

FILED
Court of Appeals
Division III
State of Washington
6/12/2020 4:49 PM
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**

Respondent.

**RESPONSE BRIEF OF SPRING CREEK EASEMENT
OWNERS ASSOCIATION (RMA) BOARD OF
TRUSTEES**

**PETER M. RITCHIE, WSBA #41293
JACOB A. LARA, WSBA #46861
Attorneys for Respondent
Meyer, Fluegge & Tenney, P.S.
P.O. Box 22680, Yakima, WA 98907-2680
(509) 575-8500**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I.	<u>INTRODUCTION</u>	1
II.	<u>RESPONSE TO ASSIGNMENTS OF ERROR</u> ..	3
III.	<u>COUNTER STATEMENT OF CASE</u>	3
A.	SUMMARY OF BACKGROUND FACTS	3
B.	RELEVANT ASSOCIATION COVENANTS	5
C.	PLAINTIFFS’ GATE AND BOULDERS	9
D.	REMOVAL OF GATE AND BOULDERS	12
E.	PROCEDURAL FACTS	13
F.	SUMMARY JUDGMENT MOTIONS	15
IV.	<u>ARGUMENT</u>	16
A.	STANDARDS OF REVIEW	16
B.	THE COURT SHOULD NOT CONSIDER PLAINTIFFS’ NEW ISSUES RAISED FOR THE FIRST TIME ON APPEAL	17
C.	THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO THE ASSOCIATION ..	19

1. **Property Owners Subject to Restrictive Covenants Have Diminished Rights over Their Property.....20**
2. **The CC&Rs Grant the Association Exclusive Authority to Maintain the Easements.....22**
3. **The CC&Rs Grant the Association Exclusive Authority to Erect Gates.....27**
4. **Plaintiffs' Attempts to Circumvent the CC&Rs Fail.....28**
5. **Plaintiffs' Common Law Authorities are Distinguishable and Inapposite.....33**
7. **Plaintiffs Were Not Authorized to Erect a Permanent Gate.....34**
8. **The Trial Court Properly Dismissed the Claim of Negligence.....35**

B. THE BUSINESS JUDGMENT RULE REQUIRES DISMISSAL OF PLAINTIFFS' CLAIMS.....37

C. THE TRIAL COURT PROPERLY DENIED THE MOTION TO RECONSIDER.....42

D. IN THE EVENT THE COURT ADDRESSES THE NEW ARGUMENTS, THEY ARE WITHOUT MERIT.....43

1. **The Association is the Successor in Interest...43**

2. There is No Basis to Object to Standing.....	46
3. Plaintiffs Did Not Preserve An Objection to the Declaration of Marion Deardorff.....	46
4. The Statute of Limitations Does Not Apply...	47
5. Plaintiffs' Use Was Clearly Permissive.....	48
III. <u>CONCLUSION</u>	48

I. TABLE OF AUTHORITIES

Table of Cases

<u>Arkison v. Ethan Allen, Inc.</u> , 160 Wn.2d 535, 538, 160 P.3d 13, 15 (2007).....	45
<u>Bennett v. Hardy</u> , 113 Wn.2d 912, 917, 784 P.2d 1258 (1990).....	19
<u>Burbo v. Harley C. Douglass, Inc.</u> , 125 Wn. App. 684, 692, 106 P.3d 258 (2005)	45
<u>Champagne v. Thurston Cty.</u> , 134 Wn. App. 515, 520, 141 P.3d 72 (2006), <u>aff'd on other grounds</u> , 163 Wn.2d 69, 178 P.3d 936 (2008).....	17
<u>Goldwater v. Burnside et al.</u> , 22 Wash. 215, 218 (1900)	44
<u>Hemenway v. Miller</u> , 116 Wn.2d 725, 731, 807 P.2d 863 (1991)	42, 16
<u>Hudson et ux. v. Pacific Trust & Tractor Co.</u> , 151 Wash. 46, 50 (1929)	44
<u>In re Marriage of Fiorito</u> , 112 Wn. App. 657, 654 (2002)	42
<u>Key Design Inc. v. Moser</u> , 138 Wn.2d 875, 894, 983 P.2d 653 (1999), <u>amended</u> , 993 P.2d 900 (1999)	44
<u>Kunkel v. Fisher</u> , 106 Wn. App. 599, 602, 23 P.3d 1128 (2001)	48
<u>Lamden v. La Jolla Shores Club Dominion Homeowners' Ass'n.</u> , 980 P.2d 940, 944 (CA 1999)	40

<u>Littlefair v. Schulze</u> , 169 Wn. App. 659, 663, 278 P.3d 218 (2012).....	33
<u>Mathis v. Ammons</u> , 84 Wn. App. 411, 416, 928 P.2d 431 (1996).....	38
<u>Mayer v. Pierce County Medical Bureau Inc.</u> , 80 Wn. App. 416, 420 (1995)	24
<u>McCormick v. Dunn & Black, P.S.</u> , 140 Wn. App. 873, 887, 167 P.2d 610 (2007)	39
<u>McDevitt v. Harbor View Med. Ctr.</u> , 179 Wn.2d 59, 64, 316 P.3d 469 (2013)	17
<u>Nationwide Mut. Ins. Co. v. Hayles, Inc.</u> , 136 Wn. App. 531, 537, 150 P.3d 589 (2007)	24
<u>Nw. Properties Brokers Network, Inc. v. Early Dawn Estates Homeowner's Ass'n</u> , 173 Wn. App. 778, 795, 295 P.3d 314 (2013)	33
<u>Oltman v. Holland Am. Line USA, Inc.</u> , 163 Wn.2d 236, 249 n. 10, 178 P.3d 981, 989 (2008)	16, 42
<u>Riss v. Angel</u> , 131 Wn.2d at 632	39
<u>Roberson v. Perez</u> , 156 Wn.2d 33, 39, 123 P.3d 844, 847-48 (2005).....	18
<u>Rupert v. Gunter</u> , 31 Wn. App. 27, 29–30, 640 P.2d 36, 38 (1982).....	34
<u>Shorewood W. Condo. Ass'n v. Sadri</u> , 140 Wn.2d 47, 53, 992 P.2d 1008 (2000)	21

<u>Smith v. Showalter</u> , 47 Wn. App. 245, 248, 734 P.2d 928 (1987).....	47
<u>Smith v. Showalter</u> , 47 Wn. App. 245, 248, 734 P.2d 928, 930 (1987).....	35
<u>State v. Kirkman</u> , 159 Wn.2d 918, 926, 155 P.3d 125 (2007).....	18, 43
<u>State v. Sommerville</u> , 111 Wn.2d 524, 535, 760 P.2d 932 (1988).....	31
<u>Universal/Land Const. Co. v. City of Spokane</u> , 49 Wn. App. 634, 637, 745 P.2d 53 (1987)	23
<u>Viking Bank v. Firgrove Commons 3, LLC</u> , 183 Wn. App. 706, 712–13, 334 P.3d 116 (2014)	23
<u>Viking Props., Inc. v. Holm</u> , 155 Wn.2d 112, 120-21, 118 P.3d 322 (2005)	31
<u>Weyerhaeuser Co. v. Commercial Union Ins. Co.</u> , 142 Wn.2d 654, 669–70, 15 P.3d 115 (2000)	23
<u>Wilcox v. Lexington Eye Inst.</u> , 130 Wn. App. 234, 241, 122 P.3d 729 (2005)	17
<u>Wilkinson v. Chiwawa Cmtys. Ass’n</u> , 180 Wn.2d 241, 255, 327 P.3d 614 (2014)	31
<u>Wilson Son Ranch, LLC v. Hintz</u> , 162 Wn. App. 297, 303, 253 P.3d 470, 473 (2011)	18

Statutes

RCW 4.84.18549
RCW 64.384, 12
RCW 64.38.0209, 26
RCW 64.38.025(1)8, 38
Nonprofit Corporations Act, Chapter 24.03 RCW
("NPCA").....38
RCW 24.03.09538
RCW 24.03.12738

Rules of Appellate Procedure

RAP 9.1218, 19, 47
RAP 18.149

Other

Black's Law Dictionary 763 (6th ed.1990)31

I. INTRODUCTION

This case involves an attempt by a minority owner to second-guess the valid judgment of a homeowner's association board of directors. 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. The Association, pursuant to its lawful authority, properly ordered the removal of these impediments.

Plaintiffs sued, challenging the authority of the Association.¹ The trial court, after reviewing and considering the records and evidence, granted complete summary judgment to the Association. Plaintiffs now appeal.

The issues in this case are simple and controlled by longstanding Washington case law and the language of the Association's restrictive covenants. Plaintiffs' brief mistakenly

¹ This case involves claims Plaintiffs made against the Association, as well as the Association's separate lawsuit for foreclosure. This brief addresses solely the claims Plaintiffs asserted against the Association; the Association, through separate counsel, will submit a separate brief on the foreclosure and assessment issues.

frames the issue to be whether the obstructions unreasonably interfered with/hindered the easement. This misstates the issue.

The position of the Association and the trial court is that the covenants provide a binding contractual overlay and govern the rights of the parties on the specific issues in this case, especially whether or not access can be infringed. The restrictive covenants impose restrictions on what the landowners can do with their land. The restrictive covenants provide a critical contractual overlay to this case that plaintiffs ignore, or at least greatly misunderstand. As noted below, the covenants control and expressly disallow any action that inhibits access to the easements. The covenants specifically disallow any obstruction of the easement, and solely grant the Association authority to maintain the easement.

Plaintiffs' appeal brief raises no issues or legal arguments to cast any doubt on the trial court's decisions. Instead, it mistakenly relies on common law principals that do not apply and a strained and incomplete reading of the governing

documents in an attempt to create issues of fact. It also raises two new issues on appeal that were not presented to the trial court and are not proper.

The trial court's decision to dismiss Plaintiffs' claims against the Association was appropriate and supported by the record. The Court should affirm the trial court's decisions.

II. RESPONSE TO ASSIGNMENTS OF ERROR

1-3 The trial court properly granted summary judgment to the Association. Plaintiffs' gate and boulders obstructed the easement in violation of the restrictive covenants. In addition, plaintiffs provided no evidence to support a negligence claim failed.

4-5 The trial court properly denied Plaintiffs' Motion for Reconsideration.

III. COUNTER STATEMENT OF CASE

A. SUMMARY OF BACKGROUND FACTS

The Spring Creek Easement Owners Association (the "Association") was created by Sapphire Skies, LLC in August of 2003. CP 268-269. Sapphire Skies developed/platted the lots and entered into restrictive covenants, creating the Association to

maintain, operate, and repair the private road easements accessing its properties. *Id.*

The purpose of the Association was for recreational use and for maintaining roadway easements. CP 300. Sapphire Skies later sold the properties and has no further role in this litigation. CP 269.

The Association is governed by restrictive covenants (CC&Rs), which govern the Association, impose certain duties on the owners, and grant the Association enforcement powers. CP 299-324. The Association also has Bylaws. CP 288-297. The CC&Rs give the Association the explicit authority to organize as a nonprofit corporation and homeowners association under the Homeowner's Association ("HOA") Act, RCW 64.38, upon a vote of the owners. CP 309.

In April, 2018, after being run informally for years, the owners officially converted into a homeowners Association named the Spring Creek Easement Owners Association. CP 269.

The Association is the successor in interest to the prior Association. *Id.*

The Association is small and consists of only eight properties. *Id.* Each property owner is a member of the Association. *Id.* The owners include the plaintiffs. *Id.* It is run by a Board of Directors (the “Board”). *Id.*

Marion Deardorff became President in April, 2017. *Id.* Prior to that time, Mr. Hebert was President of the former Association for several years. *Id.* During Mr. Hebert’s tenure, he very loosely managed the Association, and there was little oversight and recurring failures to properly document the Association’s activities. *Id.* This largely led to the decision to form the HOA. *Id.*

B. RELEVANT ASSOCIATION COVENANTS

Several provisions of the CC&Rs bear on the issues before the Court. Under Paragraph 3.2, the Association has the exclusive power and authority to maintain the roadway

easements, and otherwise enforce the CC&Rs (notably, the covenants do not grant this power and authority to the owners):

The Association shall maintain and repair the Easements, or shall contract for such maintenance and repair to assure maintenance of the Easements in good condition.

CP 304.

Paragraph 10.1, which enumerates the broad authority for the Association Board, also makes this clear and states as follows:

The Board . . . shall have the right to enforce, by any proceedings at law or in equity, all restrictions, conditions, covenants, reservations, liens and charges now or hereafter imposed by this declaration

CP 320.

Moreover, the CC&Rs grant the Association the exclusive authority and responsibility to ensure maintenance of the roadway easements by levying assessments:

The Assessments levied by the Association shall be used exclusively to promote the recreation, health, safety and welfare of all the residents in the entire

property, for improvement, maintenance, operation, insurance and repair of the Easements...

CP 318.

The duties and powers of the Association are those set forth in this Declaration, the Articles and Bylaws adopted by the Association, together with its general and implied powers of a nonprofit corporation, generally to do any and all things that a corporation organized under the laws of the State of Washington may lawfully do which are necessary or proper in operating for the peace, health, comfort, safety and general welfare of its Members, subject only to the limitations upon the exercise of such powers as are expressly set forth in this Declaration, the Articles and Bylaws. Without limiting the generality of the foregoing, the primary functions of the Association shall be enforcement of the covenants, the maintenance, operation and repair and insurance of the entry statement, private road easements over and across the Property for the purpose of ingress and egress to the Lots (A map of such roads is attached to the CC&R's as *Exhibit C* (the "Easements"))...

CP 315 (emphasis added).

Further, Paragraph 5.1 forbids property owners from any conduct that would infringe any lot owner's right of access:

Declarant expressly reserves the right to install entry gates...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...

CP 306 (emphasis added).

In that same Paragraph, only to the Association, as the successor in interest to the Declarant, is reserved the right to erect a gate. *Id.* The CC&Rs do not grant any of these powers or authority to owners such as the plaintiffs.

In addition, Paragraph 1.10 states as follows:

Subject to the exemption of 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.

CP 316.

As a HOA, the Association is governed by RCW 64.38.025(1), which states that the Board has the exclusive authority to act on behalf of the Association in all instances.

Further, the Association broadly may exercise any lawful powers necessary and proper for the governance and operation of the Association. RCW 64.38.020. The CC&Rs also provide that same power in Paragraph 1.2. CP 315.

C. PLAINTIFFS' GATE AND BOULDERS

Plaintiffs own 3753 Ridgecrest Road, Ronald, WA 98940. CP 270. Plaintiffs are members of the Association under Paragraph 1.3. CP 315. It is undisputed plaintiffs are subject to the CC&Rs.

The map of the Association properties demonstrates the geographical lay out. CP 276. Plaintiffs' property is parcel number 19443. *Id.* The property is accessed by a road called Ridgecrest Road. *Id.* Other owners also use Ridgecrest Road to access their properties. Ridgecrest Road is an easement as described in the CC&Rs and is subject to them. CP 314, 306.

In 2004, without the permission or authority of the Board, plaintiffs installed a chain gate across Ridgecrest Road on the southern portion of their parcel, blocking access to the

Association's roadway easement. CP 270 & 327. This was not to limit access to their personal residence; plaintiffs actually have a separate private gate restricting access to their home from Ridgecrest Road. CP 270.

The Association members discussed plaintiffs' gate at a January, 2005 meeting. CP 326-327. At that time, the Association did not approve a gate. *Id.* The Association had concerns about erecting a gate without the permission of Sapphire Skies and an entity called Plum Creek, both of which had an easement. *Id.*

As a result, the Association only voted to allow plaintiffs to erect a gate if they could obtain written permission from Sapphire Skies and Plum Creek. CP 270 & 327. If they could not, the Association only authorized a temporary gate. *Id.*

Plaintiffs did not obtain written permission. CP 270-271. On May 26, 2005, the Association held another meeting and discussed the gate. CP 270-271 & CP 330. The Association only voted to allow plaintiffs to erect a temporary gate. *Id.*

Plaintiffs concede they ignored this decision and installed a permanent gate. *Pls.' Opening Brief at 4* (“the Heberts’ [sic] constructed a permanent gate . . .”). Indeed, the minutes from the May 26, 2005 meeting indicate plaintiffs had already installed their gate prior to the May 26, 2005 meeting, without the permission or authority of the Board, and at the meeting plaintiffs insisted that the gate “would not be removed even if the association voted for its removal,” in blatant disregard for the Association and the governing documents. CP 330.

In 2004, plaintiffs also installed large boulders along the edge of Ridgecrest Road on the Association’s easement without the permission of the Board. CP 271. These boulders narrowed the width of the roadway easement, made passing difficult and dangerous, and generally impeded access. CP 271

The gate and boulders made snow plowing difficult and dangerous. CP 261-262. The spacing of the boulders was such that the snowplow contractor (Benito Chavez, Jr.) had to plow the snow in between the boulders to push the snow over the edge

of the road, then reverse up hill and proceed forward in the same fashion in between each set of boulders. CP 261-262. The boulders made it difficult to maintain proper road width. *Id.*

The gate also impeded access and made plowing difficult. CP 261-262. This also cost the Association money. *Id.*

D. REMOVAL OF GATE AND BOULDERS

On July 18, 2017, the Association held a properly noticed Board meeting in which plaintiffs' problematic easement obstructions were discussed. CP 271 & 332. The Board concluded the gate and boulders violated the CC&Rs and voted to have them removed. CP 271 & 332.

The Board then directed the Association's attorney to request the plaintiffs to remove the obstructions, and provide notice and an opportunity to be heard under RCW 64.38. CP 271. Notice was sent to plaintiffs' former counsel on July 26, 2017. *Id.* & CP 339-340. Plaintiffs did not comply. CP 271.

Because the CC&Rs require unobstructed roadway easements, the Association had no choice but to have the

obstructions removed. As a result, the Board held another meeting on September 5, 2017, and again voted to have the plaintiffs' obstructions removed. CP 271-272; CP 335-336. The boulders were removed during October 2017, and the gate was removed during November of 2017. CP 272. The obstructions were removed by the Association's independent contractor, Mr. Chavez. *Id.* Mr. Chavez deposited the boulders and gate on another Association members' property. CP 581.

E. PROCEDURAL FACTS

On April 5, 2018, Mrs. Hebert filed a *pro se* Complaint against the Association and its "Board of Trustees", asserting claims of negligence and harassment. CP 1-5. Mrs. Hebert filed an amended *pro se* Complaint on May 10, 2018. CP 6-10.

After retaining counsel, plaintiffs filed a Second Amended Complaint on November 20, 2018, adding Mr. Hebert as a plaintiff, and keeping the "Board of Trustees" as a defendant. CP 142-147. The new complaint alleged the Association was negligent in having the gate and boulders removed. *Id.* Contrary

to the clear evidence, they alleged the Association gave them permission to install a permanent gate in 2004. *Id.*

They also alleged the Association hired a snowplow contractor, Mr. Chavez, who negligently removed plaintiffs' boulders, damaged their fence, and compromised the integrity of the roadway. *Id.* They claimed the Association was vicariously liable for these alleged acts under an agency theory. CP 144. Contrary to plaintiffs' position on appeal, they clearly argued vicarious liability/agency at the trial court level at summary judgment. CP 543-544 & CP 803.

Plaintiffs also asked for declaratory judgments, declaring that (1) the Association "cannot restrict the Plaintiffs' right to install an entry gate on the south border of their property," (2) the Association "may not, without unanimous consent of the all property owners, modify the Covenants, Conditions and Restrictions to prohibit entry gates on Ridgecrest Road" and (3) "[p]laintiffs have the right to protect the integrity of their property", and ordering "barricades and/or boulders . . . placed at

an agreed location to protect the slope of the road and Plaintiffs' adjoining property." CP 144-146.

The Association filed a separate complaint for foreclosure for past due assessments. The two cases were consolidated on December 13, 2018. CP 167-168.

F. SUMMARY JUDGMENT MOTIONS

The Association moved for summary judgment to dismiss all of plaintiff's claims, and for foreclosure. CP 233-257.

The motions were heard on July 18, by Judge Scott Sparks. *See* RP at 1. After lengthy oral argument, the trial court took the matter under advisement. RP at 84. Notably, plaintiffs did not object to the declaration of Marion Deardorff, and did not raise any of the new issues they now raise. CP 142-146; CP 536-545; CP 800-806; RP at 36-50.

On August 5, 2019, Judge Sparks issued a written memorandum decision, granting the Association's motions. CP 685-686. The trial court held that the "language from the HOA (and the obvious need for certainty when managing disparate

property interests) mandates that the HOA be responsible for the easements within the HOA and that said responsibility extinguished the landowners' rights thereto." CP 685.²

On September 12, 2019, Judge Sparks entered an order granting both summary judgment motions. The same day, the trial court entered a judgment and decree of foreclosure against the plaintiffs' real property. CP 786-796.

On September 20, 2019, plaintiffs moved for reconsideration. CP 800-806. Judge Sparks issued a letter decision denying the motion for reconsideration on October 21, 2019. CP 857. Plaintiffs filed a Notice of Appeal on November 19, 2019. CP 858-859.

IV. ARGUMENT

A. STANDARDS OF REVIEW

² Plaintiffs' argument that the trial court erred by not making any findings of fact, *Pls.' Opening Brief at 2-3*, is contrary to the law. It is well established law that such findings and conclusions are inappropriate and not required on summary judgment. Oltman v. Holland Am. Line USA, Inc., 163 Wn.2d 236, 249 n. 10, 178 P.3d 981, 989 (2008); Hemenway v. Miller, 116 Wn.2d 725, 731, 807 P.2d 863 (1991) ("findings of fact on summary judgment are not proper, are superfluous, and are not considered by the appellate court"). Thus, there was no reason for the trial court to make findings.

The standard of review for review of a summary judgment order is *de novo*. McDevitt v. Harbor View Med. Ctr., 179 Wn.2d 59, 64, 316 P.3d 469 (2013).

“Motions for reconsideration are addressed to the sound discretion of the trial court and a reviewing court will not reverse a trial court’s ruling absent a showing of manifest abuse of discretion.” Wilcox v. Lexington Eye Inst., 130 Wn. App. 234, 241, 122 P.3d 729 (2005).

This Court “can affirm a trial court on any alternative basis supported by the record and pleadings, even if the trial court did not consider that alternative.” Champagne v. Thurston Cty., 134 Wn. App. 515, 520, 141 P.3d 72 (2006), aff’d on other grounds, 163 Wn.2d 69, 178 P.3d 936 (2008).

B. THE COURT SHOULD NOT CONSIDER PLAINTIFFS’ NEW ISSUES RAISED FOR THE FIRST TIME ON APPEAL

As a preliminary issue, in their opening brief plaintiffs raise five issues for the first time on appeal: 1) the Association did not establish itself as the successor in interest to the

Declarant; 2) the Association lacks standing to enforce the CC&Rs on behalf of the Association owners; 3) the Association President, Marion Deardorff, testified to facts constituting hearsay; 4) the statute of limitations expired on a claim by the Association for a breach of the CC&Rs; and 5) that the plaintiffs acquired a prescriptive easement. *Pls.' Opening Brief, at 15-16, 21, 25, 27-29.*

“The general rule is that appellate courts will not consider issues raised for the first time on appeal.” State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). See also Roberson v. Perez, 156 Wn.2d 33, 39, 123 P.3d 844, 847-48 (2005) (“In general, issues not raised in the trial court may not be raised on appeal.”); Wilson Son Ranch, LLC v. Hintz, 162 Wn. App. 297, 303, 253 P.3d 470, 473 (2011) (same) (declining to consider argument not raised at the trial court level). As RAP 9.12 provides, in pertinent part:

On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.

RAP 9.12 (emphasis added).

The purpose of this rule is to ensure the trial court had an opportunity to consider and rule on relevant authority. Bennett v. Hardy, 113 Wn.2d 912, 917, 784 P.2d 1258 (1990).

None of these new theories were advanced below, and accordingly the trial court was not presented with and could not rule on any relevant authority. The new theories are improper and the Court should disregard them entirely.

C. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO THE ASSOCIATION

Plaintiffs' argument on appeal, and to the trial court below, is that the CC&Rs do not "prohibit the Owners from erecting gates on their own property within the easement." *Pls. ' Opening Brief at 10.*³ They further argue that the CC&Rs provide a non-exclusive duty to the Association to maintain the easement, but

³ The covenants do not prohibit them from erecting a gate restricting accessing their own private driveway. But that is not the issue. This appeal is about a gate placed across the easement. Plaintiffs actually have a separate private gate restricting access to their home from Ridgecrest Road, but that gate is not at issue. CP 270. At issue is plaintiffs' unlawful effort to impede access to Ridgecrest Road, a roadway easement over which the Association has exclusive authority.

individual owners are otherwise allowed to restrict access by placing obstructions in the easement. *Id.* Plaintiffs do not deny they are bound by the CC&Rs. They just do not think the CC&Rs mean what they clearly say.

This is the same flawed argument the trial court rejected, and which this Court should likewise reject. Plaintiffs' argument at best misstates or misreads the controlling documents, and at worst misrepresents them. Regardless, the argument is untenable. The CC&Rs grant no authority to plaintiffs to erect gates, boulders, or maintain the easement. The trial court did not err, and appropriately granted summary judgment.

1. Property Owners Subject to Restrictive Covenants Have Diminished Rights over Their Property

As a preliminary matter, it is important to identify what this case is and what it is not. Plaintiffs incorrectly try to make this case about whether the gate and boulders were reasonable impediments. According to plaintiffs, the real issue is whether the gate and boulders unreasonably interfere with the easement.

That is irrelevant because this case involves an HOA whose CC&Rs provide a controlling contractual overlay that impacts the parties' common law rights. As the trial court judge correctly noted, landowners who own property subject to an HOA have diminished rights over their property included in the HOA. CP 686. *See also Shorewood W. Condo. Ass'n v. Sadri*, 140 Wn.2d 47, 53, 992 P.2d 1008 (2000).⁴

Thus, the only issue is whether the CC&Rs contractually allow plaintiffs to erect gates/boulders (they do not), and whether the Association Board has the corporate authority to remove them (it does). The issue is not whether any interference with the easement is reasonable, it is whether there can be any interference at all in light of the CC&Rs. The reasonableness of the impediments is irrelevant to the interpretation of the CC&Rs.

⁴ "Central to the concept of condominium ownership is the principle that each owner, in exchange for the benefits of association with other owners, 'must give up a certain degree of freedom of choice which he [or she] might otherwise enjoy in separate, privately owned property.'" *Shorewood*, 140 Wn.2d at 53. Although *Shorewood* was in the context of a condominium association, its reasoning should apply equally to the Association as an HOA.

2. The CC&Rs Grant the Association Exclusive Authority to Maintain the Easements

There is no dispute plaintiffs are bound by the CC&Rs. On appeal, plaintiffs simply argue the CC&Rs do not endow the Association with broad powers to forbid owners from blocking or impeding access to the roadway easements,” or from erecting gates. *Pls.’ Opening Brief at 10*. Plaintiffs believe they are allowed to do these things because the CC&Rs grant them reciprocal, non-exclusive easements for the purpose of ingress and egress. *Id.* This is a *non-sequitur*, and has no foundation in the actual CC&Rs. The plain language grants plaintiff no ability to erect gates or impede access to the roadway easements, and cloaks the Association alone with such authority. Nowhere do the CC&Rs provide any authority to owners to erect gates or other impediments blocking access to the easements.⁵

The CC&Rs are a contract. Washington follows the

⁵ Plaintiffs even admitted that the Association has exclusive authority over the easements in their answer and counterclaim to the Association’s complaint for foreclosure. CP 1037-1038.

“objective manifestation theory” of contract interpretation. The focus is on the reasonable meaning of the contract language to determine the parties’ intent. Viking Bank v. Firgrove Commons 3, LLC, 183 Wn. App. 706, 712–13, 334 P.3d 116 (2014).

Courts “give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent.” Id. As this Court noted in Universal/Land Const. Co. v. City of Spokane, 49 Wn. App. 634, 637, 745 P.2d 53 (1987). “Words should be given their ordinary meaning; courts should not make another or different contract for the parties under guise of construction.”

Further, “we view the contract as a whole, interpreting particular language in the context of other contract provisions.” Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 669–70, 15 P.3d 115 (2000). “Ordinary meaning” is considered to be the dictionary definition of the word.

Nationwide Mut. Ins. Co. v. Hayles, Inc., 136 Wn. App. 531, 537, 150 P.3d 589 (2007).⁶

Since the CC&Rs are the controlling documents, we start there. The crucial provisions are Paragraphs 1.2, 3.2, 4.2, 5.1 and 1.10. Paragraphs 1.2, 5.1 and 3.2 set out the Association's broad powers over the easements and to determine what may be erected in them. For example, Paragraph 3.2 sets forth the Association's authority to maintain the easements:

The Association shall maintain and repair the Easements, or shall contract for such maintenance and repair to assure maintenance of the Easements in good condition.

CP 304.

Paragraph 4.2 reinforces Paragraph 3.2 and grants the Association the exclusive authority and responsibility to ensure maintenance of the roadway easements by levying assessments against the members:

⁶ "Interpretation of an unambiguous contract is a question of law. 'If a contract is unambiguous, summary judgment is proper even if the parties dispute the legal effect of a certain provision.'" Mayer v. Pierce County Medical Bureau Inc., 80 Wn. App. 416, 420 (1995).

The Assessments levied by the Association shall be used exclusively to promote the recreation, health, safety and welfare of all the residents in the entire property, for improvement, maintenance, operation, insurance and repair of the Easements...

CP 318.

Paragraph 1.2 states:

. . . the primary functions of the Association shall be enforcement of the covenants, the maintenance, operation and repair and insurance of the entry statement, private road easements over and across the Property for the purpose of ingress and egress to the Lots

CP 315.

Likewise, Paragraph 1.10 makes it clear the Association alone has authority over determining what visible obstructions will be allowed:

Subject to the exemption of 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.

CP 316.

Finally, Paragraph 1.2 also give the Board broad authority to do what is necessary and proper in operating the Association. CP 315 (the Association may do what is necessary and proper in operating . . . for the safety and general welfare of its members). This is also provided by statute. RCW 64.38.020.

The only reasonable, rational interpretation of these provisions is that the CC&Rs were intended to, and do in fact, grant exclusive and broad authority to the Association to maintain the easements and determine what obstructions are or are not allowed on them. There is no provision granting similar authority to the owners.

Plaintiffs argue in their brief that Paragraph 3.2 only imposes a duty on the Association, with no exclusive authority. *Pls.' Opening Brief at 15*. This is a distinction without a difference and defies common sense. Whether characterized as a duty or authority, it is clear the Association alone has responsibility and power to maintain and repair the easements. Nothing in the covenants suggests the owners have similar

authority. Under Plaintiffs' position, Paragraph 3.2 would be superfluous.

3. The CC&Rs Grant the Association Exclusive Authority to Erect Gates

The CC&Rs also address gates. They prohibit owners such as plaintiffs from erecting gates that restrict access to the easement. This is made clear by Paragraph 5.1, which contains the only mention of gates, and grants to the Declarant alone (and his the successor in interest) the right to erect gates: "Declarant expressly reserves the right to install entry gates..." CP 306.

In addition, Paragraph 5.1 emphasizes that the CC&Rs do not allow lot owners to restrict access to the roadway easements, stating:

...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...

CP 306 (emphasis added).

Paragraph 5.1 makes it clear that the owners may not do anything on the easement that infringes access. There is no indication in the covenants that the owners have any ability to erect gates blocking the easements. Accordingly, plaintiffs have no right to install gates or any obstruction that impedes access.

4. Plaintiffs' Attempts to Circumvent the CC&Rs Fail

In response, plaintiffs attempt to sidestep the plain language of Paragraph 5.1 by arguing that that the Association did not establish it is a successor in interest. *Pls.' Opening Brief at 10, 15-16*. As noted in Section IV D 1, *infra*, that is incorrect. Plaintiffs in their pleadings acknowledge the Association is the successor in interest. CP 142.

Plaintiffs also misconstrue Paragraph 5.1, claiming it incorporates the common law. *Pls' Opening Brief, P.11*. That is incorrect. Paragraph 5.1 dictates that any use of the easement shall not infringe on access. CP 306. For plaintiffs to be correct

(and they are not), that Paragraph would need to say that “any such use shall not *unreasonably* infringe on access.” But Paragraph 5.1 does not say that.⁷

Plaintiffs also argue that Paragraphs 3.2 and 5.1 do not create an exclusive right to erect gates and maintain the easement. *Pls.’ Opening Brief at 15-16*. Thus, each owner is free to erect gates and perform maintenance. *Id.*

Distilled down, plaintiffs’ interpretation of the CC&Rs is untenable and contrary to the plain language of the CC&Rs. The structure of the CC&Rs is clear. Taken together, the CC&Rs grant the Association the exclusive right to maintain, operate or obstruct the easements and expressly forbid anything that infringes access. The CC&Rs provide no right to owners such as plaintiffs to erect gates, place boulders, or any restriction on access to the roadway easements.

Plaintiffs’ strained interpretation would have the Court

⁷ They likewise misstate the Association’s position. The Association has not contended a gate is a utility; the provision highlights that owners are not permitted to impede access to the roadway easements.

ignore Paragraphs 1.2, 5.1, 3.2, 4.2, and the intent of the CC&Rs in general, and imply a right of owners to restrict access to the roadway easements. It would have the Court essentially read Paragraphs 3.2 and 5.1 out of the CC&Rs.

Further, to adopt plaintiffs' interpretation would lead to chaotic and absurd results. It would mean that owners and the Association all have concurrent authority to act. This would mean that the owners and the Association could all erect gates, otherwise impede access to the easement at their discretion, and maintain the easement, without oversight. As Judge Sparks recognized, there is a need for certainty in managing different property interests in an HOA, and plaintiffs' interpretation does not provide it; it provides uncertainty. CP 685. Notably, plaintiffs cite no language in the CC&Rs that support their theory that any owner may act on behalf of the Association.⁸

⁸ In fact, the CC&Rs are replete with language to the contrary. Paragraph 1.7 plainly provides: "The affairs of the Association shall be managed by a Board of Trustees"

The Court should not interpret the CC&Rs in this chaotic manner. Wilkinson v. Chiwawa Cmtys. Ass'n, 180 Wn.2d 241, 255, 327 P.3d 614 (2014) (“We reject ‘forced or strained’ interpretations of covenant language if they lead to absurd results.”). Instead, the most sensible interpretation is that the CC&Rs mean what they plainly say, and that they prohibit owners such as plaintiffs from impeding access to the roadway easements, such as by gates or boulders.

Plaintiffs’ interpretation also conflicts with the modern standard of covenant interpretation. When faced with a dispute between successors in interest to a restrictive covenant, courts apply a “liberal interpretation” designed “to protect all the property owners’ interests.” Viking Props., Inc. v. Holm, 155 Wn.2d 112, 120-21, 118 P.3d 322 (2005).

In addition, plaintiffs’ interpretation violates the canon of construction holding that to express or include one thing implies the exclusion of another—termed *inclusio unius est exclusio alterius*. See Black’s Law Dictionary 763 (6th ed.1990); State v.

Sommerville, 111 Wn.2d 524, 535, 760 P.2d 932 (1988). The CC&Rs expressly provide authority only to the Association to maintain the roadway easements and erect gates. Presumably, the Declarant was aware of the possibility gates would be needed, since the CC&Rs expressly address gates. If the covenants intended to grant the owners such authority, they would have stated as such. They did not.

The Declarant certainly knew how to grant rights to the owners, and did so in Paragraph 5.1, as well as elsewhere (e.g., Paragraph 3.1). CP 304, 306. He chose not to do so with respect to installing gates and boulders, granting that authority only to the Association. The express grant to the Association to maintain the roadway and erect impediments works as an exclusion of plaintiffs' purported right.

Finally, it is worth noting that plaintiffs' argument is contradicted by their own conduct. Mrs. Hebert acknowledged she had no right to unilaterally restrict access on the easement when she sought permission to install a gate from Sapphire Skies,

LLC, per the Association meeting minutes from January, 2005. CP 327. 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. CP 330. Plaintiffs' prior conduct demonstrates their awareness of their restricted rights as members of a homeowners association. There was no reason to seek permission if, as they now claim, they have a right to do so.

5. Plaintiffs' Common Law Authorities are Distinguishable and Inapposite

The cases Plaintiffs cite are inapposite. Littlefair v. Schulze, 169 Wn. App. 659, 663, 278 P.3d 218 (2012) did not involve any defenses based on violations of restrictive covenants such as the covenants here. Id. That case actually supports the Association's position because the trial court held that a permanent structure (a fence) within the easement could support a claim of adverse possession and thus the plaintiff had a right to protect against such interference. Id. at 671.

Likewise, Nw. Properties Brokers Network, Inc. v. Early

Dawn Estates Homeowner's Ass'n, 173 Wn. App. 778, 795, 295 P.3d 314 (2013) is inapplicable, because no one in that case disputed that a gate was allowed. Rather, the sole issue was whether a restriction on leaving the gate open was reasonable or unreasonable. Id. But here, whether the gate and boulders are allowed is disputed, and they are a clear violation of the covenants.

Finally, Rupert v. Gunter, 31 Wn. App. 27, 29–30, 640 P.2d 36, 38 (1982) did not involve any covenants at all and was based solely on a private easement dispute between two neighbors about the existence of a gate. Id. In Rupert, there were no contractual restrictions preventing obstructions as there are in the present matter.

7. Plaintiffs Were Not Authorized to Erect a Permanent Gate

Plaintiffs curiously claim they “have provided conclusive evidence that the Association authorized the installation of their gate.” *Pls.’ Opening Brief at 24*. That is misleading and incorrect.

There is no evidence whatsoever that the Association authorized a permanent gate. *See Section III, C, supra.* CP 327, 330. This is made clear by the actual meeting minutes which show that the Association merely authorized a temporary gate.⁹

But more fundamentally, this is irrelevant. Whether the gate was intended to be permanent or not, the Association properly determined the gate violated the CC&Rs and reasonably exercised its lawful authority to have it removed based on evidence the gate obstructed the road easement. CP 332.

8. The Trial Court Properly Dismissed the Claim of Negligence

On appeal, it is not entirely clear what plaintiffs' position is on negligence. Plaintiffs incorrectly argue they were not and are not making a claim for vicarious liability of the Association

⁹ Plaintiffs attempt to bypass this problem by objecting—for the first time—to the Declaration of Marion Deardorff. *Pls. ' Opening Brief at 25.* As noted below, that objection is untimely. Plaintiff did not object to the declaration at the trial court level, and the trial court considered the declaration in rendering its decision. *Smith v. Showalter*, 47 Wn. App. 245, 248, 734 P.2d 928, 930 (1987). Plaintiffs cannot manufacture an objection for the first time on appeal; it has been waived.

for the negligence of its independent contractor. *Pls.' Opening Brief 34*. There is no doubt they made that claim. CP 144.

Plaintiffs argued vicarious liability in the summary judgment proceedings. CP 543-544 & CP 803. Plaintiffs are shifting the goal posts and in doing so have abandoned their claim for vicarious liability. That issue needs no further discussion, but it is worth noting briefly that the trial court properly found that plaintiffs produced no evidence that Mr. Chavez was negligent. Plaintiffs' expert declaration did not establish negligence. CP 639-632; CP 672-674. Also, plaintiffs submitted no evidence of an agency relationship. CP 260, 606.

With vicarious liability abandoned, there is no basis for a property damage claim against the Association because it did not engage in the acts of removing plaintiffs' obstructions. Thus, on appeal, plaintiffs' sole negligence claim is that the Association either lacked authority or was negligent in its *decision* to remove the obstructions. The trial court properly found that removal of the plaintiffs' obstructions was justified because obstructions

were clearly prohibited. *See Subsection IV C. 2 Above.* As Judge Sparks wrote in his letter decision, “Since the HOA had to expend funds to undo what the Hebert’s had done, the HOA is entitled to reimbursement.” CP 685.

Righting a wrong pursuant to contractual authority does not constitute negligence. The Court should hold that the plaintiffs did not establish any negligence and/or lack of authority on part of the Association.

**B. THE BUSINESS JUDGMENT RULE REQUIRES
DISMISSAL OF PLAINTIFFS’ CLAIMS**

Plaintiffs did not address the Association’s business judgment rule argument below, and therefore conceded it. CP 536-545; CP 800-806. Now for the first time on appeal, they argue the business judgment rule is inapplicable because their claims are not against the individual members or management of the Board, and thus there is no need to immunize them from liability. *Pls’ Opening Brief at 33.*

This argument misunderstands the facts and law. Washington law requires the Board to manage the Association's affairs. RCW 24.03.095. The HOA Act requires the Board to "act in all instances on behalf of the association." RCW 64.38.025(1). It also requires that the officers and members of the board of directors shall exercise the degree of care and loyalty required of an officer or director of a corporation organized under the Nonprofit Corporations Act, Chapter 24.03 RCW ("NPCA") in the performance of their duties. *Id.*

The NPCA requires directors to perform the responsibilities as a director in good faith, in a manner the director believes to be in the best interests of the Association, and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances. RCW 24.03.127.

This standard is applied in numerous contexts in Washington and is often referred to as a duty of "ordinary and reasonable care." *See, e.g., Mathis v. Ammons*, 84 Wn. App.

411, 416, 928 P.2d 431 (1996) (duty is the duty to exercise ordinary care, or, alternatively phrased, the duty to exercise such care as a reasonable person would exercise under the circumstances). The concept is that, so long as this duty is met, decisions of a Board on behalf of a nonprofit corporation are presumptively appropriate. *Id.* Otherwise, any member of a homeowners' association or nonprofit corporation could sue to have its judgment substituted for that of the Board and such communities and corporations would be unable to do business.

In Washington, the business judgment rule applies to insulate decisions of the Board, provided that the directors complied with their duties in reaching those decisions. McCormick v. Dunn & Black, P.S., 140 Wn. App. 873, 887, 167 P.2d 610 (2007). A court will not substitute its judgment for that of corporate directors unless there is evidence of fraud, dishonesty, or incompetence (i.e., failure to exercise proper care, skill, and diligence). Riss v. Angel, 131 Wn.2d at 632.

Thus, Washington law on this subject is similar to other

states' business judgment rule that "insulates from Court intervention those management decisions which are made by directors in good faith in what the directors believe is the organization's best interest." Lamden v. La Jolla Shores Club Dominium Homeowners' Ass'n., 980 P.2d 940, 944 (CA 1999).

The business judgment rule is applicable here given the nature of the Association; it only acts by and through its Board, and the law makes it clear the decisions of the Board are protected.

It is notable that plaintiffs sued the "Board of Trustees" of the Association as defendants. CP 142. It is plain the claims are against the actual Board members who compose the Board and who made the corporate decisions plaintiffs now challenge. This conclusion is supported by the following allegations of the Second Amended Complaint:

The Board of Directors of Defendants, although initially giving permission to establish an entry gate on the south portion of Plaintiffs' property, which is the entry into the subdivision, in 2006, then changed their decision, voted to require the Plaintiffs to

remove said gate, and when Plaintiffs did not accede to that vote, which Plaintiffs regard as illegal, Defendants then removed the gate, and Plaintiffs suffered damages as contained in the previous Articles of this Complaint...

Defendants have unlawfully removed and damaged said boulders, claiming that the boulders restrict the plowing activities when in fact the same barricades constructed by other owners are left intact.

CP 145-146.

Thus, plaintiffs have made allegations of wrongful conduct against the Board. Yet, plaintiffs have produced no evidence of a breach of any duty on the part of the Board. Instead, plaintiffs merely repeat their mantra that the CC&Rs should be construed in some other way.

But this response misses the point entirely. Under the Business Judgment Rule, the Board is presumed to have met its duties in carrying out its authority unless proven otherwise. In other words, to establish liability, it is plaintiffs' burden to provide admissible evidence to demonstrate a breach of its duties. Unless there is evidence of fraud, dishonesty, or a failure

to exercise proper care, skill, and diligence, a court will not substitute its judgment for that of the directors.

Therefore, the Board's decision on how to interpret the CC&Rs as to the use of gates and other impediments is protected from second-guessing by plaintiffs and court intervention.

C. THE TRIAL COURT PROPERLY DENIED THE MOTION TO RECONSIDER

Plaintiffs argue the trial court erred in denying the motion without entering findings and conclusions. *Pls.' Opening Brief at 35*. That argument has no merit. Findings of fact and conclusions of law are inappropriate and not required in summary judgment proceedings. Oltman, 163 Wn.2d at 249 n. 10; Hemenway, 116 Wn.2d at 731.

Plaintiffs cite to In re Marriage of Fiorito, 112 Wn. App. 657, 654 (2002). But that case is inapposite because it involved a dissolution trial where findings of fact and conclusions of law must be entered (because there is no right to a jury trial in such

proceedings). Id. at 659. Simply put, there is no abuse of discretion for failing to do what the law does not require.

Plaintiff also argue the trial court judge failed to explain his basis for denying the motion. There is no requirement that a trial court judge must explain his or her reasoning when denying a motion to reconsider. There was no abuse of discretion.¹⁰

**D. IN THE EVENT THE COURT ADDRESSES THE
NEW ARGUMENTS, THEY ARE WITHOUT
MERIT**

1. The Association is the Successor in Interest

Plaintiffs' argument is flawed for several reasons. First, plaintiffs did not raise this at the trial court level. Therefore, the Court should not consider it. Kirkman, 159 Wn.2d at 926.

Second, plaintiffs have never contested that the Association may erect a gate, collect assessments and enforce the

¹⁰ Moreover, the trial court did not apply the wrong legal standard. The common law does not apply in this matter. *See Subsection IV C. 2, 5 Above*. There is also no indication that Judge Sparks relied on unsupported facts. Judge Sparks relied on the submissions of the parties that were replete with citations to many circumstances concerning plaintiffs' obstructions in the easement as well as the authority in the covenants. Judge Sparks also relied on their failure to produce facts sufficient for a *prima facie* case of negligence.

covenants. Plaintiffs conceded that the Association may levy assessments, enforce the covenants (and erect a gate), and that they still owe some assessments. *See, e.g.*, CP 539-540.

Third, plaintiffs' argument is disingenuous. Their own complaint alleges that the Association is the successor. The complaint states, "The Defendant is the successor to the previous Association, all acts of the predecessor are the acts of the Defendant." CP 142.

Plaintiffs cannot now disclaim their prior position and representation to the Court simply because it now appears inconvenient for their appeal. They are judicially estopped from taking a position inconstant with the position in their complaint. Hudson et ux. v. Pacific Trust & Tractor Co., 151 Wash. 46, 50 (1929) (admissions and affirmative allegations in a pleading are binding on parties); Key Design Inc. v. Moser, 138 Wn.2d 875, 894, 983 P.2d 653 (1999), amended, 993 P.2d 900 (1999); Goldwater v. Burnside et al., 22 Wash. 215, 218 (1900) (where a pleading makes certain allegations, evidence offered by the party

contradicting such evidence is inadmissible); Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538, 160 P.3d 13, 15 (2007) (“Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.”).

Fourth, more fundamentally, the argument is irrelevant. Even if the Association were not the successor in interest, that does not mean Plaintiffs themselves have any authority to erect gates, as they seem to suggest. It is clear the covenants did not grant authority to erect gates to individual owners (i.e., Plaintiffs). By granting the authority exclusively to the Declarant (and its successor in interest), it is clear that authority was delegated to someone other than the owners. Thus, ultimately it does not matter whether the Association is the successor interest (it is); what is clear is that owners such as plaintiff do not have authority to erect gates.

2. There is No Basis to Object to Standing

This argument patently lacks merit. Paragraph 10.1 of the covenants states, “The Board, any Owner...shall have the right to enforce, by any proceedings at law or in equity, all restrictions, conditions, covenants... now or hereafter imposed by this Declaration.” CP 320 (emphasis added).

Thus, the Association has the right to enforce or defend any covenant, whether such covenant relates to the Association’s easement or that belonging to the individual members.

3. Plaintiffs Did Not Preserve An Objection to the Declaration of Marion Deardorff

Arguments to exclude evidence must be addressed to the trial court. Burbo v. Harley C. Douglass, Inc., 125 Wn. App. 684, 692, 106 P.3d 258 (2005) (appellant’s motion to strike hearsay in summary judgment affidavit denied for failure to raise objection at the trial court level). A reviewing court presumes

that the judge knows the law and disregards improper evidence on summary judgment. Id.

Plaintiffs failed to object to the declaration at the trial court level, and thus failed to preserve an objection. Smith v. Showalter, 47 Wn. App. 245, 248, 734 P.2d 928 (1987) (where no objection or motion to strike is made prior to entry of summary judgment, a party waives any deficiency in an affidavit). The Court should deny the invitation to review evidentiary matters that could have, and should have been addressed to Judge Sparks.

4. The Statute of Limitations Does Not Apply

In addition to being improperly raised under RAP 9.12, plaintiff's statute of limitations argument makes no sense. The argument is illusory because plaintiffs because they admit the Association has never filed a claim related to plaintiffs' obstructions. *Pls.' Opening Brief at 28*. The argument is moot.

Moreover, the acts plaintiffs complain about (removal of the obstruction) occurred in 2017, not 2004-05, as alleged. *Pls.'*

Opening Brief at 28. There is no factual or legal basis to assert the statute of limitations.

5. Plaintiffs' Use Was Clearly Permissive

Not only did plaintiffs not properly raise this argument, their brief undermines it. Plaintiffs concede they did not bring a claim for a prescriptive easement because they believed their use was permissive. *Pls.' Opening Brief at 28-29.* Plaintiffs are correct about their permissive use. Under the law of prescriptive easements, a use is not adverse if it is permissive. Kunkel v. Fisher, 106 Wn. App. 599, 602, 23 P.3d 1128 (2001).

The records clearly reflect that Plaintiffs were given permission for a temporary gate only. CP 327, 330. Under such circumstances, no prescriptive easement can materialize. The Court should ignore plaintiffs' new prescriptive easement theory.

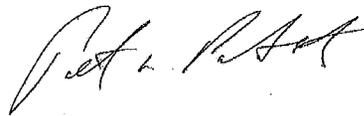
III. CONCLUSION

The Court should affirm the decisions and judgment of the trial court and hold that the Association's motion for summary judgment was properly granted and that plaintiffs' motion for

reconsideration was properly denied.

The trial court's decisions were correct, appropriate, and based on sound legal doctrine and established facts. The Court should affirm them in their entirety, and the Court should further award the Association its costs and attorney's fees on this appeal pursuant to RCW 4.84.185 and RAP 18.1.

Respectfully submitted this 12th day of June, 2020.



PETER M. RITCHIE, WSBA #41293
JACOB A. LARA, WSBA #46861
Meyer, Fluegge & Tenney, P.S.
Attorneys for the Spring Creek Easement
Owners Association

MEYER, FLUEGGE & TENNEY

June 12, 2020 - 4:49 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 37215-4
Appellate Court Case Title: Cynthia & James D. Hebert v. Spring Creek Easement Owners Assoc.
Superior Court Case Number: 18-2-00104-1

The following documents have been uploaded:

- 372154_Affidavit_Declaration_20200612135143D3393042_4821.pdf
This File Contains:
Affidavit/Declaration - Service
The Original File Name was 2020.06.12 cert transmittal of response brief.pdf
- 372154_Briefs_20200612135143D3393042_0891.pdf
This File Contains:
Briefs - Respondents
The Original File Name was 2020.06.12 response brief.pdf
- 372154_Other_20200612135143D3393042_4111.pdf
This File Contains:
Other - Letter to Clerk requesting oral argument
The Original File Name was Letter to Clerk COA re Oral Argument.pdf

A copy of the uploaded files will be sent to:

- john@comstocklaw.com
- lstoffel@barkermartin.com
- mhawkins@barkermartin.com
- ruby@comstocklaw.com

Comments:

Sender Name: Carol Switzer - Email: switzer@mftlaw.com

Filing on Behalf of: Peter McGillis Ritchie - Email: ritche@mftlaw.com (Alternate Email: switzer@mftlaw.com)

Address:
230 S. 2nd Street
Yakima, WA, 98901
Phone: (509) 575-8500

Note: The Filing Id is 20200612135143D3393042