restore the Order on Summary Judgement entered on the 16<sup>th</sup> day of December, 2015, (CP 73-75), dissolve the injunction and remand the case to the trial court for further proceedings consistent with the Court's opinion herein.

RESPECTIVELY SUBMITTED this 11<sup>th</sup> day of August, 2016.

  
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