

FILED

JUL 03 2017

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Court of Appeals No. 345696-III

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

LYNN BREWER and DOUGLAS BREWER, a married couple
Appellants / Plaintiffs

v.

LAKE EASTON ESTATES HOMEOWNERS ASSOCIATION,
a Washington corporation and
MICHAEL D. PECKMAN, an individual

Respondent / Defendants

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

This is an appeal of an order denying Plaintiffs / Appellants Douglas and Lynn Brewer's ("Brewers") Motion for Partial Summary Judgment and granting of summary judgment to Defendants / Respondents Lake Easton Estates Homeowners Association ("LEEHOA") that resulted in Brewers' claims for negligence, nuisance, and conversion to be dismissed in their entirety.

The focus of the appeal is three-fold:

1) Does LEEHOA qualify as a lawful HOA? If so, can LEEHOA assert dominion over Brewers' private Well? The trial court ruled LEEHOA has a right to manage Brewers' private Well. To draw this conclusion, the trial court examined two critical documents. The first was the 1992 Covenants, Conditions & Restrictions ("1992 CC&Rs") providing for an "association." The second was the 1995 Water User's Declarations ("1995 WUDs") deemed to be the valid deeds to nine privately owned Wells in Lake Easton Estates. The trial court acknowledged LEEHOA is not a party to the deeds (CP933). Brewers argue the 1995 WUD is unambiguous as to the management of their Well and it does not mention or grant a homeowners association any rights to manage the Well. Even if it did, Brewers argue LEEHOA does not qualify as a lawful homeowners

association under RCW 64.38.010(11) and cannot be granted powers as a homeowners association.

2) What is the controlling instrument for Brewers' private Well? The trial court asserted the WUD is the governing document for the Brewers' Well but the 1992 CC&Rs is the controlling instrument. The trial court's Order (CP933) needs to be clarified as the two positions contradict one another. The trial court's ruling says: "the well owners shall not be subject to assessments for any other well system" but then dismissed Brewers' claim for conversion.

Section 3.2 of the 1992 CC&Rs provided for assessments for lighting, landscaping, signage and "water thereof" (CP275). The Brewers argue the 1995 WUDs deeded the "water thereof" to the private lot owners and to argue that management of the private "water thereof" is authorized by the 1992 CC&Rs is like saying the "landscaping" and "lighting" for the private residences should be managed by LEEHOA and paid for across the community—which is absurd. Even if the 1992 CC&Rs are deemed to be the controlling instrument, LEEHOA, at the time of its incorporation in 2000 did not meet a single legally required element to be deemed a lawful homeowners association under the 1995 Homeowners Association Act. As

affirmed in *Halme v. Walsh*¹ all three elements under RCW 64.38.010(11) must be present. LEEHOA cannot be granted powers under the 1992 CC&Rs under statutory and common law.

3) Did the trial court ignore key evidence that demonstrated genuine issues of material fact existed? Brewers presented several key pieces of evidence as exhibits that should have precluded the trial court from granting summary judgment to LEEHOA. The trial court's order states Brewers are not responsible for assessments for any other Well but then turned around and dismissed Brewers' claim for conversion on the basis the 1992 CC&Rs allow LEEHOA to collect assessments to manage the water systems which demonstrates a material issue of fact exists.

II. ASSIGNMENT OF ERRORS

1. The Trial Court Erred in Granting LEEHOA Authority to Manage Brewers' Private Well.
2. The Trial Court Erred in Ruling the 1992 CC&Rs are the Controlling Instrument for Management of the Privately Owned Wells in Lake Easton Estates.
3. The Trial Court Erred in Granting LEEHOA's Motion for Summary Judgment Dismissing Brewers' Claims of Negligence, Nuisance and Conversion in their Entirety.

¹ *Halme v. Walsh*, 192 Wn.App. 893; 370 P.3d 42 (2016)

III. STATEMENT OF CASE

Brewers own of a ½-acre parcel (Lot 27) in Lake Easton Estates—a platted sub-division in upper Kittitas County developed in the late 1980s (CP1, 126). Appurtenant to Brewers’ ownership in Lot 27 is a 1/6th undivided interest in a private Class “B” Well located on Brewers’ property (“Brewers’ Well”)(CP1, 126, 69). Ownership of Brewers’ Well was granted by way of a Water User’s Declaration (“WUD”) recorded as a valid deed on January 27, 1995 under Kittitas County Auditor’s number 578783 (“1995 WUD”) (CP1, 69, 126). On the same day and sequentially, the other eight wells serving the Lake Easton Estates development were deeded to the properties receiving water from each Well (CP1, 126, 194-256). The Brewers’ private Well is their only source of potable water (CP 69).

The location of Brewers’ Well is clearly identified within the recorded 1995 WUD (CP69) and appears as an encumbrance on the title to Brewers’ property as an “easement” (CP733)—thus meets the requirements under Washington’s Statute of Frauds. The trial court acknowledged the 1995 WUD is the valid deed to Brewers’ Well and LEEHOA is not a party to the deed and by virtue of which the Lake Easton Estates community at large has no right, title or ownership interest in Brewers’ Well (CP933).

All streets within the boundaries of the Lake Easton Estates’ plat are public roadways maintained entirely by Kittitas County (CP1, 126, 428-

429). All lots within Lake Easton Estates are privately owned (CP1, 126). Each private Well is appurtenant to ownership of the 4-6 parcels served by the specific Well (CP1, 126, 194-256). Each parcel has a similar yet distinctive WUD recorded on the individual titles of the lot owners, each of whom owns an undivided 1/4th to 1/6th interest only in their respective Well (CP1, 126, 194-256). No other WUD appears on Brewers' title other than the 1995 WUD to their Well (CP743). Each Well only serves the lots connected to them and the Wells cannot be interconnected (CP194-256). Brewers receive no beneficial use from any other Well, other than their own Well (CP186).

At the time Brewers bought their property in 2004, there were "covenants, conditions & restrictions" ("CC&Rs") recorded on Brewers' property title (CP743). The governing CC&Rs were recorded on September 21, 1992 ("1992 CC&Rs") (CP1, 126, 275). Section 3.2 of the 1992 CC&Rs stated the purpose of assessments was for lighting, landscaping, signage and "water thereof" (CP1, 126, 277). In the preceding CC&Rs recorded in 1990, the developer had indicated Lot 18 of Lake Easton Estates would be a "common area" (CP171). The 1992 CC&Rs "superseded any and all covenants, conditions and restrictions heretofore made" and the reference to a specific common area was removed (CP275). Although the 1992 CC&Rs referred to an "association," there is no

evidence any homeowners association was formed and the developer retained legal title to most of the lots at the time, including Lot 18, the common area designated in the 1990 CC&Rs but removed from the 1992 CC&Rs, which he sold to a private party in 1999 (CP139).

In 1995, the developer legally transferred ownership of all the “water thereof” within Lake Easton Estates to the individual private lots by way of the nine separate WUDs—one separate and distinct for each of the nine Wells in Lake Easton Estates (CP194-256). The “water thereof” language in the 1992 CC&Rs became obsolete with the transfer of the ownership of the Wells and recording of the 1995 WUDs (CP194-256). The remaining basis for collection of assessments under Section 3.2 of the 1992 CC&Rs was for “lighting, landscaping and signage” and could only apply to a common area, as Lake Easton Estates has no lighting, landscaping or signage—leaving Lake Easton Estates void of any of the required elements for assessments under the 1992 CC&Rs (CP277, 674).

The Homeowners Association Act of 1995 (RCW 64.38), as affirmed in *Halme, supra*, defines a lawful “homeowners’ association” in RCW 64.38.010(11) to include an:

“[1] Unincorporated association, or other legal entity, [2] each member of which is an owner of residential real property within the association’s jurisdiction, as described in the governing documents, **and** [3] by virtue of membership or ownership of property is obligated to pay real property taxes, insurance premiums, maintenance costs, or for improvement of

real property *other than that which is owned by the member.*

“Homeowners’ association” does not mean an association created under chapter 64.32 or 64.34 RCW.” *emphasis added.*

In 2000, two individuals (one of whom did not own property in Lake Easton Estates) incorporated “Lake Easton Estates Homeowners Association” on June 5, 2000 (CP869, APPENDIX). Both of these individuals were listed as the only directors. At the time of its incorporation, LEEHOA did not meet a single legally required element to be a lawful HOA under RCW 64.38.010(11). (CP869)

In September 2001, a small group of 9 of 52 lot owners prepared Bylaws that limited assessments to “provide for improvements and the maintenance and administration of any and all of the properties owned or as may be acquired by the Homeowners Association” (APPENDIX). Not all of the board owned property in Lake Easton Estates and there is no other indication that the community at large agreed to or participated in the creation of LEEHOA (APPENDIX).

Between 2000 and 2012, LEEHOA’s only role was as the self-appointed “Well manager” since there has never been any property owned or acquired by the Homeowners Association—i.e. no “common areas in the community, such as parks, lakes, roads, and community centers” (CP884) All property, including the nine private Wells, is privately owned (CP1, 126). None of LEEHOAs “board meetings” have ever been “open for

observation by all owners of record and their agents” as required in RCW 64.38.035(4).

In complete deference to the language of the 1995 WUDs, the newly formed “LEEHOA” undertook the collection of assessments, water testing, and making repairs to the private Wells (CP319-629, 778). LEEHOA even went so far as registering itself as the owner of all nine private Wells with the State of Washington Department of Health (CP258-273, 319-427, 778). Thus, when Brewers bought their property in 2004, they were under the mistaken impression and the minutes reflect the Wells were treated like “association Wells.” To add to the confusion, Brewers’ title report identified a “Water User’s Easement” (CP733, 778). Brewers assumed the Well on their property was “community owned.”

In 2012, one of LEEHOA’s current Board members brought it to Brewers’ attention the Wells managed by LEEHOA were not “association property” but rather private property governed by the 1995 WUDs and the fees being charged were in violation of the 1995 WUDs (CP801). And further the Board member raised deep concerns about the encroachment of the Wells by any structure (CP801). Despite knowing of the existence of the recorded WUDs, and specific requirements, including maintaining the integrity of the Wellheads preventing construction of any structure within 100’ of the Wells, under State and County codes, LEEHOA had managed

the private Wells and continues to manage them in complete disregard to the provisions in the 1995 WUDs or maintaining the integrity of the Wellheads (CP778, 792-847). LEEHOA's board has violated their fiduciary duty to promote the "health, safety and welfare of the Owners" under Section 3.2 of the 1992 CC&Rs (CP 1, 277, 778, 937). Kittitas County Deputing Prosecuting Attorney affirmed in his Brief that building a structure within 100' of a Class B Well is a danger to public health, safety and welfare and should never be permitted under any circumstances (CP803) which supports a the claim of negligence / nuisance, *per se*.

Upon learning of LEEHOA's violations of State and County Code in its management of the private Wells, Brewers retained a certified geological engineer to determine whether their health was at risk (CP703, 778). As affirmed by the geological expert and presented to the trial court, Brewers argued although their Well had not been encroached, the offending Wells share the same aquifer as Brewers' Well and are all located uphill from Brewers' Well (CP703, 778). The natural flow of gravity makes Brewers' Well susceptible to contamination should the aquifer become contaminated from a non-conforming structure (CP703, 778) and as a result a nuisance, *per se* had been created. Under LEEHOA's management and asserted ownership (CP258-273, 778, 792), eight of the nine Wells were encroached with the building of offending structures including bathrooms

(CP778, 792) and six of the nine wells have tested positive for fecal coliform (CP763, 778) which Brewers were never informed of. And perhaps most egregious, LEEHOA failed to test Brewers' Well for seven years (CP449-455, 778, 792-796, 862-868), supporting the Brewers' claims of negligence, nuisance and conversion.

In furtherance of its effort to gain greater control over the private property of the residents, with nothing else to manage and aware it did not meet the definition of a lawful homeowners association, in 2012 LEEHOA began to assert itself as more than a "Well Manager" and attempted to amend the 1992 CC&Rs to greatly broaden its powers to include the expansion of "water thereof" into an entire "Water System" and the right to terminate private water for non-payment (CP144, 292, 301).

In 2014, after Brewers filed suit, LEEHOA suddenly filed a lien on the title of Brewers' property and LEEHOA's Board passed 2014 "Collection Policies" that asserted LEEHOA had a "right" to terminate Brewers' water, although there is no such provision in the 1992 CC&Rs or 1995 WUDs (CP315). Brewers argue terminating water from a private Well fundamentally violates public policy and Brewers' deeded rights to 1/6th of the water in their private Well.

In August 2015, LEEHOA filed a motion for summary judgment to dismiss all of Brewers' causes of action and Brewers filed two motions for

partial summary judgment—one to invalidate the flawed 2012 Amendments to the 1992 CC&Rs and the other to declare the 1995 WUD as the valid deed to Brewers’ Well (CP139-157, 933).

If this Court overturns *Halme, supra* and deems an HOA started in 2000 that did not meet any of the required legal elements to be defined as a lawful homeowners’ association at the time of its incorporation and still does not meet all of the required elements, then the questions turn to—

1. What are the roles and responsibilities of an HOA to manage private property if the manner of management thereof violates the terms of the deed to the property?
2. Can an HOA assess homeowners for the maintenance of private property not clearly defined in its CC&Rs from which the “member” receives no beneficial use?
3. What is the liability of an HOA (lawful or unlawful) that asserts dominion over private property—maintains and controls that property—if in doing so, causes damages to private landowners?

IV. ARGUMENTS

ROLE OF THE COURT

“An appellate court reviewing a summary judgment places itself in the position of the trial court and considers the facts in a light most favorable to the nonmoving party.”²

Summary Judgment can only be granted and the Court of Appeals can only affirm a summary judgment order of a trial court if, based upon clear and convincing evidence, no genuine issues of material fact exist. In

² *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226; 770 P.2d 182, 188 (1989) (citing *Del Guzzi Constr. Co. v. Global Northwest Ltd.*, 105 Wn.2d 878, 882; 719 P.2d 120 (1986)).

reviewing the trial court's decision *de novo*, this Court must consider the facts most favorable to Brewers, as the aggrieved and non-moving party, as to whether on a fundamental level, the trial court ignored key evidence as to Brewers' claims and whether genuine issues of material fact did indeed exist that should have precluded the trial court from granting summary judgment to LEEHOA.

AS TO ASSIGNMENT OF ERRORS BY THE TRIAL COURT

1. Did the Trial Court Error in Granting LEEHOA Authority to Manage Brewers' Private Well?

The Brewers argue the first assignment of error rests in LEEHOA's authority as a lawful homeowners association under RCW 64.38.010(11) as affirmed in *Halme v. Walsh, supra*. If LEEHOA does not qualify as a lawful homeowners' association then it cannot be granted the powers afforded an HOA. If LEEHOA is deemed to qualify as a lawful homeowners association then the question is what are LEEHOA's roles and responsibilities in managing private deeded property because Lake Easton Estates has no property owned by the association. And what are LEEHOA's liabilities, if in its management of deeded private property, damages are caused? What is Brewers' responsibility to pay for maintenance of private Wells delivering water deeded to the specific private owners when the deed specifically limits maintenance costs to the deeded owners of the property? And if the Brewers are responsible for

maintenance of other private Wells, are they also responsible for lighting and landscaping for private residences in which they hold no right, title or interest as provided for in Section 3.2 of the 1992 CC&Rs? This is the confluence of arguments that requires we first establish LEEHOA's standing as a lawful homeowners' association.

Passed in 1995, the Homeowners Association Act ("HOA Act") (RCW 64.38) governs homeowners associations. As affirmed by this Court in *Halme v. Walsh*,³ there are three required elements to qualify as a lawful homeowners association and all three elements must be present. At the time of LEEHOA's incorporation in 2000, LEEHOA did not actually meet a single one of the three required elements to be a lawful homeowners association under the 1995 HOA Act as set forth in RCW 64.38.010(11).

LEEHOA was: 1) not an unincorporated association or other legal entity (RCW 64.38.010(11)[1]); 2) the President & Incorporator did not own property in Lake Easton Estates (RCW 64.38.010(11)[2]); and 3) Lake Easton Estates did not and still does not have any property other than that which is privately owned (e.g. common areas beneficially owned or used by the community at large) (RCW 64.38.010(11)[3]). Lake Easton Estates has no "common areas in the community, such as parks, lakes, roads, and community centers." All property, including the nine private Wells, is

³ *Halme v. Walsh*, 192 Wn.App. 893, 370 P.3d 42 (2016)

privately owned. All roads are public roadways maintained entirely by Kittitas County (CP127). Lake Easton Estates is a sub-division, like thousands of platted sub-divisions with CC&Rs recorded by the developer.

LEEHOA will argue “even if” it does not qualify as a lawful homeowners association under RCW 64.38, Lake Easton Estates should be deemed to be a “common interest community.” However, RCW 64.70.020(3)(a) defines a “common interest community” as condominiums or cooperative apartment complexes or “homeowners associations” ***as defined in RCW 64.38.010(11)***, which creates a circular argument leading back to *Halme, supra*.

In the case of *Halme*, all parties were bound by a Road Maintenance Agreement (“RMA”) to maintain a private road in which all parties to the agreement received beneficial use. In the case of Lake Easton Estates, only the 4-6 deeded owners connected to their specific private Well receive beneficial use and the Wells are not and cannot be interconnected. The defendants in *Halme* attempted to assert by way of the RMA, a homeowners’ association could be created and exist. This Court rejected that the RMA / maintenance of the road provided for the creation of an HOA even though the entire community used the private roads.

If we look at what creates an HOA in this case, Brewers argue the 1995 WUDs do not afford the creation of an HOA anymore than the RMA

did in the *Halme* case. In fact, Brewers argue the 1995 WUDs cannot create an HOA specifically because the ownership and use of the private property is restricted to specific owners. LEEHOA cannot simply call itself a homeowners association in order to expand its powers over private deeded rights, even if it is for convenience of managing the private property dedicated to the specific grantees of which LEEHOA is not one.

LEEHOA's argument that by way of managing the private Wells, Lake Easton Estates is a "common interest" community would establish a very bad precedent. By the mere fact that a sub-division exists, there is a common interest in the neighborhood but that clearly was not the Legislature's intent in crafting RCW 64.38—that every neighborhood be subject to unrestricted control by a handful of homeowners in the neighborhood by creating a "homeowners association." The "common area" component of RCW 64.38.010(11)[3] requiring there be "property other than that owned by the members" was to ensure common areas established beneficial use of all property owners equally to ensure equitable control and maintenance thereof. The private Wells in Lake Easton Estates do not qualify as common areas because they are not beneficially used by the community at large. They are exclusively used only by the recorded owners of each Well. Furthermore, the 1995 WUDs, as the valid deeds to the private Wells, specifically limit the financial obligations of the costs

associated with maintenance to those who receive beneficial use from the specific Wells.

And lastly, as in this case, according to the trial court's way of thinking, LEEHOA has no accountability or liability in the mismanagement of the Wells or for failure to follow State and County Code in managing the private Wells. If LEEHOA is not responsible for the mismanagement while recording itself as the owner of all of the Wells with the Department of Health, then who is? LEEHOA cannot have it both ways most certainly.

This Court must turn to the "governing documents" to determine whether LEEHOA can establish itself as a lawful homeowners association and can legally collect assessments for the maintenance of all of the private Wells, charging each resident equally in a manner that conflicts with the deeds to the provision of the WUDs. LEEHOA's own Bylaws (APPENDIX) limits its collection of assessments to "maintenance and administration of any and all properties owned or as may be acquired by the Homeowners Association." Brewers argue this is proper and aligns with the requirements under RCW 64.38.010(11)[3] that there must be property other than property owned by the "members" / residents – e.g. "common areas in the community, such as parks, lakes, roads, and community centers."

If we accept the trial court's ruling, then today in any platted subdivision in Washington state with recorded CC&Rs and no common areas or properties providing beneficial use to all property owners, a small group of individuals could assert dominion and power over the management of the members' private property simply by forming a "homeowners association." In the case of Lake Easton Estates, there is no record that any more than a handful of homeowners in Lake Easton Estates agreed to be part of LEEHOA more than 18 months after its inception (APPENDIX). If this Court rejected the arguments in *Halme, supra* that a private road used by all did not create a lawful HOA, then LEEHOA most certainly does not qualify as a lawful homeowners association because Lake Easton Estates does not have any property beneficially used by all of the residents.

When statutory language is clear and unambiguous, the Court determines its meaning from the statute itself.⁴ The Homeowners' Association Act of 1995 (RCW 64.38) was passed "to provide consistent laws regarding the formation and legal administration of homeowners' associations." (*emphasis added*) The statute sets forth the possible activities of an association; it does not create or empower one. The provision for an

⁴ *Kelsey Lane Homeowners Association v. Kelsey Lane Company, Inc.*, 125 Wn.App. 227; 103 P.3d 1256 (2005).

association generally occurs, as it did in Lake Easton Estates, through “restrictive covenants” recorded by the developer. However, if any covenant or encumbrance is later deemed to be a violation of statute or is illegal, the language can be voided or stricken by the courts. Even within the 1992 CC&Rs (CP275), there is a severability clause so even if a provision for an “association” is deemed to be unlawful under statutory and common law, the 1992 CC&Rs can stand as a contract between homeowners without the need for an “association.” If a resident has a problem with another resident’s compliance with CC&Rs then there is a means by which the residents can resolve their differences based upon contract law. An association is not necessary for such enforcement.

Hundreds, if not thousands, of platted sub-divisions exist in Washington state with recorded CC&Rs and no common areas. Imagine if this Court were to rule a small group of individuals in every platted subdivision could organize fiefdoms called “homeowners’ associations” and begin through unrecorded bylaws and governing documents to control homeowners they did not like. This simply cannot be—which is why the Legislature passed the 1995 HOA Act and required the fundamental existence of common areas to meet the qualifications to form an HOA.

The HOA Act was designed to create consistent rules to prevent overzealous, power hungry homeowners from getting together and

asserting power over individual(s) and their private property in an attempt to control another's actions under the "guise" of a homeowners association, which this Court affirmed in *Halme, supra*.

If the WUD does not create a lawful HOA anymore than the RMA created a lawful HOA in *Halme, supra*, then we must look to the governing documents, statutory and common law to determine LEEHOA's authority to assert dominion over Brewers' private property.

At the time of LEEHOA's incorporation in 2000, there were primarily two recorded instruments: 1) the nine 1995 WUDs, each of which is recorded only on the titles of the parcels connected to the respective private Wells and binds only those parcels; and 2) the 1992 CC&Rs which are recorded on the title of all parcels in Lake Easton Estates and bind the community at large. Both of these documents pre-date the passage of RCW 64.38 in 1995 and the incorporation of LEEHOA in 2000.

For this assignment of error, we will look only to the 1995 WUDs and the Brewers' obligation to pay for "water thereof" from private deeded Wells in which they hold no right, title or interest in and receive no beneficial use. And we will examine whether Brewers can be burdened with the financial liabilities associated with maintaining these private Wells under the 1995 WUDs, statutory and common law.

Each WUD specifically identifies the legal address of the location of the private Well and the “Property Benefited” with the legal description of the 4-6 lots (CP194-256). Ownership is “appurtenant to each parcel above described an undivided one-sixth interest in and to the use of the well and water system now constructed or to be constructed. Each above described shall be entitled to receive an equal supply of water for one residential dwelling for domestic purposes.” The deed states unequivocally “Appurtenant to each parcel above described shall be the obligation to participate in the maintenance and operational costs of the well and water system described.” (*emphasis added*). The trial court agreed that “well owners shall not be subject to assessments for any other well system.” (CP933)

Nowhere in any of the 1995 WUDs is an “association” or LEEHOA mentioned. Each WUD requires a number of functional aspects in management of the private Wells, including meters, monthly accountings and a reserve bank account, none of which LEEHOA has done as *de facto* manager of the Wells. And there are required water quality tests which LEEHOA failed to perform on Brewers’ Well for seven years (CP778, 862-868). There are also “restrictions on furnishing water” that “no other property may be served by water from the well and water system without prior consent of all properties subject to this declaration.” (CP186) Thus,

there can be no interconnectivity or use of the private Wells by the community at large.

In order to comply with statutory and common law, a covenant that intends to bind a party must meet the Statute of Frauds.

“Enforceability of covenants between the original parties is based on contract law.⁵ But in order to be enforceable between the original parties, a covenant must also satisfy the statute of frauds.”

RCW 64.04.010 requires that every conveyance or encumbrance of real property shall be by deed, and RCW 64.04.020 requires that every deed shall be in writing.⁶ And a deed concerning an interest in land must contain a description of the property conveyed.⁷ To comply with the statute of frauds, the description of the land must be **‘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.’**⁸ An agreement with an inadequate description is void.⁹ (*emphasis added*) *Dickson v. Kates*.¹⁰

Had the declarant intended the 1995 WUDs to bind the residents of Lake Easton Estates to maintain the Wells as a community, the 1995 WUDs would have had to reference the 1992 CC&Rs stating “as set forth in. . .” or “subject to the provisions of the 1992 CC&Rs.”

⁵ *Lake Limerick Country Club v. Hunt Manufactured Homes, Inc.*, 120 Wn.App. 246, 254; 84 P.3d 295 (2004)

⁶ *Lake Limerick*, *supra* at 259

⁷ *Howell v. Inland Empire Paper Co.*, 28 Wn.App. 494, 495; 624 P.2d 739 (1981)

⁸ *Howell*, 28 Wn.App. at 495 (quoting *Bigelow v. Mood*, 56 Wn.2d 340, 341; 353 P.2d 429 (1960)); see also *Berg v. Ting*, 125 Wn.2d 544, 551; 886 P.2d 564 (1995)

⁹ *Howell*, 28 Wn. App. at 495.

¹⁰ *Dickson v. Kates*, 132 Wn.App 724; 133 P.3d 498 (2006)

The Brewers argue in order to be enforceable, the covenant must be sufficient to contain a description of property with a definite location or else there must be a reference to another instrument. The Brewers' 1995 WUD does not refer to the 1992 CC&Rs and the 1992 CC&Rs do not refer to any of the WUDs or specific Wells. The only reference in the 1992 CC&Rs to anything that could be construed to reference the Wells is the vague term "water thereof." Furthermore, in 1992, not all of the private Wells had been drilled (CP706). However, by 1995, the declarant's intent was specific and clear. He indeed transferred any "water thereof" to the private property owners leaving no other water. The WUDs meet the Statute of Frauds on the basis that they are very specific with exact locations of the property to be benefitted and encumbered. The 1992 CC&Rs provide only a vague reference to the "water thereof" which is not sufficient to burden the Brewers' property for the maintenance of the other Wells from which they receive no beneficial use and in which they hold no right, title or interest.

Here, the *phrase* 'the land immediately to the west' *is not sufficient* to identify the burdened property without looking to other sources."¹¹ (*emphasis added*)

The WUDs bind the Brewers to pay only for the maintenance and expenses of their respective Well and does not afford LEEHOA the right to manage

¹¹ See, e.g., *Howell*, 28 Wn. App. at 495; *Dickson v. Kates*, 132 Wn.App. 724, 733-34; 133 P.3d 498, 503 (2006)

the Brewers' property as the terms are definite and certain within the Brewers' WUD. Nor do the other WUDs allow LEEHOA to assess Brewers fees for maintenance of the other private Wells because the recorded WUDs are equally specific as to the location of the land to be encumbered. And the recorded WUDs limit the financial obligations of each Well to the owners of the Well, not to the Lake Easton Estates community at large. The term "water thereof" in the 1992 CC&Rs, similar to the "land immediately to the west" is "not sufficient to identify the burdened property."

The Washington Statute of Frauds requires that if a party is to be legally bound to maintain real property—the specific location (legal description) of the real property to be burdened it must have been recorded on the title to Brewers' property in the same manner the 1995 WUD that binds Brewers to their Well and maintenance thereof is recorded on their title. "Water thereof" from unspecified locations, not developed at the time of recording the 1992 CC&Rs does not qualify without identifying those specific properties and providing notice and a legal description to Brewers because it does not meet the Statute of Frauds and thus common law.

This requires we now turn to the 1992 CC&Rs to determine whether it creates a lawful HOA. The CC&Rs were not intended to establish management of privately-owned property and the Brewers

contend that the purpose of assessments was for lighting, landscaping, signage and water for common areas. However, for purposes of argument, the Brewers will accept that if “water thereof” applies to the private Wells, then we must examine the “community” nature of the “water thereof” within the context of establishing LEEHOA’s authority as a lawful HOA under RCW 64.38. The WUDs prohibit the “water thereof” from being community owned and operated and do not therefore constitute “neighborhood” or “community” or “common interest” or “joint” property and do not qualify as “property other than that which is owned by the member” as required under RCW 64.38.010(11)[3] and affirmed in *Halme, supra*.

Under the terms of each WUD, the specific owners have the right to “mutually agree” upon the manager for their Well and no parties other than the owners of Brewers’ Well have the right to participate in the selection of the manager for their Well. Brewers have no right to the “water thereof” drawn from another Well nor any obligation to pay for maintenance associated with other Wells. Within the four corners of the valid 1995 WUDs, this point is clear and specific as to the management. Of course, the question then turns to what obligation does a manager of private property have to manage to the terms of the valid deed to the private property? LEEHOA has most assuredly ignored any aspect of the WUDs when it

comes to management of the Wells except to object to the Brewers' request for a variance.

Nowhere in the WUD is the "association" mentioned or assumed to be the manager. Breach of the WUD only allows the parties to the WUD to collect unpaid obligations. LEEHOA cannot collect fees due for maintenance or enforce the terms of the WUD. The only means by which a manager shall be selected is by mutual agreement. The trial court acknowledged this means "all owners must agree." The trial court then contradicted itself by asserting the "association" had the right if not the duty to manage the Wells and in doing so, the trial court completely ignored the argument—that LEEHOA is not a lawful homeowners association so it cannot be granted the powers of an HOA under RCW 64.38. Furthermore, even if LEEHOA were a lawful homeowners association, it does not have the right to manage the private Wells or at least must manage them within the four corners of the valid deed. Otherwise, the deed has been reformed by the trial court and Brewers' deeded property rights have been eviscerated.

2. **Did the Trial Court Error in Ruling the 1992 CC&Rs are the Controlling Instrument for Management of the Privately Owned Wells in Lake Easton Estates?**

In denying in part Brewers' Motion for Partial Summary Judgment, the trial court deemed the 1992 CC&Rs to be the "controlling instrument"

which Brewers argue is an error. “The interpretation of language contained in a restrictive covenant is a question of law” which this Court must review *de novo*.¹²

The basis for all decisions the trial court made appear to stem from language contained within the 1992 CC&Rs providing for an “association” and the “association” could collect assessments under Section 3.2 for lighting, landscaping, signage and “water thereof.” From this, the trial court reasoned the 1992 CC&Rs and not the 1995 WUDs is the “controlling instrument” for the management of the “water thereof.” This once again points to LEEHOA’s standing as a lawful HOA because the 1992 CC&Rs is what provided for an “association” in Lake Easton Estates. However, once again, under contract law, if a provision of a covenant is found to be unlawful, it shall be void and the severability clause of the 1992 CC&Rs would apply.

Section 3.2 of the 1992 CC&Rs provide for collection of assessments for “lighting, landscaping, signage and water thereof.” (CP275) The trial court ruled as such the 1992 CC&Rs are the controlling instrument based upon the vague term “water thereof” which it determined refers to the private Wells; but then said the “well owners shall not be

¹² *Bloome v. Haverly*, 154 Wn.App. 129, 137; 225 P.3d 330 (2010), (citing *Green v. Normandy Park Riviera Section Cmty Club*, 137 Wn.App. 665, 681; 151 P.3d 1038 (2007)).

subject to assessments for any other well system.” (CP933). If we are to broadly interpret the trial court’s ruling then it presumes LEEHOA has the authority to manage the landscaping and lighting on the private properties within Lake Easton Estates and charge the residents across the community for planting flowers or adding light posts to private property. Certainly, we cannot assume that “water thereof” can apply any more than we can assume management and assessments for private “lighting” & “landscaping” is proper. If we are to accept the trial court’s ruling then LEEHOA has the broadest powers imaginable including the right to terminate Brewers’ access to their private deeded water.

LEEHOA’s overreaching effort to impugn Brewers is what the Legislature intended to stop when it passed the HOA Act. Never would the Legislature intend a small group of individuals (under the guise of a homeowners’ association) to control the private property of another or to take away Brewers’ right to use their private water. Article 1, Section 16 of the Washington’s Constitution is clear on this point “Private property shall not be taken for private use, except for private ways of necessity . . .”

Lake Easton Estates is not a condominium complex where “lighting, landscaping, signage and water thereof” must be community managed. It is a platted sub-division with no common areas and public

roadways and Brewers' constitutional rights protect them from LEEHOA's attempts to take private property for private purposes.

"The test of whether a contractual provision violates public policy is 'whether the contract as made has a "tendency to evil," to be against the public good, or to be injurious to the public'"¹³ Before we will find a restrictive covenant to be in conflict with public policy, the record must demonstrate "a legislative intent to declare a general public policy sufficient to override a contractual property right."¹⁴ A clear demonstration of such intent is especially important in light of the constitutional takings questions that are implicated by the potential violation of such property rights.¹⁵

In the case of *Viking Props. Inc. v. Holm*, *supra*, the Supreme Court severed a provision within the "restrictive covenants" that violated public policy and conflicted with statutory provisions.

Brewers argue that all of these elements—"lighting, landscaping, signage and water thereof" were intended as a reference to possible or future common areas. However, in 1995, the "water thereof" was deeded to the private property owners and there was no longer any "water thereof." The provision for collection of assessments and any stretch of interpretation that it included the private Wells become obsolete with the recording of the 1995 WUDs and the trial court erred in its ruling that the 1992 CC&Rs are the "controlling instrument."

¹³ *Thayer v. Thompson*, 36 Wn.App. 794, 796; 677 P.2d 787 (1984) (quoting *Golberg v. Sanglier*, 27 Wn.App. 179, 191; 616 P.2d 1239 (1980), rev'd on other grounds, 96 Wn.2d 874; 639 P.2d 1347 (1982)).

¹⁴ *Mains Farm Homeowners v. Worthington*; 121 Wn.2d 810, 823; 854 P.2d 1072 (1993)

¹⁵ *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 126; 118 P.3d 322, 329 (2005)

The Wells in Lake Easton Estates are not community owned nor community used and Brewers have no obligation to pay for maintenance of any other Well other than their private deeded Well.

“When the owner of the servient estate and the beneficiary of an easement or profit both **make the use of the servient estate** that is authorized by the easement or profit, they are **both liable to contribute to the costs reasonably incurred for repair and maintenance of the portion of the servient estate and the improvements they use in common.**”¹⁶ (*emphasis added*)

The 1992 CC&Rs are “restrictive covenants” that apply to the owners of property within the description of the Lake Easton Estates community. The 1992 CC&Rs provides: “The invalidity of any one of these covenants shall in no way affect any other provisions, which shall remain in full force and effect.” The passage of the HOA Act in 1995 would not impact the CC&Rs but those portions deemed unlawful or illegal, such as the creation of an association would be deemed to be “invalid.”

Now we turn to the nature of the 1992 CC&Rs and the vague nature of the management of the “lighting, landscaping, signage and water thereof” if indeed the 1992 CC&Rs are the controlling instrument. The 1995 WUDs could not be more clear and unambiguous as to how the Wells, including Brewers’ Well, are to be individually managed as set forth

¹⁶ Restatement (Third) of Property: Servitudes § 4.13(3)
Buck Mountain Owners’ Ass’n v. Prestwich, 174 Wn.App. 702, 718 n.17; 308 P.3d 644, 653 (2013)

within the four corners of the nine 1995 WUDs. The 1992 CC&Rs could not be more ambiguous. There is absolutely no language on the management of the Wells or collection of assessments in the 1992 CC&Rs other than the vague language “water thereof.” This leaves Brewers with no course of action if LEEHOA’s mismanagement of the Wells cause them damage because the trial court ruled that LEEHOA is not a party to the 1995 WUDs. The only way the trial court could reconcile the 1992 CC&Rs was in essence to render the deeds to the Wells “invalid” as to their terms. This amounts to a reformation of the deeds, which is not allowed by the trial court. “Courts are not at liberty, under the guise of reformation, to rewrite the parties’ agreement and foist upon the parties a contract they never made.”¹⁷ Alternatively the trial court could have actually recognized common and statutory law as the guiding standard and found that LEEHOA has no authority to exist as a homeowners association and thus has no power under the 1992 CC&Rs. This would have rendered the 1995 WUDs the controlling instruments for the Wells. This is simple and straight-forward. Let the private parties manage their private property in accordance with the valid deeds. Don’t try to fit a square peg in a round hole. The CC&Rs can co-exist with the WUDs but LEEHOA cannot co-exist as a lawful homeowners association because it is not.

¹⁷ *Seattle Prof'l Eng'g Employees Ass'n v. Boeing Co.*, 92 Wn.App 214, 220; 963 P.2d 204 (2000)

This brings us to liability of LEEHOA in managing private property. If LEEHOA is a lawful HOA then where is its liability found—in the deed to the property and its failing to manage the private property in accordance with the deed or in its duty to uphold the terms of the 1992 CC&Rs which requires strict adherence to State and County Code? If the Brewers have been damaged as a result of LEEHOA’s mismanagement of the Wells as they assert, then under which “instrument” or statute do the Brewers or any other resident of Lake Easton Estates hold LEEHOA accountable for its mismanagement—including its failure to test Brewers’ Well for seven years while reporting itself as the owner of the Wells with the State of Washington?

The trial court’s ruling that deemed the 1992 CC&Rs paramount to the 1995 WUDs disrupts the servient estates of every landowner in Lake Easton Estates. The trial court’s error is serious for the following reasons:

- 1) It effectively voids every resident’s deeded private property rights, including Brewers’, under the recorded 1995 WUDs.
- 2) It effectively transfers the deeded property rights to Brewers’ Well, to the residents of Lake Easton Estates by way of LEEHOA.
- 3) It effectively burdens individual lot owners for the expenses and maintenance costs associated with private property in which they gain no beneficial use and is inequitable.
- 4) It establishes LEEHOA has the right to manage private property in any manner as it sees fit without consideration of the specific management provisions in the deed to the property (Well).

5) It allows LEEHOA the right to terminate Brewers' access to their water and amounts to a "taking" of private property for private purposes.

6) And yet, it assigns no liability to LEEHOA for mismanagement or negligence in management of the Wells since the Wells are privately owned despite LEEHOAs assertion of dominion over the Wells.

Furthermore, if LEEHOA is allowed to continue in the same manner as the trial court ruled it could, it allows the provisions of the recorded deeds to be modified at the whim of LEEHOA's board, despite the fact that LEEHOA has no rights under the deeds. Brewers argue this is exactly why the State Legislature enacted RCW 64.38 to prevent such an abuse of power.

"[T]he primary objective is to 'determine the intent or purpose of the covenant.'¹⁸ The court noted the objective intent of 'restrictive covenants' will be tempered by the 'presumption strongly favoring the *free, lawful use of land*' following three principles governing the interpretation of "restrictive covenants":¹⁹

- (1) The primary objective is to determine the intent of the parties to the agreement, and, in determining intent, clear and unambiguous language will be given its manifest meaning.²⁰
- (2) **Restrictions**, being in derogation of the common-law right to use land for all lawful purposes, **will not be extended by implication to include any use not clearly expressed. Doubts must be resolved in favor of the free use of land.**²¹

¹⁸ *Hollis v. Garwall, Inc* 137 Wn.2d 684, 696; 974 P.2d 836 (1999)

¹⁹ *Burton v. Douglas County* 65 Wn.2d 619, 622; 399 P.2d 68 (1965)

²⁰ *Gwinn v. Cleaver*, 56 Wn.2d 612; 354 P.2d 913 (1960);
Katsoff v. Lucertini, 141 Conn. 74, 103 A. (2d) 812 (1954).

²¹ *Granger v. Boulls*, 21 Wn.2d 597, 152 P.2d 325 (1944)

- (3) The **instrument must be considered in its entirety**, and surrounding circumstances are to be taken into consideration when the meaning is doubtful.”²² (*emphasis added*)

Granting LEEHOA dominion over the private Wells and expanding the 1992 CC&Rs in a manner not intended under common law or which clearly conflicts with statutory law is not what the original grantor intended in light of the acts taken to record the 1995 WUDs. Even absent the conflict between the 1992 CC&R provisions and RCW 64.38, the intent of establishing the “community property” rule of RCW 64.38.010(11) was to define the boundaries of control between private vs. community property owned or beneficially used by the community at large to ensure the common area is maintained where no individual owner owns the property, it burdens the entire community to maintain the property for the equal benefit of all “members.” It is not for the purposes of managing private property, where a valid deed exists defining the management or allow benefits to third parties who are granted rights in the property transferred.

Brewers do not dispute the existence of covenants in the 1992 CC&Rs as restrictive covenants; however, Brewers assert those covenants cannot conflict with statutory or common law or be paramount to vested

²² *Gwinn v. Cleaver*, 56 Wn.2d 612, 354 P.2d 913 (1960);
B. T. Harris Corp. v. Bulova, 135 Conn. 356, 64 A.2d 542 (1949);
Parrish v. Newbury, 279 SW.2d 229 (Ky1955); 65 Wn.2d at 621-22 (citation omitted);
see also *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 120, 118 P.3d 322 (2005)
Blome v. Haverly, 154 Wn.App. 129, 142-43; 225 P.3d 330, 336-37 (2010)

rights of a valid recorded deed to which LEEHOA nor is the Lake Easton Estates community a party to the deed, except for the owners of the property.

Had the declarant of the 1995 WUDs sought to grant the “homeowners association” dominion over the water resources, he would not have deeded the Wells to the private lot owners in 1995. He would have transferred ownership of the Wells to the “homeowners association” and deeded the “water thereof” by way of the Wells to the Lake Easton Estates community at large. From this we can determine his clear objective intent to assert the free use of land over the restrictive covenants.

LEEHOA has ignored these intentions and the 1995 WUDs and rather manages the Wells without any guidelines or parameters and fails to adhere with State law, or follow the clear mandates of the deeds to the Wells. Under this scenario LEEHOA assumes absolutely no liability for any mismanagement that might occur—simply because the property is privately owned—leaving each owner liable for LEEHOA’s mismanagement and without the ability to recover from LEEHOA damages resulting from their negligence, mismanagement or clear inaction.

We must now turn to the “intent of the contracting parties” which in this case was the declarant of the 1992 CC&Rs, 1995 WUD and the owner of Brewers’ Lot 27 – who was the same person in all three instances.

“Determination of the intent of the contracting parties is to be **accomplished by viewing the contract as a whole**, the **subject matter** and the **objective of the contract**, all of the circumstances surrounding the making of the contract and subsequent acts and conduct of the parties to the contract and the reasonableness of respective interpretations advanced by the parties.²³ The **ordinary meaning of words** used in a contract or **deed** will be used unless a different meaning is **clearly** indicated.²⁴ (*emphasis added*)

Under the Restatement approach, in the ***absence of an agreement***, ***joint use*** of an easement, an obligation to share costs is created.

“Joint use by the servient owner and the servitude beneficiary of improvements used in enjoyment of an easement or profit, or of the servient estate for the purpose authorized by the easement or profit, gives rise to an obligation to contribute jointly to the costs reasonably incurred for repair and maintenance ***of the portion of the servient estate or improvements used in common.***”²⁵ (*emphasis added*)

In *Buck Mountain Owners' Ass'n v. Prestwich*, *supra*, the Court agreed “non-members” of the Association were deemed to use 62.5% of the road and thus should be responsible for their beneficial use. The Court recognized **joint users** have a duty to share in the costs of maintenance such as the case in “Road Maintenance Agreements” where all of the

²³ *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250; 510 P.2d 221 (1973);
Patterson v. Bixby, 58 Wn.2d 451; 364 P.2d 10 (1961).

²⁴ *Wasser & Winters Co. v. Jefferson County*, 84 Wn.2d 597; 528 P.2d 471 (1974);
Schauerman v. Haag, 68 Wn.2d 868; 416 P.2d 88 (1966);
Coleman v. Layman, 41 Wn.2d 753; 252 P.2d 244 (1953).
Comfort & Fleming Ins. Brokers v. Hoxsey, 26 Wn.App. 172, 176; 613 P.2d 138, 141 (1980)

²⁵ *Buck Mountain Owners' Ass'n v. Prestwich*, 174 Wn.App. 702, 718-19; 308 P.3d 644, 653-54 (2013)

parties use the road. However, in this case, the private properties are not roads jointly used by all members but rather the specific use is by necessity limited to the connections to the owners' parcels and no other members' property. As stated, Brewers do not use and receive no beneficial use from the other eight Wells in Lake Easton Estates thus they are not community Wells and even if the "covenant" in the 1992 CC&Rs and the language "water thereof" obligated Brewers, case law is well settled on this matter. The court has reversed and remanded with instructions to "strike the binding covenant."²⁶

As noted, "Before a covenant can be enforced against a property owner, the party seeking enforcement must establish an equitable servitude and the one to be bound must have notice of the covenant."²⁷

In this case, Brewers do not have "equitable servitude" in any of the other eight Wells, and most certainly Brewers did not have "notice" of the covenants contained in the eight other 1995 WUDs as the instruments are not recorded on the title to Brewers' property. Brewers have absolutely no obligation to pay for the maintenance or expenses of the other Wells based upon the deeds to the Wells as private property. Even if "water thereof" in the 1992 CC&Rs could be deemed to refer to the Wells in Lake Easton

²⁶ *Buck Mountain Owners' Ass'n v. Prestwich*, 174 Wn. App. 702 (2013)

²⁷ *Hollis v. Garwell* 137 Wn.2d 683, 691, 974 P.2d 836 (1999);
Nw. Props. Brokers Network, Inc. v. Early Dawn Estates Homeowners' Ass'n,
173 Wn.App. 778, 800-01; 295 P.3d 314, 326 (2013)

Estates, the language would fail on the basis of impossibility because Brewers are not connected to those Wells and cannot be. Thus, they cannot receive any beneficial use / equitable servitude therefrom. There is absolutely no case law that asserts anything other than **joint users** of **shared property** have any obligation to pay for private property for which they have no right, title or ownership interest. The trial court failed to recognize this in its ruling.

Brewers do not dispute under their WUD they have a duty and obligation to pay for expenses associated with their private Well as joint users of that Well. The other eight WUDs limit the financial obligation to those owners / joint users of the specific property and no one else. If the Lake Easton Estates community at large was intended to be financially obligated, the WUD would not have restricted which lots would be financially liable and there would have been a single WUD recorded on every title to every property the way the CC&Rs are recorded. Absent that, the non-benefitting parties cannot be bound under the Statute of Frauds and “water thereof” does not provide sufficient notice to bind a party.

The party to be bound must intend to be bound. Namely the declarant and the owner of Lot 27 were the same person both in 1992 when the CC&Rs were recorded and in 1995 when the WUD was recorded so there is no confusion or ambiguity as to the intent of the “parties” and

whether the 1992 CC&Rs are sufficiently clear to be enforceable as it pertains to the Wells and cannot be paramount to the 1995 WUD as a deed.

“For covenants to pay money, the critical issue is the "touch and concern" requirement. 5 R. Powell para. 675[2][a]. Under Washington law, an obligation to pay assessments for the **maintenance of neighborhood property** touches and concerns the land.²⁸ The majority of American jurisdictions are in accord.²⁹

As noted, the other private Wells in Lake Easton Estates are not “**neighborhood property**” and other than Brewers’ Well they do not touch and concern Brewers’ land.

As this Court has noted the long established rule that:³⁰

“In order 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**.”³¹

Based upon the foregoing and the significant case law that supports Brewers on these issues, Brewers request this Court review the evidence and reverse the trial court’s order so as to deem the 1995 WUDs the controlling instrument for the private Wells and not the 1992 CC&Rs.

²⁸ See *Rodruck v. Sand Point Maintenance Comm’n*, 49 Wn.2d 565; 295 P.2d 714 (1956); *Mullendore Theatres, Inc. v. Growth Realty Investors Co.*, 39 Wn.App. 64; 691 P.2d 970 (1984).

²⁹ 5 R. Powell para. 675[2]; 6 P. Rohan § 8.03[2][c]; Stoebuck, *Running Covenants: An Analytical Primer*, 52 Wash. L. Rev. 861, 870 (1977). *Lake Arrowhead Cmty. Club v. Looney*, 112 Wn.2d 288, 294-96; 770 P.2d 1046, 1049-50 (1989)

³⁰ *Bigelow v. Mood*, 56 Wn.2d 340, 341; 353 P.2d 429 (1960)

³¹ *Howell v. Inland Empire Paper Co.*, 28 Wn.App. 494, 495; 624 P.2d 739, 740 (1981)

3. **Did the Trial Court Error in Granting LEEHOA's Motion for Summary Judgment Dismissing Brewers' Claims for Negligence, Nuisance and Conversion in their Entirety?**

The final error is a simple argument. Brewers presented sufficient factual evidence as exhibits to the Declaration of Lynn Brewer (CP792) alone that demonstrated Brewers had established genuine issues of material fact that should have precluded the granting of LEEHOA's motion for summary judgment and the dismissal of Brewers' claims of negligence, nuisance and conversion in their entirety.

CR 56(c) provides summary judgment should be granted "if the pleadings, depositions, admissions on file, together with affidavits, if any, show that there is no genuine issues as to any material fact. . . ." ³² "The burden is on the moving party to prove there is no genuine issue as to a fact which could influence the outcome at trial." ³³ Brewers presented plenty of factual evidence, including expert witness statements and the Brief of Kittitas County Assistant Prosecuting Attorney to demonstrate the existence of material issues of fact. The trial court ignored this evidence.

Whether this Court looks at the evidence or the factual arguments, LEEHOA's authority as an HOA is in question, reasonable

³² *Hartley v. State of Washington*, 103 Wn.2d 768; 774 (1985)

³³ *Hartley, supra* (citing *Jacobsen v. State*, 89 Wn.2d 104, 108; 569 P.2d 1152 (1977)).

minds could draw but one conclusion—there are genuine issues of material fact and the trial court erred in granting LEEHOA summary judgment in light of the evidence.

“Questions of fact may be determined on summary judgment as a matter of law where reasonable minds could reach but one conclusion.”³⁴

“Summary judgment is inappropriate if the record shows any reasonable hypothesis which entitles the non-moving party to relief.”³⁵

(emphasis added) Finally, the moving party under CR 56 can satisfy its initial burden by demonstrating the absence of evidence supporting the nonmoving party’s case.³⁶ *(emphasis added)* LEEHOA failed in this burden of proof. Brewers presented evidence, both in the recorded documents and the quality tests filed with the State of Washington Department of Health, LEEHOA has overstepped their authority, been negligent and allowed a nuisance, *per se* to be created. Any “reasonable hypothesis” which entitles Brewers to relief must be considered and the order granting LEEHOA’s motion for summary judgment should be reversed and the matter remanded to the trial court for adjudication.

Brewers assert the trial court erred in dismissing Brewers’ claims of negligence, nuisance and conversion in their entirety on the basis material

³⁴ *Alexander v. County of Walla Walla*, 84 Wn.App. 687, 692; 929 P.2nd 1182 (1997).

³⁵ *Selberg v. United Pac. Ins.*, 45 Wn.App. 469, 474; 726 P.2d 468 (1986);
see Mostrom v. Pettibon, 25 Wn.App. 158, 162; 607 P.2d 864 (1980).

³⁶ *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 n. 1; 770 P.2d 182 (1989).

issues of fact existed that should have precluded the trial court from granting LEEHOA's motion for summary judgment and request this Court review the record and in particular the exhibits to the Declaration of Lynn Brewer (CP792).

LEEHOA and its agents have a duty under RCW 24.03.127 to act "in good faith" and with such care, including "**reasonable inquiry**, as an ordinarily prudent person in a like position would use under similar circumstances."³⁷ (*emphasis added*) Would this not require as a manager of something so critical as Wells delivering potable water to understand and adhere to State Law? Would this not include actually testing the Brewers' Well as required by law and for which assessments were collected from the Brewers? Based upon the evidence, members of LEEHOA's Board were aware of the statutory requirements as it related to their duties as officers but failed to make reasonable inquiry in pursuit or to uphold those duties. The immunity of Board members applies "except for acts or omissions that involve intentional misconduct or **knowing violation of the law**."³⁸

In this case, LEEHOA is an association, albeit an unlawful HOA, made up of its members. And those members are bound to the covenants, conditions and restrictions and must comply with State and County Code.

³⁷ *Waltz v. Tanager Estates Homeowners Ass'n*, 183 Wn.App. 85, 87; 332 P.3d 1133, 1133 (2014).

³⁸ *Alexander v. Sanford*, 181 Wn.App. 135, 175; 325 P.3d 341, 364 (2014)

LEEHOA, as an association, and thus its members, cannot be insulated in an attempt to bifurcate the liability and responsibility for the bad acts of its members that its Board fails to investigate or prohibit.

RCW 24.03.127 preserves a **negligence**, or reasonableness, standard of liability in relation to a corporation's **members**. Thus, the stricter gross negligence standard of RCW 4.24.264(1) does not apply to directors and officers for their dealings with corporation members.³⁹ (*emphasis*)

The court in *Waltz v. Tanager Estates Homeowners Ass'n*, *supra* found the directors owed the homeowners, as members of the corporation, the obligation to act in good faith with the care of an ordinarily prudent person, and could be liable to them for negligent actions and a reasonableness standard was proper.

LEEHOA should be held liable for negligence, of its board and its members, to the extent they have failed to comply with State and County Code, particularly if this Court deems under RCW 64.38, it is not a lawful homeowners association. As a member of LEEHOA, each resident has a duty on behalf of the “association” to uphold the State and County Code and if any resident fails to do so, LEEHOA should be held liable as a corporation. The encroachments of building into the 100’ Sanitary Control Area that have occurred in violation of the 1992 CC&Rs, the WAC and

³⁹ *Waltz v. Tanager Estates Homeowners Ass'n*, 183 Wn.App. 85, 87; 332 P.3d 1133, 1133 (2014)

KCC should be deemed to be the liability of LEEHOA as an association. The failure of LEEHOA's board to ensure compliance by making reasonable inquiries is no different than a board member of a for profit company turning a blind eye or being complicit in failing to make a reasonable inquiry to ensure compliance with contracts and the law. The Board of any corporation has a fiduciary duty. Thus the protections afforded a non-profit organization's board would fail. Rather, with no fiduciary duty, what other purpose does a board of directors serve, if not to ensure compliance. If LEEHOA claims it has a right to be an association then it's Board has a duty to protect its members.

LEEHOA cannot have it both ways – to argue it is an “association” and assert control and dominion over private assets of the members, collect assets for testing Brewers' Well and then fail to test the Well. This is a classic case of negligence and Brewers argue the trial court erred in dismissing their claim of negligence.

Brewers assert the trial court erred in dismissing Brewers' claim of nuisance on the basis genuine issues of material fact existed that should have precluded the trial court from granting LEEHOA's motion for summary judgment. The offending structures which include bathrooms violate WAC 246-295-100 [repelled and replaced with WAC 246-295-125]

“RCW 7.48.120 states in part: ‘**Nuisance** consists in unlawfully doing an act [that] either annoys, injures or

endangers the comfort, repose, health or safety of others, offends decency . . . ; or in any way renders other persons insecure in life, or in the use of property.’ This court must determine whether the Wray's use of their land was reasonable while considering the facts and circumstances of this case.⁴⁰

Lake Easton Estates homeowners will claim, “it was the County” that should have stopped the building, while LEEHOA will say, it has no duty to enforce the terms of the CC&Rs; however, damage has occurred and rendered the Brewers insecure in life or in the use of their property. This fact is confirmed in the Brief of the deputy prosecuting attorney of Kittitas County who alone indicates genuine issues of material facts existed in the Brief submitted (CP792). Any structures to be built within the 100’ radius around the Wells violate State and County Code, jeopardizes the public, including Brewers’ health, safety and welfare. If LEEHOA can assert dominion over the Wells, can it claim it has no duty to protect the Wells? If LEEHOA, as an association consisting of its members, is not liable for the unlawful actions of its members that create a public nuisance or nuisance, *per se*, then who is liable?

As for damages, Brewers presented the declaration of a licensed real estate broker that indicates Brewers’ property value would be diminished on the basis of their duty to disclose the aquifer from which Brewers draw potable water has been compromised.

⁴⁰ *Riblet v. Spokane-Portland Cement Co.*, 41 Wn.2d 249, 254; 248 P.2d 380 (1952).

The Supreme Court addressed the issue of nuisance, *per se* that prohibits an act, thing, omission or use of property, which is **not permissible or excusable under any circumstances**. “An actionable nuisance must either **injure the property** or unreasonably **interfere with the enjoyment of the property.**”⁴¹ (*emphasis added*). The question of whether a nuisance has been created by the adjacent uphill properties that impact or damage Brewers is one for the jury. Therefore, the trial court should not have dismissed Brewers’ claims of nuisance.

One of the most famous cases as it relates to nuisance and the “fear of danger” is one where the construction of buildings created fear and dread of disease and speculatively was assumed a depreciation of the value of adjacent properties, based upon the impact the fear would have on the mind, health and nerves of the occupants thereof.

“The court said, in the sanitarium case, *supra*, that, although the danger of communication of disease might be reduced to a negligible quantity, and that such a sanitarium might be constructed with due regard to the safety of patients and the public, and that ***there might be no danger*** to persons living in the immediate vicinity, and that the sanitarium would be a great benefit to the general community, yet that it constituted a nuisance for the reason that there had grown into the law of nuisances an element not recognized at common law; that is, that ***making uncomfortable the enjoyment of another's property is a nuisance***. It was there held that, ***though the fear of disease might be unfounded, imaginary and fanciful, yet where there is a positive dread which science has not yet been***

⁴¹ *Tiegs v. Watts*, 135 Wn.2d 1, 15; 954 P.2d 877, 884 (1998)

able to eliminate, such dread, robbing as it did the home owner of the pleasure in and comfortable enjoyment of his home, would make the thing dreaded an actionable nuisance, and the depreciation of the property consequent thereon would warrant a decree against its continuance. Further, that dread of disease and fear induced by the proximity of the sanitarium, if that in fact destroys the comfortable enjoyment of the property owners, is ***not unfounded and unreasonable*** when it is shared by the whole of the interested public, and property values become endangered, and that—

"The question is, not whether the fear is founded in science, but whether it exists; not whether it is imaginary, but whether it is real, in that it affects the movements and conduct of men. Such fears are actual, and must be recognized by the courts as other emotions of the human mind. . . . Comfortable enjoyment means mental quiet as well as physical comfort. . . . Nuisance is a question of degree, depending upon varying circumstances. There must be more than a tendency to injury; there must be something appreciable. The cases generally say tangible, actual, measurable, or subsisting."⁴² (*emphasis added*)

The Brewers' case involves buildings that contain sources of contamination that creates a nuisance *per se* because the buildings with bathrooms were built in some cases within 23 feet of a Well that shares an aquifer providing Brewers with their potable water and could never have legally been built. It is a reasonable fear that Brewers' Well could become contaminated based upon expert witness statements and most certainly, "where a seller has knowledge of a material fact not easily discoverable by the buyer, and where there exists a statutory duty to disclose"⁴³ thus Brewers

⁴² *Everett v. Paschall*, 61 Wn. 47; 111 P. 879, Ann. Cas. 1912B 1128; 31 L.R.A. (N.S.) 827

⁴³ *Alexander v. Sanford*, 181 Wn.App. 135, 177, 325 P.3d 341, 365-66 (2014)

have a duty to disclose the condition of their Well. The trial court's ruling that no nuisance has been created in Lake Easton Estates ignores the facts.

The tort of conversion is "the act of willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it."⁴⁴ Since purchasing their property, LEEHOA has collected fees from the Brewers for maintenance of private property and private Wells from which they receive no value or beneficial use. The trial court agreed that "the well owners shall not be subject to assessments for any other well system." (CP933) Brewers agree and assert the Wells, as private property, are not to be paid for with the funds collected by LEEHOA and in light of LEEHOA's lack of standing as a lawful HOA, Brewers should be refunded sums paid.

Brewers argue for all of the above-reasons, their claims for negligence, nuisance and conversion should not have been dismissed and the errors of the trial court should be reversed.

V. RAP 18.1 REQUEST FOR ATTORNEY FEES

RCW 64.38.050 entitles an aggrieved party to any remedy provided by law or in equity and in an appropriate case, the court may award

⁴⁴ *Judkins v. Sadler-Mac Neil*, 61 Wn.2d 1, 3, 376 P.2d 837 (1962) (quoting Sir J. Salmond, *Torts* § 78 (9th ed. 1936)).

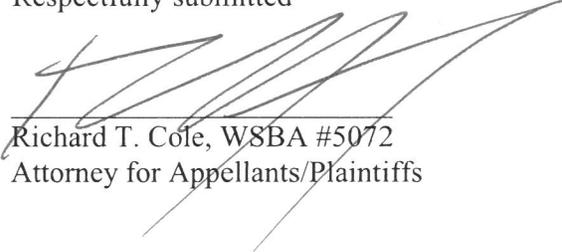
reasonable attorney fees to the prevailing party. Brewers request that this Court award them attorney fees in the Court of Appeals.

VI. CONCLUSION

For all of the reasons stated above, Brewers ask this Court to reverse the trial court's decision granting summary judgment to LEEHOA on the basis that genuine issues of material fact existed. Brewers ask this Court to find error in the trial court's orders denying Brewers' Motion for Partial Summary Judgment and Motion for Reconsideration and award attorney fees.

DATED this ⁴²30 day of June, 2017.

Respectfully submitted



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FILED

JUL 03 2017

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Court of Appeals No. 345696-III
COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

LYNN BREWER and DOUGLAS BREWER, a married couple

Appellants / Plaintiffs

v.

LAKE EASTON ESTATES HOMEOWNERS ASSOCIATION,
a Washington corporation and
MICHAEL D. PECKMAN, an individual

Respondent / Defendants

CERTIFICATE OF FILING AND SERVICE BY MAIL

I, RICHARD T. COLE, certify that I filed Appellants Brief on the 30th day of June, 2017, by faxing the same to the Court of Appeals and depositing the original in the mail to the Clerk of the Court. I served opposing counsel by depositing a copy in the U.S. Postal Service to the address on file on the same date.

DATED this 30th day of June, 2017.

Respectfully submitted


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