

NO. 349390

COURT OF APPEALS STATE OF WASHINGTON

DIVISION THREE

DARLENE JEVNE,

Appellant/Cross-Appellee,

v.

THE PASS, LLC, a Washington limited liability company, d/b/a
The Pass Life, and BRYCE PHILLIPS and JANE DOE PHILLIPS,
husband and wife and their marital community,

Respondents/Cross-Appellants.

BRIEF OF APPELLANT/CROSS-APPELLEE

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A. INTRODUCTION

This case involves Darlene Jevne's ("Jevne") nuisance and trespass claims against a third party developer, the Pass, LLC and Bryce Phillips, ("Pass, LLC") into a stormwater pond that Jevne was granted a real property interest in pursuant to her homeowners association's articles of incorporation. Jevne is a member in good standing with The Village at the Summit Homeowners Association ("HOA"). The HOA has been in existence for over twenty years prior to the formation of the Pass, LLC and the commencement of its new development which is adjacent to the HOA's development. The HOA collectively, through its members, owns, oversees and maintains the real property, including Tract A, the pond, located in a development identified as The Village at the Summit, Division I ("Village"). The Pass, LLC's development and the Village are both situated at the foot of the ski slopes of the Snoqualmie Summit West's ski resort.

The Pass, LLC was never given permission by the HOA or Jevne to dump stormwater into the pond through a new drainpipe located outside of the designated drainage easement. Notwithstanding not having permission to drain to the pond through a new drain pipe, the Pass, LLC dug into the pond, connected their large stormwater drain pipe to the pond and now directs all of their stormwater runoff into the pond.

In 2014 and during the Pass, LLC's development, Darlene Jevne ("Jevne") purchased lot 31 with a home on it in the Village. Jevne's home is situated directly across the street from the HOA's pond. Pursuant to home ownership, Jevne was required to become a member of the HOA. Each year, Jevne is required to pay dues to the HOA for road snow removal, stormwater ditch and pond clearing, and other maintenance type work within the HOA community. The Pass, LLC does not pay for any maintenance of the pond; and, they are not a HOA member.

Pursuant to the HOA's Articles of Incorporation, there is an explicit and undisputed provision that gives Jevne and other HOA members an undivided interest in the HOA's real property assets and/or proceeds from the sale of the HOA's assets upon liquidation or dissolution. One such real property asset is the HOA's stormwater pond known as Tract A which is at issue in this case.

In successfully defending against the Pass, LLC's 12(b)(6) motion to dismiss Jevne's claims in March 2016, Jevne argued that she has standing to bring her nuisance and trespass related claims because Jevne has an ownership interest in the pond or its sale proceeds upon dissolution or liquidation of the HOA. This interest is real and not speculative. Jevne's right to HOA real property assets, including the pond, gives Jevne standing to bring her actions to protect her property interests in the pond against third

parties, like the Pass, LLC, who abuse or unlawfully use the pond. The trial court agreed that Jevne had standing and denied the Pass, LLC's CR 12(b)(6) motion.

After denying the Pass, LLC's 12(b)(6) motion, the trial court, in October 2016, dismissed all of Jevne's claims on summary judgment even though Jevne was able to show that 1) the Pass, LLC had no permission to use the pond, 2) all of the Pass, LLC's stormwater historically did not go into the pond, 3) the Pass, LLC directed all of its subdivision's storm water into the pond through a drain pipe that was located outside of the Plat's designated drainage easement, 4) the Pass, LLC unlawfully connected its stormwater drain pipe directly to the pond, and 5) the Land Use Petition Act ("LUPA") did not apply to extinguish Jevne's claims because Jevne's nuisance and trespass claims are based in compensatory damages which are exempted from LUPA.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

The trial court erred by granting the Pass, LLC's motion for summary judgment when:

1. The Pass, LLC had no permission to install a new stormwater drain pipe into the pond where the pipe is located outside of the Plat's designated drainage easement.

2. The Pass, LLC historically did not direct all of its stormwater runoff into the pond as is now allowed by the lower court.

3. The Pass, LLC dumps all of its subdivision's storm water into the pond through a new drain pipe that is located outside of the Plat's designated drainage easement location.

4. The Pass, LLC unlawfully connected its stormwater drain pipe directly to the pond.

5. The Land Use Petition Act ("LUPA") did not apply to extinguish Jevne's claims because Jevne's claims are based in compensatory damages which are explicitly exempted from LUPA.

6. The trial court allowed into evidence First American Title Insurance Company's title report which showed that Tract A's owner is an entity other than that provided on the face of the 1990 Plat and, therefore, is inadmissible extrinsic evidence.

7. The trial court allowed the declaration of Marc K. Kirkpatrick which contradicts the plain meaning on the face of the 1990 Plat which does not account for any future stormwater retention needs for Tract E and, therefore, is inadmissible extrinsic evidence.

8. The trial court denied Jevne's motion for reconsideration in an order entered on December 9, 2016.

(2) Issues Pertaining to Assignments of Error

1. Did the lower court err by granting the Pass, LLC's motion for summary judgment when the Pass, LLC had no permission to install a stormwater drain pipe directly into the pond to which Jevne has a real property interest to protect?

2. Did the lower court err by granting the Pass, LLC's motion for summary judgment when the Pass, LLC historically did not direct all of its stormwater runoff into the pond which the lower court now allows?

3. Did the lower court err by granting the Pass, LLC's motion for summary judgment when the Pass, LLC directed all of its subdivision's stormwater into the pond through a new drain pipe that is located outside of the controlling Plat's designated drainage easement location?

4. Did the lower court err by granting the Pass, LLC's motion for summary judgment when the Pass, LLC unlawfully entered and connected its stormwater drain pipe directly to the pond?

5. Did the lower court err by granting the Pass, LLC's motion for summary judgment by applying the Land Use Petition Act ("LUPA") to Jevne's claims when Jevne's claims are based in compensatory damages which are explicitly exempted from LUPA?

6. Did the lower court err by failing to exclude First American Title Insurance Company's title report which showed Tract A's owner to be an entity other than the owner as provided on the face of the 1990 Plat?

7. Did the lower court err by failing to exclude the declaration of Mark K. Kirkpatrick who concluded that all of the Pass, LLC's stormwater can be directed to the HOA pond which is based on inadmissible extrinsic evidence and is contrary to the 1990 Plat?

8. Did the lower court err by failing to grant Jevne's motion for reconsideration to deny the Pass, LLC's motion for summary judgment?

C. STATEMENT OF THE CASE

This case arises out of trespass and nuisance based claims requesting damages and injunctive relief brought by a homeowner, Darlene Jevne, in her Complaint, against a developer, the Pass, LLC. CP 1-8. Jevne's claims arise from the Pass, LLC's unauthorized dumping of all of its developments stormwater into a pond that belongs to the HOA members. *Id.* Jevne is the legal owner of Lot 31, Village at the Summit, Division I. CP 155. Jevne is a member of the HOA in good standing. *Id.* As a basis for Jevne's standing to bring her claims, the Articles of Incorporation of the HOA provide, in Article VIII, paragraph 8.4 that in the event of dissolution or liquidation of the corporation, the assets of the corporation shall be distributed as provided by Chapter 24.03 of Revised Code of Washington, and any assets remaining

after all the liabilities and obligations of the corporation shall have been paid, satisfied, discharged, or other adequate provision made therefore, shall be distributed, either in cash or in kind, among all of the members of the corporation who are members in good standing. . .” CP 158 & 162.

In its Answer to Jevne’s Complaint, the Pass, LLC admitted that during the summer of 2013, it commissioned the installation of a drainage system throughout Tract E to direct Tract E’s surface water into the HOA’s stormwater detention pond. CP 167. Tract E is an approximately 5 acre parcel of land being developed for commercial and residential purposes by the Pass, LLC. *Id.* The Pass, LLC admitted that they did not seek permission from the HOA to install the drainage system. CP 168. The Pass, LLC also admitted to connecting one drainage pipe to the pond on September 5, 2013. *Id.* In answering Jevne’s Requests for Admission, the Pass, LLC admitted that they entered onto Tract A, the pond, and placed storm water drainage pipes into Tract A. CP 218. The Pass, LLC admitted that The Village at the Summit, Division I, “the Final Plat” that was submitted by the “original developer” on or about September 24, 1990 for development of The Village (the “1990 Plat) “speaks for itself.” CP 166.

Speaking for itself, the 1990 Plat specifically states that the ownership of Tract A, the pond, is the Homeowner’s Association. CP 195. In addition, Kittitas County government declares that the owner of Tract A is

the Village at the Summit Homeowners Association as set forth on their Kittitas County Assessor website. CP 152. The Pass, LLC specifically admits that they deny any allegations regarding the 1990 Plat that are inconsistent with the terms of the document itself. CP 166-67.

The Pass, LLC argued that all of Tract E's water historically flowed to Tract A, the pond. In refuting this assertion, Mr. Haycock, an eye witness, and a former officer and director of the HOA, stated the following:

"I have read the Declaration of Marc K. Kirkpatrick. At paragraph 9, Mr. Kirkpatrick states that the "stormwater from Tract E has flowed to Tract A since the development of the 1990 plat." I can state that Mr. Kirkpatrick's statement is not true. I can state, with certainty, that Tract E, before it was developed, had substantial water leave its property over the years and enter onto Highway 906. In fact, there use to be a small stream or creek of water that ran west to east along the northern property line of Tract E which, at times, would flow a substantial amount of water out into Highway 906 which is the adjacent highway next to Tract E. Approximately, 5 or 6 years ago, I needed to help solve the road erosion problem that the Village's north entrance was enduring. In order to determine the cause of the erosion and pooling of water, I investigated the source of the water. I noticed that a lot of water would come from Highway 906 and run into a ditch that would then direct the water toward the Village's north entrance way. I also saw

significant water coming off of Tract E that would enter the ditch along the roadway and head in both a northern and a southern direction of Highway 906.” CP 147-49.

Mr. Haycock’ also asserts that “as a result of my personal observations of Tract E, over the years, I can state with certainty that a significant amount of Tract E’s stormwater would leave Tract E and enter the ditches along Highway 906. In addition, because the slope of Tract A, the pond, was higher than other parts of Tract E because it was built with a berm of dirt around it, a significant amount of the water that would build up on Tract E would not enter into Tract A, the pond. Because I have visually observed the water coming off of Tract E and enter onto Highway 906 for years, I can state that the water did not get rerouted back into Tract A, the pond, after leaving Tract E.” CP 149.

Mr. Haycock states that he has reviewed both the 2012 Encompass map and The Village at the Summit 1990 Plat map for Division I which show Tract A, the pond. *Id.* CP 206, 195-99, 200-02. Mr. Haycock states that from the map of Tract A, it is clear that Tract E’s stormwater drainage pipe enters the approximate middle of Tract A which is substantially east of the easement area shown on the 1990 Plat map. CP 206. From Mr. Haycock’s review, he concludes that Tract E’s drainage pipe is entering

Tract A's boundary several feet east of the easement area provided by the 1990 Plat map for the Village at the Summit. CP 206-07.

D. SUMMARY OF ARGUMENT

The trial court erred by granting the Pass, LLC's motion for summary judgment and by denying Jevne's motion for reconsideration. It is clear that the 1990 Plat made the HOA the owner of Tract A, the pond. As a member of the HOA, the HOA's Articles of Incorporation gave Jevne an ownership interest in the HOA's real property upon the HOA's dissolution or liquidation providing Jevne with standing to pursue her claims. The HOA never gave permission or authorization to the Pass, LLC to enter into the pond to install its stormwater drain pipe. In addition, the HOA never gave the Pass, LLC authorization to direct its entire 5 acre development's stormwater into the HOA's pond.

Former officer and director of the HOA, Mr. Haycock, stated that a substantial amount of water coming off of the Pass, LLC's property, Tract E, did not enter the pond, but went elsewhere. Mr. Haycock also states that the new location of the Pass, LLC's drainage pipe entering the pond is located several feet east of the specific drainage easement identified and provided for Tract E's use in the 1990 Plat.

Because Jevne's nuisance and trespass related claims are based in compensatory damages, LUPA's procedural requirements do not apply to

bar Jevne's claims. Because LUPA's exemptions specifically apply to Jevne's claims, it cannot be successfully argued that Jevne's claims are deemed to be a collateral attack on a previous county government land use ruling.

E. ARGUMENT

1. Standard of Review:

- i. The Court of Appeals reviews the lower court's summary judgment dismissal ruling de novo.

On appeal of summary judgment, the standard of review is de novo, and the appellate court performs the same inquiry as the trial court. *Lybbert v. Grant County, State of Washington*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000); *citing Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 197-98, 943 P.2d 286 (1997). When ruling on a summary judgment motion, the court is to view all facts and reasonable inferences there from most favorably toward the nonmoving party. *Id. citing Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891, 897, 874 P.2d 142 (1994). A court may grant summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Lybbert, supra, citing Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995); *see also* CR 56(c).

2. The 1990 Plat established ownership of Tract A in the HOA:
 - i. The HOA's ownership is relevant because the Pass, LLC did not have permission from the HOA to enter Tract A and conduct stormwater drainage activities.

The ownership of the pond is relevant because the Pass, LLC would need permission to lawfully enter the pond to conduct drainage pipe installation activities and then direct their stormwater drainage to the pond. If ownership was not relevant, then Jevne would have no basis for her claims against the Pass, LLC. According to the 1990 Plat, the ownership of Tract A, the pond, lists the Homeowners Association as the designated "Ownership" for Tract A on the face of the Plat. CP 195.

- a. Washington's Supreme Court makes it clear that if a plat is plainly stated and not subject to ambiguity, then only the language of the plat, including all of its marks and lines, will be used to determine the intention of the grantor.

Washington's Supreme Court has held that if a plat is not ambiguous, then the Court is to determine the grantor's intention by looking only at the plat with its marks and lines. Accordingly, the decision in *The Roeder Company v. Burlington Northern, Inc.*, 105 Wn.2d 269, 716 P.2d 855 makes it clear that "In construing a plat, the intention of the dedicator controls. *Frye v. King County*, 151 Wn. 179, 182, 275 P. 547 (1929). That intention

is to be determined from all the marks and lines appearing on the plat. 26 C.J.S. Dedication § 49, at 519 (1956). However, where the plat is ambiguous, surrounding circumstances may be considered to determine intention. 26 C.J.S., at 520. *See also Deaver v. Walla Walla County*, 30 Wn. App. 97, 633 P.2d 90 (1981); *Camping Comm'n of Pac. Northwest Conf. of Methodist Church v. Ocean View Land, Inc.*, 70 Wn.2d 12, 421 P.2d 1021 (1966); *Cummins v. King County*, 72 Wn.2d 624, 434 P.2d 588 (1967); *Rainier Ave. Corp. v. City of Seattle*, 80 Wn.2d 362, 494 P.2d 996 (1972); 2 G. Thompson, *Real Property* § 383 (Supp.1980)."

In addition, under Washington Supreme Court's decision in *Olson Land Co. v. City of Seattle*, the rule is well settled that: "An official survey, map, or plat, or one which is duly filed or recorded in the proper office, is not subject to be contradicted, impeached, or invalidated by parol or other extrinsic evidence. . . . It is apparent, therefore, that the plat itself is the best evidence of the intention of the dedicators; and, unless such plat is uncertain or ambiguous, parol evidence cannot be heard to determine the intention of the dedicators. *Olson Land Co. v. City of Seattle*, 76 Wn. 142, 145-46, 136 P. 118 (1913).

To be certain about how drafter's intent is derived from any document, including covenants, contracts, and plats, Washington's Supreme Court has recently ruled as follows: ["Thus, our primary

objective in contract interpretation is determining the drafter's intent.

Hollis v. Garwall, Inc., 137 Wn.2d 683, 696, 974 P.2d 836 (1999); *Riss v.*

Angel, 131 Wn.2d 612, 623, 934 P.2d 669 (1997); *Mains Farm*

Homeowners Association v. Worthington, 121 Wash.2d 810, 815, 854

P.2d 1072. “While interpretation of the covenant is a question of law, the

drafter's intent is a question of fact.” *Ross v. Bennett*, 148 Wn.App. 40,

49, 203 P.3d 383 (2009) citing *Wimberly v. Caravello*, 136 Wn. App. 327,

336, 149 P.3d 402 (2006). “But where reasonable minds could reach but

one conclusion, questions of fact may be determined as a matter of law.”

Ross v. Bennet, supra, at 49–50, 203 P.3d 383; citing *Owen v. Burlington*

Northern And Santa Fe R.R. Co., 153 Wn.2d 780, 788, 108 P.3d 1220

(2005). In determining the drafter's intent, we give covenant language “its

ordinary and common use” and will not construe a term in such a way “so

as to defeat the plain and obvious meaning.” *Mains Farm Homeowners*

Association v. Worthington, 121 Wn.2d 810, 816, 854 P.2d 1072 (1993);

Riss v. Angel, 131 Wn.2d 612, 623, 934 P.2d 669 (1997). We examine the

language of the restrictive covenant and consider the instrument in its

entirety. *Hollis*, 137 Wn.2d at 694, 974 P.2d 836 (quoting *Mountain Park*

Homeowners Ass'n v. Tydings, 125 Wn.2d 337, 344, 883 P.2d 1383

(1994); *Wimberly*, 136 Wn. App. at 336, 149 P.3d 402. The lack of an

express term with the inclusion of other similar terms is evidence of the

drafter's intent. See *Burton v. Douglas County*, 65 Wn.2d 619 , 622, 399 P.2d 68 (1965). ("Extrinsic evidence is used to illuminate what was written, not what was intended to be written." *Hollis*, 137 Wn.2d at 697, 974 P.2d at 836. We, however, do not consider extrinsic evidence "that would vary, contradict or modify the written word" or "show an intention independent of the instrument." *Id.* at 695, 974 P.2d 836."]

In our case, no party is contradicting the terms of the 1990 Plat. Jevne is in agreement with the Pass, LLC's admission that the 1990 Plat "speaks for itself." CP 166.

- b. RCW 58.17.165 establishes that the HOA is the owner of Tract A, the pond, as a matter of law.

In part, RCW 58.17.165 provides as follows:

" . . . Any grant as shown on the face of the plat shall be considered to all intents and purposes, as a quitclaim deed to the said . . . grantee"

From the face of the 1990 Plat, it is clear that the ownership of the pond, Tract A, is specifically stated to be the homeowner's association. CP 195. Furthermore, Kittitas County government has deemed the HOA to be the 100% owner of Tract A as shown on its Assessor's website. CP 152. Even the Pass, LLC admits that the 1990 Plat "speaks for itself." CP 166. The Pass, LLC additionally admits that they deny any allegations regarding the 1990 Plat that are inconsistent with its terms. CP 166-67. As a result of

the application of RCW 58.17.165 to the 1990 Plat in conjunction with Kittitas County government's declaration of ownership of Tract A to be the HOA and supported by the Pass, LLC's admissions, the pond's ownership is in the HOA.

3. Standing:

- i. Washington State's Supreme Court makes it clear that Jevne has a "present interest" in the HOA's real property, Tract A, providing her with standing to protect the pond from the Pass, LLC's encroachments.

Schroeder et al. v. Meridian Improvement Club Settled The Standing Issue In 1950.

The Supreme Court of Washington ruled that incorporated association members, like Jevne, in good standing, with distribution rights to HOA assets upon dissolution of the association have a "present interest" giving them standing to maintain actions as we have in this case. The controlling authority regarding association members' present interest in HOA property, as "distinguished from a mere expectancy, or future, contingent interest," is the landmark case of *Schroeder et al. v. Meridian Improvement Club*. In *Schroeder*, the Supreme Court stated the following:

"A corporation differs from an unincorporated association or club in that the latter is not ordinarily a legal entity distinct from its component individuals; whereas, a corporation is always and necessarily a distinct and separate legal entity. Corporations are divided into stock corporations and nonstock or member corporations. The corporation under consideration falls within the latter category. The legal entity, rather than the component

members, holds title to the property. Nevertheless, such holding by the corporation is for the use and benefit of the members, and, in the event of a dissolution, each member would have a right to have distributed to him, a pro rata share of the proceeds of sale, after all debts and the expenses of sale and dissolution had been paid. Because (sic) a member has a right to a share of such proceeds, he has a present interest in the property of the corporation to the extent that no group of officers or members can, without complying with the constitution and by-laws, impair his ultimate right to share in the proceeds in the event of dissolution. But this right exists as an incident of membership and not because of any ownership of the property of the corporation. Such a right is dependent upon membership, and it expires with a loss or termination of membership.”

Schroder et al. v. Meridian Improvement Club, 36 Wn.2d 925, 930, 221 P.2d 544, 547 (1950).

In our case, it is clear that Jevne is a member of the incorporated HOA in “good standing.” CP 155. It is also clear that the HOA’s Articles of Incorporation entitle Jevne to share in HOA assets upon the event of dissolution of the HOA. CP 158 & 162. Moreover, the *Schroeder* ruling makes it is clear that no group of officers or members can impair Jevne’s ultimate right to share in the proceeds of the HOA’s real property in the event of dissolution. Therefore, when applying *Schroeder* to our case, it is clear that Jevne has a present interest in the HOA’s property and assets, namely, Tract A. And, as a matter of law, has standing to bring her trespass and nuisance related claims against the Pass, LLC.

In our case, *Schroeder* has made it clear that Jevne has a present interest in the pond providing Jevne with standing. In addition, Jevne will be able to show that a benefit will accrue to her if she is granted the relief she seeks in her Complaint. In part, Jevne has requested the removal of the Pass, LLC's new drainage pipe from the HOA's drainage pond to which Jevne has a present interest to protect against the direct dumping of any water, including road oil contaminated water, coming from the Pass, LLC's development.

4. All of the Pass, LLC's prior water flow did not flow to the pond and establishes a question of fact for the jury.
 - i. All of Tract E's historical stormwater flow did not flow to the pond through the 15 foot drainage easement given Scott Haycock's testimony.

Jevne presented the trial court with Scott Haycock's declaration which demonstrated that all of Tract E's historical stormwater did not flow to Tract A through the 15 foot easement. Mr. Haycock's testimony specifically refuted the Pass, LLC's claim that all of Tract E's water eventually flowed to the pond. CP 147-49. In refuting the Pass, LLC's claim, Mr. Haycock created a genuine issue of material fact as to whether all of the Pass, LLC's development's water flowed to the pond. *Id.* In particular, Mr. Haycock claims that he personally observed significant

amounts of Tract E's stormwater leave Tract E and enter ditches on Highway 906 which did not get rerouted back into the pond. CP 149.

- ii. The case of Logan v. Brodrick makes it clear that reasonable drainage use or unreasonable drainage deviation in the use of an easement is a question of fact.

A question of fact exists as to whether the Pass, LLC's drainage to the pond through a new drain pipe outside of the 1990 Plat's drainage easement designation is reasonable use or unreasonable deviation. A case regarding this issue is *Logan v. Brodrick*, 29 Wn.App. 796, 800 (1981). *Logan* dealt with an easement allowing the natural development of resort traffic over time. Our case, on the other hand, deals with whether the Pass, LLC's installation of a new drain pipe and its subsequent stormwater dumping to the HOA pond outside of the designated drainage easement is a reasonable use or an unnatural deviation. Specifically, *Logan*, at 799-800, stated as follows:

“In determining the permissible scope of an easement, we look to the intentions of the parties connected with the original creation of the easement, the nature and situation of the properties subject to the easement, and the manner in which the easement has been used and occupied. *Evich v. Kovacevich*, 33 Wn.2d 151, 157, 204 P.2d 839 (1949). It can be assumed the parties had in mind the natural development of the dominant estate. Accordingly, the degree of use may be affected by development of the dominant estate. See *W. Burby*, *Real Property*, s 32 (3d ed. 1965). The law assumes parties to an easement contemplated a normal development under conditions which may be different from those existing at the time of the grant. *Restatement, Property*, s 484 (1944);³ see also *Cameron v. Barton*, 272 S.W.2d 40, 41 (Ky.

1954). Normal changes in the manner of use and resulting needs will not, without adequate showing, constitute an unreasonable deviation from the original grant of the easement. See *Michaelson v. Nemetz*, 346 N.E.2d 925, 926 (Mass. 1976). The question of reasonable use or unreasonable deviation is one of fact. See 2 G. Thompson, *Real Property*, s 426 (1980).”

In our case, the Pass, LLC’s Tract E’s past and present use of the HOA’s pond, whether it is reasonable use or unreasonable deviation, is a question of fact that is not subject to summary judgment. Clearly, Tract E’s past and present drainage to the pond use are clearly distinguishable. Because Tract E’s past drainage needs required no drainage pipe and, arguably, did not direct “all” of its water to the 15 foot drainage easement and then to the pond, the Pass, LLC’s present use of the pond, including its drain pipe in a location outside of the original drainage easement, may be viewed by the trier of fact as an unreasonable deviation from the established drainage easement.

5. Without authorization, the Pass, LLC connected its new stormwater drainage pipe to the pond supporting Jevne’s claims for trespass, nuisance, overburdening existing easement, and claim for injunctive relief.

The Pass, LLC admits that it connected its new stormwater drainage pipe to the HOA’s pond without permission from the HOA. CP 168. Jevne contends that the Pass, LLC’s actions in connecting their pipe to the pond is unlawful and supports Jevne’s claims for trespass, nuisance, overburdening existing easement, and claim for injunctive relief. CP 7.

6. Jevne's claims do not fall within the purview of LUPA because Jevne's claims are based on compensatory damages and are exempt from LUPA's application under RCW 36.70C.030.

RCW 36.70C.030 exempts Jevne's damages' claims from Washington's Land Use Petition Act ("LUPA"). LUPA's requirement that forces parties to appeal a county land use decision does not apply to Jevne's claims because her claims are damages based claims. LUPA's exception is set forth as follows under subsection (1)(c):

“(1) This chapter replaces the writ of certiorari for appeal of land use decisions and shall be the exclusive means of judicial review of land use decisions, except that this chapter does not apply to:

(c) Claims provided by any law for monetary damages or compensation. If one or more claims for damages or compensation are set forth in the same complaint with a land use petition brought under this chapter, the claims are not subject to the procedures and standards, including deadlines, provided in this chapter for review of the petition. The judge who hears the land use petition may, if appropriate, preside at a trial for damages or compensation.”

Jevne's damages' claims are based in monetary damages or compensation which would be required to pay for the removal of the Pass, LLC's drainage pipes from the pond and to restore the pond to its original condition. Jevne's nuisance claim, for example, is a damages related claim entitling Jevne to injunctive relief. Washington's Supreme Court has explained that an actionable nuisance is as an act or omission that injures the plaintiffs' property or unreasonably interferes with their

enjoyment of the property. *Tiegs v. Watts*, 135 Wn.2d 1, 13, 954 P.2d 877 (1998). The relief for a nuisance may be either damages or injunction. RCW 7.48.010 (indicating that a nuisance is “the subject of an action for damages and other and further relief”); WILLIAM B. STOEBUCK & JOHN WEAVER, 17 WASHINGTON PRACTICE REAL ESTATE: PROPERTY LAW § 10.3 at 664 (2004) (describing the two forms of remedies for nuisance as “damages and some kind of injunctive relief.”). LUPA clearly exempts nuisance claims is confirmed by the Washington Supreme Court's recent decision in *Grundy*. There, the Court determined that whether a land owner had a valid permit was irrelevant to the landowner's private nuisance action. *Grundy v. Thurston County*, 155 Wn.2d 1, 8, 10, 117 P.3d 1089 (2005). . . . Moreover, LUPA specifically exempts from its coverage “[c]laims provided by any law for monetary damages or compensation.” RCW 36.70C.030(1)(c). To the extent a nuisance claim may be construed as a claim for damages, LUPA would not seem to bar suit. And Washington recognizes that a plaintiff may elect to bring a land use petition to challenge a land use decision and a claim for damages. *Phillips v. King County*, 87 Wn. App. 468, 477, 943 P.2d 306 (1997), *aff'd*, 136 Wn.2d 946, 968 P.2d 871 (1998). When that occurs, the court will consider the claims separately. *Phillips*, 87 Wn. App. at 477, 943 P.2d 306.

Clearly, RCW 36.70C.030(1)(c) exempts Jevne's tort claims based in damages as indicated by Washington's Supreme Court. Because Jevne's claims are based in damages making them exempt from LUPA, Jevne's claims cannot be viewed as a collateral attack on previous county land use rulings.

7. Washington's Supreme Court established that once a written easement is established, then the owner of the dominant tenement cannot change the use, location, point of diversion, or any other aspect of the easement without the servient tenement's permission.

Our Washington courts adhere to the principle that once an easement is established, whether by prescription or by an express easement, "the owner of the dominant tenement has an easement which he cannot change without the consent of the servient tenement." *White Bros. & Crum Co. v. Watson*, 64 Wn. 666, 670, 117 P. 497, 499 (1911). In *White Bros. & Crum Co.*, White Bros. & Crum had established a prescriptive easement to allow diversion of water across Watson's property for irrigation purposes. The easement allowed for diversion of water at a fixed point and for conveyance of that water by ditch and flume on a then existing right of way across what later became Watson's property. When a flood caused loss of much of the water at the original point of diversion, White Bros. & Crum sought to modify both the point of diversion and the means of conveying the water across Watson's property with a cement dam and pipe line along the right of

way across Watson's property. Watson, by force and threats of violence, prevented the work. White Bros. & Crum then sought an injunction against interference and sought to quiet title in the rights to divert the water to its property. The Washington State Supreme Court held that White Bros. & Crum could not change either the location of the point of diversion or even the means of providing for the water to cross through the easement area because all rights of the dominant estate in the easement became vested upon the establishment of the prescriptive easement. The Court held, at 64 Wn. 669-70, as follows:

"The manner of diversion, the length and location of the right of way, the means of conveyance of the water over the right of way - in short, the easement, became fixed and determined by the facts as they existed when [the easement was established]. No change can now be made in the character of the servitude. A pipe line cannot be substituted for ditch and flume, nor the right of way changed or lengthened."

The principle that an easement cannot be relocated even if the change is necessary to one estate and would not inconvenience the other, has consistently been upheld by Washington courts, including, most recently, the cases of *MacMeekin v. Low Income Housing Institute, Inc.*, 111 Wn. App. 188, 45 P.3d 570 (2002); and *Crisp v. Vanlaeken*, 130 Wn. App. 320, 122 P.3d 926 (2005).

In our case, the 1990 Plat established the drainage rights for Tract E through a designated 15 foot easement area identified and located in the

westerly portion of Tract A and marked with dashed lines on the 1990 Plat itself. CP 195. The Pass, LLC, however, with their excavation efforts and burying of a stormwater drain pipe, have now relocated the easement with drainage from its own property through a large pipe that passes directly from Tract E to several feet east of the designated drainage easement as identified by Scott Haycock. CP 206-07. The stormwater drainage pipe now enters the approximate middle of Tract A which is located a substantial distance east of Tract E's granted 15 foot easement. CP 206. Tract E's new stormwater discharge location into the middle of Tract A is identified on the Pass, LLC's 2012 Encompass Survey Map as identified by Scott Haycock. CP 206, CP 200.

Under *White Bros. & Crum Co. v. Watson*, the Pass, LLC's new use of Tract A is an impermissible relocation of the easement and a change in the character of the servitude contrary to the express language on the face of the 1990 Plat which declared the rights of the easement. In addition, the Pass, LLC's current placement of their drain pipe and their continued dumping of their stormwater into Tract A is a continuing trespass.

8. The 1990 plat is the only evidence to review when determining the intention of the grantor.

In our case, the Pass, LLC admits that the 1990 Plat "speaks for itself" and they deny any allegations regarding the 1990 Plat that are

inconsistent with the terms of the Plat. CP 195, CP 166-67. From their admission alone, it is clear that they agree that the 1990 Plat is not ambiguous. Jevne also agrees that the 1990 Plat is not ambiguous.

- i. Extrinsic evidence is not admissible when a plat is not ambiguous.

Unless the plat is uncertain or ambiguous, parol evidence cannot be heard to determine the intent of the dedicators. *Olson Land Co. v. City of Seattle*, 76 Wash. 142, 145-46, 136 P. 118. In our case, extrinsic evidence cannot be allowed to determine the 1990 Plat's meaning. However, the Declaration of Marc K. Kirkpatrick and the title insurance report of First American Title Insurance Company were allowed by the trial court to alter the clear meaning of the 1990 Plat.

- a. First American Title Insurance Company's 2016 title report listing Snoqualmie Summit Inn, Inc. as the owner of Tract A is inadmissible extrinsic evidence and contrary to the 1990 Plat's granted ownership to the homeowner's association.

Washington's Supreme Court's decision in *Olson Land Co.*, supra, strictly prohibits the use of parol evidence to contradict the plain meanings of the 1990 Plat map. First American Title Insurance Company's title report showing the owner of Tract A to be Snoqualmie Summit Inn, Inc. is contrary to the plain language shown on the 1990 Plat. CP 500. The Plat shows that the Homeowner's Association is the owner of Tract A. CP 195. Therefore,

title report is inadmissible extrinsic evidence contrary to the 1990 Plat and should have been excluded by the trial court.

- b. Marc K. Kirkpatrick's statements in his declaration are based on inadmissible extrinsic evidence.

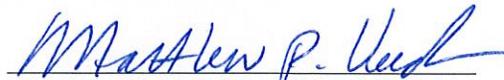
In formulating their interpretation of the 1990 Plat, the Pass, LLC has submitted the declaration of Marc K. Kirkpatrick with the trial court. According to Mr. Kirkpatrick, he states that Tract A was designed to accommodate the future stormwater runoff from Tract E based on the following documents: 1) Group Four's Hydrology Report and Calculations; and 2) Group Four's Construction Plans. CP 391-92. None of these documents are included in the 1990 Plat. No where in the Plat does it suggest that all of Tract E's stormwater is to be directed to Tract A. Because Mr. Kirkpatrick's opinion is contrary to the Plat, his declaration is inadmissible extrinsic evidence and should have been excluded by the trial court.

F. CONCLUSION

The 1990 Plat is the controlling document in this case that established that Jevne's HOA is the true owner of Tract A, the Pond, under the plat statute, RCW 58.17.165. Darlene Jevne has standing to bring her damages based claims because she is a HOA member in good standing. The HOA's Articles of Incorporation provide that Jevne is entitled to a portion of

the HOA's real property assets or asset sales proceeds upon dissolution or liquidation of the HOA providing Jevne with a real property interest to protect. The Pass, LLC's drainage pipe and their stormwater drainage enter Tract A in a completely different location than is allowed in the 1990 Plat constituting trespass, nuisance, overburdening the existing drainage easement, and claim for injunctive relief. The Pass, LLC's trespass and nuisance is currently ongoing. The Land Use Petition Act ("LUPA") exempts Jevne's damages' claims from LUPA appeal application. The Pass, LLC's First American Title Insurance Company's title report should be excluded as evidence because the report is contrary to the 1990 Plat and, therefore, constitutes inadmissible extrinsic evidence. Moreover, the Pass, LLC's declaration of Marc K. Kirkpatrick is also inadmissible extrinsic evidence because it is based on reports and calculation paperwork that is not stated on the face of the 1990 Plat. The trial court erred by dismissing Jevne's case and denying Jevne's motion for reconsideration.

RESPECTFULLY SUBMITTED this 24th day of March, 2017.



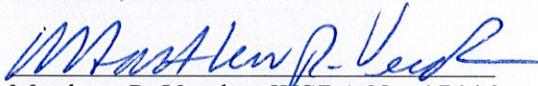
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Certificate of Service

I, Matthew P. Veeder, certify and declare under penalty of perjury of the laws of the State of Washington that on March 24, 2017, I caused a copy of the document to which this is attached to be served on the following individual(s) via email and U.S. first class mail, postage paid.

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March 24, 2017 - 12:16 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
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Appellate Court Case Title: Darlene Jevne v. The Pass, LLC, et al
Superior Court Case Number: 15-2-00352-9

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