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Division III
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NO. 372154

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CYNTHIA HEBERT AND JAMES D. HEBERT,
husband and wife

Appellants,

v.

SPRING CREEK EASEMENT OWNERS ASSOCIATION (RMA)
Board of Trustees

Respondents,

REPLY BRIEF OF APPELLANTS CYNTHIA HEBERT AND JAMES D. HEBERT

John L. Comstock
WSBA #30678
The Comstock Law Firm, PLLC
3631 82nd Avenue SE
Mercer Island, WA 98040
(425) 990-1576
Fax (425) 671-1743
john@comstocklaw.com
Attorney for Appellants

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A. ARGUMENT

1. Objection to the Association's Filing of Two Briefs.

In an effort to minimize confusion in responding to the two briefs filed by the Association, we will refer to the Respondent's Brief filed by Meyer, Fluegge and Tenney, P.S. as the "Brief One," and the Brief filed Barker Martin, P.S. as "Brief Two." Despite the Association's complaints that "every dollar spent on this case and every day that goes by without collection represents another chance that the Association breaks", (Brief Two, p. 48), they have persisted in retaining two separate law firms, who continue to file separate briefs and pleadings containing duplicative, and frequently inconsistent arguments. Their tag-team strategy unnecessarily compounds the costs and complicates the issues involved in this matter for both parties and for the Court. Despite the Association's prior efforts to keep the matter formally bifurcated (hoping to foreclose upon the Heberts' residence without resolving the issues of wrongfully removing the Heberts' gate and boulders) the Superior Court consolidated the two cases on December 13, 2018, because the two cases clearly involved the same legal issues and the same parties. The Superior Court case captioning has been confusing due to the fact that the Association filed their initial complaint under an obsolete name[1], but it is clear and uncontested that Spring Creek Easement Owners Association (the "Association") is and was the same

[1] "Spring Creek Road Maintenance Assoc."

entity and party named under both of the original cases. Despite the consolidation of the cases, the Association persists in their efforts to bifurcate the case, arguing that the Heberts' claims are "irrelevant to the collection action..." Brief Two, p. 11. Of course, the "collection action" is seeking to collect the costs of removing the gate and boulders from the Heberts[2] – exactly what the Heberts' claims are contesting. It is patently absurd that the Association has filed two Respondent's Briefs totaling 99 pages in response to the Heberts' 37-page Appellants' Brief, and such would appear to run afoul of the 50 page limitation under RAP 10.4(b). Yet this has been the Association's strategy even after the cases were consolidated, filing two Motions for Summary Judgment, two Replies in Support, two Oppositions to Motion to Reconsider, two Oppositions to the Hebert's Motion for Stay Pending Appeal, two Respondent's Briefs. – and then decry the high cost of litigation they claim to have been subjected to.

2. Summary Judgment Should Be Overturned Because Multiple Issues of Material Fact Remain Unresolved.

Summary judgment is appropriate when there is no genuine issue as to any material fact. When determining whether an issue of material fact exists, the court must construe all facts and inferences in favor of the nonmoving party. A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation.

[2] Though the legal fees the Association is seeking to collect have far outstripped the initial amount in controversy.

Ranger Ins. Co. v. Pierce Cty., 164 Wash. 2d 545, 552, 192 P.3d 886, 889 (2008). The Association claims there is "absolutely no indication that any of the material facts before the trial court were disputed…" Brief Two, p.2. Nothing could be further from reality. The Court need not go any further than the second sentence of the Brief One to find one of the most glaring unresolved issues of material fact. The Association asserts: "Plaintiffs unilaterally and without permission of the Association installed a permanent gate across the Association's easement and placed boulders on the easement, obstructing the easement." This issue, of whether or not the Association gave permission (whether "temporary" or "permanent") for the Heberts' gate, thirteen years before the Association decided to remove it, involves multiple issues of disputed and material fact, which not even the Association can provide a cohesive narrative about. In its own two briefs, the Association makes the following inconsistent assertions bearing solely on this issue:

- "In 2004, without permission or authority of the Board, plaintiffs installed a chain gate across Ridgecrest Road…" Brief One, p. 9
- "At that time [January 2005], the Association did not approve a gate." Brief One, p.10.
- "[T]he Association only voted to allow plaintiffs to erect a gate if they could obtain written permission form Sapphire Skies and Plum Creek. Brief One, p. 10.
- The Association only voted to allow plaintiffs to erect a temporary gate" Brief One, p. 10.
- "Contrary to the clear evidence, [the Heberts] alleged the Association gave them permission to install a permanent gate in 2004." Brief one, p. 14.
- "Then in May, 2005, Mrs. Hebert allowed the issue to be submitted to a vote of the Association who again approved only a temporary

gate." Brief One, p. 33.

- "There is no evidence whatsoever that the Association authorized a permanent gate." Brief One, p. 345.
- **"Plaintiffs' Use Was Clearly Permissive"** Brief One, p. 48. (bold and caps in original).
- "The records clearly reflect that Plaintiffs were given permission for a temporary gate only. Brief One, p. 48.
- "Evidence submitted by the Heberts demonstrated that the gate had been installed over the Association's objection…" Brief Two, p. 7.
- "[The Heberts'] claim that the Association previously permitted them to install the gate was unsubstantiated and irrelevant." Brief Two, p. 35.
- "The Heberts admit they installed their gate blocking the Road Easement, but have doubled down on the unsubstantiated claim that the 2005 meeting minutes show that the Association approved the installation. Importantly, whether the gate was placed there permissively years ago is simply not relevant." Brief Two, p. 39.

Contrary to this last assertion, the issue of "whether the gate was placed there permissively years ago" is not only relevant, but a central issue upon which this case turns. This unresolved issue alone should have resulted in a denial of summary judgment. While the Association argues that it only begrudgingly gave permission for the Hebert's gate, or that it was only "temporary", or that it required additional approvals from other HOAs, all these assertions involve issues of material fact that are disputed and were not, indeed could not, be resolved upon summary judgment.

The fact that the Association gave permission for the Heberts' gate in 2004 and 2005, and the facts pertinent to whether such permission was "permanent" or "temporary" are not only "material," but central the whole dispute. How does the court determine the validity of the Association's claimed authority to revoke its prior approval of the gate without even

resolving the disputed facts surrounding the approval? An HOA cannot arbitrarily withdraw its prior approval of an improvement. The CC&Rs, under Paragraph 1.10, require approval of *all* visible structures, improvements, and alterations (not just within the easements.) Is the Association suggesting that if they approve the construction of a house, they can later withdraw their approval and order an Owner's house torn down? This is a bizarre suggestion, but exactly the position they are taking regarding their approval of the Heberts' Gate. The facts bearing on this question are the facts necessary to resolve the "elephant in the room" question of why the Heberts' gate was allowed to be installed in 2004, remain in place for thirteen years with no objection whatsoever from the Association nor the other Owners, and then in 2017 suddenly became such an emergency that the Association, under its newly elected president, decided it was justified in ordering the removal of the gate and boulders over the Heberts' and their attorney's protests. In the 99 pages of the Association's two Briefs, they make no mention whatsoever, let alone attempt to explain why no objection was made to the Heberts' gate and boulders over the 13 years prior to the Association's sudden decision in 2017 to pursue the self-help remedy of removing them. The facts surrounding the initial permission and many years of non-objection bear directly upon whether the Hebert's gate and boulders constituted an unreasonable burden upon the Association's easement and also whether the Association's 2017 decision to remove the gate and boulders was

reasonable and not arbitrary. Multiple unresolved issues of material fact still exist bearing upon the necessary determinations of reasonableness of the Heberts' burden upon the Association's easement and Association Board's decision-making process.

The many unresolved issues of material fact prevalent in this case are not merely hypothetical. Each of the following questions of material fact are supported by substantial evidence in the record, and the outcome of the litigation should have turned upon their proper resolution:

- Did the Association give permission for the installation of the Heberts gate in 2004. In 2005? [Association Meeting minutes in 2004 and 2005 indicate gates were discussed and permission was given by the Association. CP 0094, CP 0100].
- Was such permission "temporary" or "permanent"? [2005 Association Meeting minutes (two versions exist) mention "temporary" with respect to *one* of the two gate locations that were discussed CP 0094, CP 0100]
- Was "permanent" permission contingent upon gaining permission from Plum Creek and Sapphire Skies? [Meeting minutes indicate that "temporary" aspect was conditioned upon the approval from other HOAs whose easements might be affected. CP 0094].
- Was such permission from other entities granted? [Sworn Declaration of Cynthia Hebert, based upon personal knowledge, asserts that Plum Creek granted their permission and Sapphire Skies was no longer in existence. CP 0084.]
- Did the Association or other owners object to the gate and or boulders in 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2015, 2016 [Uncontroverted sworn Declaration of Cynthia Hebert, based upon personal knowledge, asserts that no objections were made over these years. CP 0084.]
- Did other Owners install similar barriers along the roadway for safety purposes? [Uncontroverted sworn Declaration of Cynthia Hebert, based upon personal knowledge, asserts that other owners installed similar barriers along the roadway. CP 0084]
- Were dangerous conditions attributable to the gate or boulders reported

during those years? [The Association has provided no evidence of such other than conclusory statements.]

- Did the Heberts have legitimate safety and security concerns with respect to the gate and boulders? [Association Meeting Minutes in 2005 indicate that there was concern about trespassers "with automatic rifles on motorcycles…", and that legal counsel at that time advised that "security overrides recreational access..." CP 0100.]
- Did the gate and/or boulders unreasonably infringe upon the other Owners' easement rights in terms of access, ingress, egress? [The Association has provided no evidence of such other than conclusory statements.]
- Did the gate and/or boulders unreasonably infringe upon the Association's easement rights in terms of maintenance of the roadways? [The Association has provided no evidence of such other than conclusory statements.]
- Did the gate and/or boulders actually result in increased costs of plowing? [The Association has provided no evidence of actual increased costs.]
- Did the Association unreasonably refuse the Heberts' requests in 2017 to mediate the disputes regarding the gate and boulders? [It is undisputed that the Heberts' and their counsel repeatedly requested to mediate the dispute but were flatly refused by the Association.]
- Did the Association make any kind or reasonable inquiry in 2017 regarding the burden imposed by the gate/boulders, or did they just reach an (incorrect) legal conclusion that the CC&Rs prohibited the gate [July 2017 Board Meeting Minutes indicate that the three Board members devoted little discussion to the actual impact of gate or boulders on the Easements, instead focusing on their legal interpretation of the CC&Rs, CP 0074.]
- Did Marion Deardorff have a "bone to pick" with the Heberts, motivating her to push for removing the Heberts' gate and boulders as her first order of business after being elected Director of the Association in 2017? [There is a history of harassment including criminal charges brought against Charles Deardorff in April 2015 for malicious harassment against the Heberts. CP 0004.]

None of these issues of material fact were resolved, nor capable of being resolved upon summary judgment. While the Association intermittently argues its version of the facts on many of these issues, their position in support of summary judgment was predicated upon their

assertion that *none of these issues matter* because the Association Board is an omnipotent body whose decisions are "protected" and "unassailable." Of course, the Association is not immune from liability for its actions under HOA law, the Business Judgment Rule, the *Panther Lake* decision, *the Riss v. Angel* decision, the language of the CC&Rs, nor any other legal or equitable principal. Such a broad view of the Association's infallibility is contrary to even the legal authorities the Association relies upon.

3. <u>The CC&Rs Do Not Prohibit the Heberts' Gate and/or Boulders.</u>

Contrary to the Association's reference to "the Heberts' persistent belief that the Association's CC&Rs did not apply to them…," the Heberts have never argued the CC&Rs do not apply to them. Of course the provisions of the CC&Rs apply to the Heberts, as do they apply to the Association and other Owners. The disagreements are over what the CC&Rs actually say -- and what they don't say and/or govern. The Heberts also do not dispute the Association's contention that "[t]he CC&Rs grant no authority to plaintiffs to erect gates, boulders, or maintain the easement." But the Association's apparent belief that CCR's *must grant* a property owner the rights to use their own property belies a fundamental misunderstanding of property law and the role of the CC&Rs. A property owner's rights to use and enjoy their own property emanates from their ownership of the property, not from a grant under CC&Rs. "Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal. Anything which destroys

any of these elements of property, to that extent destroys the property itself. The substantial value of property lies in its use. If the right of use be denied, the value of the property is annihilated and ownership is rendered a barren right." *Ackerman v. Port of Seattle*, 55 Wash. 2d 400, 409, 348 P.2d 664, 669 (1960), citing *State ex rel. Smith v. Superior Court* (1901), 26 Wash. 278, 66 Pac. 385; *Great Northern R. Co. v. State* (1918), 102 Wash. 348, 173 Pac. 40. One does not look to CC&Rs for what they *can* do on their own property, but rather for what they *can't* do. This is why they are called *restrictions*. Clearly, CC&Rs may prohibit owners from doing things with or upon their property or within an easement -- but to argue that CC&Rs must affirmatively grant an owner the right to place a gate or boulders on their own property is fundamentally inconsistent with basic principles of property law.

CC&Rs *may*, of course, restrict an owner's right to place gates or boulders on their property, but nowhere in the Spring Creek CC&Rs do they expressly say an owner cannot place a gate or boulders on their property. Thus, it can only be argued by the Association that the language of the CC&Rs *implies* a prohibition upon the Heberts' placing a gate and/or boulders on their property and within an Easement. The Association argues that the CC&R's impliedly prohibit the Hebert's from placing a gate/boulders on their property in two ways: 1) "The CC&Rs grant the

Association Exclusive Authority to Maintain the Easements,[3]" (and thus prohibit gates/boulders); and 2) "The CC&Rs grant the Association Exclusive Authority to Erect Gates,"[4] (and thus prohibit gates). Neither of these theories lead to the conclusion that CC&Rs prohibit the Hebert's gate and boulders.

4. The Association's Duty to Maintain the Easements Under the CC&Rs Does Not Imply That the Heberts' Gate and Boulders Are Prohibited.

It is true that the CC&Rs grant the Association an easement over the roadways for the purpose of maintaining the roadways, and that the CC&Rs charge the Association, solely, with the responsibility for maintaining the roadways. The Association seeks to characterize their obligation to maintain the roadways as an exclusive privilege which, if violated, would lead to an anarchy of owners seeking to maintain the roadway on their own. But what Association really has is an easement, which is governed, like all easements, by well-established principles of easement law. Nevertheless, the Association argues that somehow, when we throw together "the HOA act, the CC&Rs, the mechanism by which they are enforced, and the statutory due process to ensure that decisions are properly made,[5]" the body of established law pertaining to easements becomes inapplicable. Brief Two, p. 41. This is indeed mysterious. The CC&Rs created the easements.

[3] Brief One, P. 22.
[4] Brief One, p. 27.
[5] And apparently also the "quasi-factual-but quasi-legal provisions of the CC&Rs", whatever those may be. Brief Two, p. 20

The Association has cited no provision of the HOA Act that purports to supersede the law of easements.

5. The Language Under the CC&Rs Granting Declarant the Right to Install Gates Does Not Prohibit the Heberts' Gate and/or Boulders.

The Association cites language in Paragraph 5.1 of the CC&Rs, which they acknowledge "contains the only mention of gates, and grants to the Declarant alone (and his the [sic] successor in interest) the right to erect gates." The cited CC&R language is: "Declarant expressly reserves the right to install entry gates…." Brief One, p. 27. The Association argues this language gives them the exclusive right to install gates, and thus prohibits anybody else from installing gates. The first thing the Association apparently still fails to distinguish is that the "Declarant" and the "Association" under the CC&Rs were, and are, different parties. The Heberts do not contend that the current Association is not the successor in interest to the *Association* in the CC&Rs.[6] But the Association has provided no evidence whatsoever that it is the successor in interest to the *Declarant*. Under the CC&Rs, the Declarant reserved the right to itself, the Declarant, to install entry gates, and not to the Association. If such reservation of the right to install entry gates was *exclusive,* as the Association contends, then

[6] It seems clear that the Association does not distinguish between the "Declarant" and the "Association" as different parties under the CC&Rs, as they argue "Plaintiffs in their pleadings acknowledge the Association is the successor in interest. CP 142." This refers to The Heberts' Second Amended Complaint which states: "The Defendant is the successor to the previous Association…" The Heberts acknowledged that the Association is successor to the original Association, not successor to the Declarant.

it *excluded* the Association from installing gates to the same degree it would have excluded the Heberts – the opposite of what the Association argues when it claims to have the exclusive right to install gates. Even so, the plain language of this provision only purports to reserve a right in favor of the Declarant (who was not an Owner or Easement holder), not to exclude others.

6. The Language Under the CC&Rs Pertaining to Utilities Does Not Prohibit the Heberts' Gate and/or Boulders.

The Association relies heavily upon the language under Section 5.1 of the CC&Rs in arguing such language expressly prohibited the Heberts' gate and boulders. The relevant language under 5.1 is as follows:

> In addition, in the Easements, the Owners of the Lots may install utilities, including but not limited to: sanitary sewer, water, electric, gas, television receiving, or telephone lines or connections, provided, however such use of the Easements shall be reasonably necessary for use and enjoyment of a Lot in the Property and such use shall not infringe on any Lot Owner's use of the Easement for access, ingress and egress.

It could not be more clear from the plain language of this provision that the words "such use" refer to *utilities*. The Association does not argue that the Heberts' gate and boulders were *utilities*, but rather, that this provision is a general term applicable to any use of the Easements, not just utilities. This is contrary to basic principles of contract law, which hold that when a "matter is referred to for a specific purpose only, it becomes a part of the contract for such purpose only, and should be treated as irrelevant for all other purposes." *W. Wash. Corp. of Seventh Day Adventists v.*

Ferrellgas, Inc., 102 Wash. App. 488, 499, 7 P.3d 861, 867-68 (2000), *citing* 11 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 30:25, at 238 (Richard A. Lord ed., 4th ed. 1999). Thus, this provision must be treated as irrelevant for the purposes the Association seeks to make it applicable.

Nevertheless, even if this provision applied to gates and boulders in addition to utilities, it would still beg the question of whether the Heberts' gate and boulders "infringed" upon the other Owners' use of the Easement for access, ingress and egress. The Association sees the issue as black and white – that *anything* existing or taking place within the Easement is an "infringement." They argue that any question of reasonableness is irrelevant, and the Court should ignore the body of easement law that has historically governed such issues. However, such is not a tenable interpretation. Under such an interpretation, even the placement of utilities or plowing the road or driving a car on the road would be an 'infringement" as it would "infringe" access to some degree, even if only temporary. The question of "infringement" of an easement is not a novel question, and is not black and white, as the Courts have many times examined the question of whether a use by the servient estate presents an unreasonable burden upon the easement rights of the dominant estate. This requires an examination of the facts, which the Association seeks to avoid by declaring anything existing within the bounds of the Easement an "infringement." The fact that the Association gave permission to the Heberts to install the

gate and that the gate and boulders existed for 13 years without complaint is compelling evidence that the Heberts' gate and boulders did not infringe upon the other owners' use of the Easement for access, ingress or egress.

7. The Language Under the CC&Rs Pertaining to Architectural Control Committee Approval Does Not Prohibit the Heberts' Gate and/or Boulders

The Association cites the language under Paragraph 1.10 of the CC&Rs as prohibiting the Heberts' gate and boulders, which reads:

> Subject to the exemption of the Declarant hereunder, no structure, improvement, or alteration of any kind which will be visible from other Dwellings, private roadways serving the Property or any public right of way shall be commenced, erected, painted, or maintained upon the Property, until the same has been approved in writing by the ACC [the Architectural Control Committee].

There is no evidence that an Architectural Control Committee was ever formed or has approved or rejected any improvement or alteration made by any of the Owners. However, the Heberts *did* receive approval of their gate by the full Association in 2004 – 2005. Is the Association arguing that the Board can now order the removal of any structure, improvement or alteration that did receive approval from the Association if they change their mind later and revoke their prior approval? If this is the Association's argument (which it seems to be), the Owners no doubt will be shocked to learn that the Association's three-person Board may, at their whim, order any Owner's home visible from the roadway or other Dwellings removed under this provision, even if the Association had previously approved it.

8. The Association Continues to Rely Upon Provisions That Were Intentionally Deleted From the CC&Rs

The Association continues to cite language from *former* Article 4.2 of the CC&Rs that stated: "The roads shall be snowplowed at a minimum, 16 feet wide upon 6 inches of snowfall. It is the intent these standards to maintain the Roads passable by four-wheel-drive vehicles" Brief Two, p. 3-4. The Association acknowledges that Article 4 of the CC&Rs was replaced in its entirety (deleting this language), but argues that "the language remains relevant to show the developer's intent." Brief Two, p. 4. This is an incorrect assertion of contract construction. To the contrary, "[a]n agreement, when changed by the mutual consent of the parties, becomes a new agreement. Such new agreement *takes the place of the old* and determines the rights of the parties to the new agreement. In such case, the agreement between the parties consists of the new terms and as much of the old agreement as the parties have agreed will remain unchanged. . . . The repudiation and cancellation of a substituted contract *will not revive* the former contract. *State v. Nationwide Life Ins. Co.*, 340 S.W.3d 161, 186-87 (Mo. Ct. App. 2011), citing 17A CJS Contracts section 408 (1999). (Italics in original). If anything, the deletion of this language shows the developer's intent to *delete* it, not to retain it.

9. <u>The Business Judgment Rule Does Not Apply, and Would Not Insulate the Association From Its Duty to Act Reasonably Even if it Did Apply.</u>

The Association doubles down on its argument the Association's

decisions are protected and "unassailable"[7] because of the business judgment rule.[8] While the business judgment rule may protect individual directors, managers, partners, owners or shareholders in certain circumstances, it does not protect an entity itself from the consequences of its actions. The Association cites no authority or example of the business judgment rule being invoked other than in the context of individual directors, managers, etc., seeking to avoid personal liability for corporate actions, and it is doubtful any such authority exists. No individual directors are named in this action, and the business judgment rule is simply inapplicable[9].

Nevertheless, even if the business judgment rule were applicable in this case, it would not immunize the Association as they claim. In fact, the Washington Supreme Court case of *Riss v. Angel*, 131 Wash. 2d 612, 934 P.2d 669 (1997), upon which the Association predominantly relies in both its Briefs, is particularly damning to the Association's position. First off, the *Riss* case involved individual homeowners who were arguing that the business judgment rule shielded them from personal liability from a decision made "within the authority of the association and made without

[7] Brief Two, p. 36

[8] The Association also complains that the Heberts argue against business judgment rule "for the first time on appeal." Of course, the "Business Judgment Rule" defense was raised by Association in their Motion for Summary Judgment, not the Heberts. The question was clearly before the trial court, and was not "conceded" by the Heberts.

[9] While the "Board of Trustees" was named in the original complaint caption, no individuals have been named, and the Heberts' claims were re-asserted in the Association's suit as counter claims, which was brought in the name of the Association entity. Either way, the Heberts' claims are clearly asserted against the Association entity.

bad faith or corrupt motive." See *Riss,* 131 Wash. 2d 612, 631, 934 P.2d 669, 680.[10] The Court rejected their arguments, stating "whether or not the business judgment rule should be applied to property owners' associations, the decisions of these associations must be reasonable." Further, "in reviewing a homeowners' association's decision under a consent to construction covenant, the court is *obliged* to determine whether that decision was properly made. *Riss,* 131 Wash. 2d at 629-30, 934 P.2d at 679-80. (Italics added).[11]

The *Riss* court went on to say:

> The trial court here found the homeowners' decision was unreasonable and arbitrary because their decision was made … 'without a thorough investigation and upon inaccurate information…' This evidence tends to show that had the association made valid comparisons of its own, its decision might have been different. Coupled with the lack of record evidence showing any legitimate comparisons with existing homes under the standard "harmony with other dwellings," Plaintiffs' evidence supported their claim of arbitrary, unreasonable decision making… Further, evidence of the circumstances surrounding the decision, such as the two Board members' misleading campaigns against Plaintiffs' proposed residence, also tends to show unreasonable decision making.
> Thus, contrary to the homeowners' argument, the evidence was not admissible as a basis for the court to substitute its judgment for that of the homeowners association, but for the purpose of determining whether its decision was reasonable. There was no error in admitting the evidence. *Riss,* 131 Wash. 2d at 629-30, 934 P.2d at 679-80.

Ironically, the evidence the Court deemed it was *obliged* to consider under *Riss*, is exactly the type of evidence the Association is seeking to have

[10] The individual homeowners were being sued in *Riss* because the association was not currently incorporated.

[11] The *Riss* case involved an association's failure to consent to construction. We expect the Association agrees that Association's decision to remove the Heberts' gate and boulders is analogous to the association's decision under *Riss*, since *Riss* is the case they have prominently cited in their own briefs.

excluded under their "business judgment" argument – evidence of whether or not the Board's decision was reasonably made. In our case, the Heberts' have provided substantial evidence that the Association' Board failed to take into consideration that the Association had given permission for the Heberts' gate in 2004 and 2005; the fact that the Hebert's gate and boulders had been in place for 13 years without objection; they failed to take into consideration the Heberts' concerns for safety and security; and that the Heberts provided evidence that the newly elected President of the Association, Marion Deardorff, was motivated by vindictiveness to remove the Heberts' gate as her first official action. The meeting notes from 2017 show that their decision to remove the gate centered around their legal opinion (none of them lawyers) as to whether the CC&Rs authorized them to do so, and not about the reasonableness of the burden upon the Association's easement as compared to the Heberts' legitimate concerns for safety and security.

Contrary to the Association's arguments, the *Riss* decision does not shield the Association from the requirement of reasonableness, but *obligates* the court "to determine whether that decision was properly made." *Riss v. Angel*, 131 Wash. 2d 612, 632, 934 P.2d 669, 681. The *Riss* Court further stated, "good faith is insufficient because a director must also act with such care as a reasonably prudent person in a like position would use under similar circumstance. In light of the cases discussed above, it is clear that the business judgment rule, even if applied here would not exonerate

the Association from the Board's unreasonable decision to remove the Heberts' gate and boulders. At the least, their failure to adequately investigate would remove them from the rule's insulating effect." *Id*.

Ultimately, not only did the *Riss* court uphold the lower court's ruling that the association's decision was unreasonable and arbitrary, but extended personal liability to "those members who violated the covenants by participating in or ratifying the unreasonable, arbitrary decision to reject Plaintiffs' proposed residence under the consent to construction covenant." *Riss v. Angel*, 131 Wash. 2d at 636, 934 P.2d at 683. Multiple issues of material fact bear upon the question of whether the Association acted in a reasonable or in an arbitrary way in ordering the Heberts' gate and boulders removed, and dismissal of this case on summary judgment was clearly improper.

10. The *Panther Lake* Case Does Not Support Dismissal of the Heberts' Claims Even if "Strictly Adhered To."

The Association argues for the "need to strictly adhere to the decision in *Panther Lake*…." Brief 2 P. 25. However, in doing so, the Association chooses to ignore relevant parts of *Panther Lake*, and wildly expand beyond its ruling. What the Association chooses to ignore is that *Panther Lake* explicitly distinguished the Lot Owners in that case, who were withholding dues as an "offset" pertaining to claims involving an outside contractor, as opposed to permissible offsets "based on a breach or liability of the party against whom the offset was asserted." *Panther Lake,* 76 Wash.

App. 591, 887 P.2d 468. The Court stated: "Here, Lot Owners seek to offset deficiencies in the road against their assessments. An offset based on the contractor's breach may be asserted by the Association against the contractor, but not by members against the Association's assessments." *Panther Lake,* 76 Wash. App. 591, 887 P.2d 468. In our case, the Heberts' assessments withheld as an offset "were based on a breach or liability of the party against whom the offset was asserted." – exactly the factor the Court differentiated the Lot Owners in *Panther Lake* upon. *Panther Lake* does not hold that assessments withheld as an offset against claims directly based on a breach or liability of the Association itself are impermissible.

But even assuming, arguendo, that the Association was correct that *Panther Lake* holds an owner may not offset any assessments even when they are assessments demanding the owner pay for the same wrongful acts they are bringing suit upon, the Association seeks to expand *Panther Lake* wildly beyond these bounds. The Association argues that, if an owner does not pay all assessments made against them, the Court must summarily dismiss all claims brought by the Owner against the Association. Of course, *Panther Lake* does not hold anything remotely along these lines.[12] At most it says Owners cannot withhold assessments as offsets. It does not hold that an Owner can not sue an HOA for its actions.

[12] Ironically, *Panther Lake* expressly listed declaratory relief as permissible, which the Heberts' sought, and the Association contends must also be summarily dismissed under *Panther Lake*.

11. The Association's Claims of "New Issues Raised For The First Time On Appeal" are Inaccurate and/or Without Consequence.

The Association complains that, "in their opening brief plaintiffs raise five issues for the first time on appeal." Brief One, p. 17-18. We will address each of these:

1) *"the Association did not establish itself as the successor in interest to the Declarant."* This is an issue raised by the *Association*, not by the Heberts. It is the Association's argument that they acquired the exclusive right to erect gates by virtue of being the successor in interest to the Declarant. The CC&Rs establish that the Association and the Declarant are different parties under the CC&Rs. The CC&Rs say what they say and are in the record, of course, and not "raised for the first time on appeal." At best, this is an issue of material fact that the Association has not established.

2) *"the Association lacks standing to enforce the CC&Rs on behalf of the Association Owners."* The Heberts have not made this broad argument, only that the Association would lack standing to bring claims on behalf of an *individual* owner. Appellants' Brief, p. 21.

3) *"the Association President, Marion Deardorff, testified to facts constituting hearsay."* The Association has filed Declarations of Marion Deardorff, upon which they rely, and which are in the record -- and much of what she testified to was hearsay. Such testimony is

obviously hearsay because Ms. Deardorff testified to events which occurred many years before the Deardorffs moved to Spring Creek (e.g. "*In 2004, without the permission or authority of the Board, the Heberts installed a chain gate across Ridgecrest Road…" CP 0270*). Hearsay is hearsay, whether the Heberts' point it out or not. Is the Association suggesting that the Heberts cannot mention, and that the court cannot take into account that that Ms, Deardorff's testimony in the record contains hearsay? The Heberts have not brought a motion to strike her Declarations, they have merely pointed out that Marion Deardorff could not have had personal knowledge of events that occurred many years before she lived in Spring Creek and/or became president of the Association. Regardless of whether Ms. Deardorff's testimony as to the facts taking place in 2004-2005 constitutes hearsay, such facts are material facts which certainly were not conclusively established by Ms. Deardorff's declarations, and should not have been decided upon summary judgment.

4) *"the statute of limitations expired on a claim by the Association for a breach of the CC&R."* As expressly stated in Appellants' Brief, the Heberts did not, and are not, asking the court to dismiss a claim by the Association based upon the expiration of the statute of limitations, because the Association did not bring any claim to dismiss. They just tore out the Heberts gate and boulders.

5) *"that the plaintiffs acquired a prescriptive easement"* Again, the Heberts have not, and are not asking the court to grant them a prescriptive easement. What the Appellants' Brief points out (P. 28-29) is that, "*Ironically,*" *if* the Association did not grant permission for the gate and/or boulders (a question of fact which the *Association* oscillates upon), the Heberts would have acquired a prescriptive easement, as all of the elements of prescriptive use would have been met, most relevantly, use adverse to the title owner. The Heberts have not sought to quiet title for a prescriptive easement in this or any other action because they were granted permission for the gate in 2004 and 2005. It is the Association who alternates on its version of the facts pertaining to events occurring between 2004 and 2017. Further, this issue was called to the attention of the trial court, and the Association was not "ambushed" by these legal theories. The Association's Attorney's own Declaration provides a letter from the Heberts' then counsel warning:

> *As a result of that assault, Mr. Hebert's request for a gate was considered by the members, and was approved by a vote of 7 to 1 in 2005. A gate was paid for and built by Mr. and Mrs. Hebert, and the Association and the owners who access their properties through that road were given gate openers, keys or combinations to the locks. I have seen nothing in the Declaration which prohibits a property owner from having a gate over the roadway, so long as the easement rights of the Association are not impaired. As you would also know, if there were a violation of the Declaration or other Association agreement, the time to object has long since past, and that prescriptive rights arising from the gate have accrued to my clients. Would the Association or the members of the Board want to face potential personal*

> *liability if they improperly removed a gate which has improved the health, welfare and security of certain members of the Association? Imagine if a person or property were injured or damaged by someone who would have been deterred by the gate? I doubt any Board members with knowledge of this risk would approve such a step." CP 0479-0480.*

Importantly, this was a warning given to the Association *before* the Association removed the Heberts' gate and boulders, and goes to the reasonableness (or rather, arbitrariness) of the Board's decision. They were on notice.

B. CONCLUSION

This case involves multiple unresolved issues of material fact and should not have been dismissed on summary judgment. The CC&Rs do not prohibit the Heberts' gate and boulders but, rather, grant the Association an easement over the Heberts' property for the purpose of maintenance of the roadway. The material facts surrounding whether the Heberts' gate and boulders unreasonably interfered with the Association's easement are in dispute and unresolved. No provision of the CC&Rs, the HOA act, the business judgment rule, or any other legal or equitable theory exempts the Association's easement from well-established principles of easement law, which involves a balancing of the reasonableness of an alleged interference with easement rights against the legitimate concerns of the servient estate. The Association approved the Heberts' gate and cannot simply withdraw or deny their approval thirteen years later. The material facts surrounding the reasonableness of the Board's decision to remove the Heberts' gate and

boulders are unresolved and in dispute. Summary Judgment should be reversed and the costs of appeal awarded to the Heberts.

DATED this 14th day of July, 2020.

Respectfully submitted,

John L. Comstock, WSBA #30678
The Comstock Law Firm, PLLC
3631 82nd Ave. SE
Mercer Island, WA 98040
(425) 990-1576

Attorney for Appellants

THE COMSTOCK LAW FIRM, PLLC

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