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NO. 372154

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

CYNTHIA HEBERT AND JAMES D. HEBERT,
husband and wife
Appellants,

v.

SPRING CREEK EASEMENT OWNERS ASSOCIATION, a
Washington Nonprofit Corporation

Respondents.

BRIEF OF RESPONDENT

BARKER • MARTIN, P. S.
701 Pike Street, Suite 1150
Seattle, WA 98101
(206) 381-9806

Marlyn Hawkins, WSBA # 26639
Alexis Ducich, WSBA # 40445
Attorneys for Respondent

TABLE OF CONTENTS

I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR & ISSUES	2
III. STATEMENT OF THE CASE.....	3
A. The Community and the CC&Rs	3
B. The Association and its Authority under the CC&Rs.....	3
C. The Heberts and Their Payment Obligation	5
D. Formalization of Association’s Budgets & Assessments	6
E. The Association’s Enforcement Activities	6
F. The Association’s Attempts to Collect from the Heberts	10
G. Ms. Sullivan’s Pro Se Lawsuit.....	10
H. The Collection & Foreclosure Suit	11
I. The Heberts Promised to Pay Undisputed Amounts.....	12
J. The Renewed Motion for Summary Judgment	13
K. Additional Post-Judgment Delay	15
IV. ARGUMENT.....	17
A. Summary of Argument	17
B. The HOA Act and the Governing Documents Establish the Applicable Law.	19
1. The Board has the Exclusive Authority to Act on Behalf of the Association Unless the Governing Documents Say Otherwise.....	21
2. The Association has the Exclusive Authority to Maintain the Road Easement.	23
C. Summary Judgment on the Association’s Affirmative Claims Was Appropriate.....	25
1. Summary Judgment with respect to Regular Assessments was Appropriate.....	25
2. Summary Judgment With Respect to Compliance Assessments Was Appropriate.	27
D. Appellants’ Argument that the Heberts Did not Violate the Governing Documents is Misplaced.	34

1.	The Board’s Determination that Appellants Violated the CC&Rs By Placing Boulders and a Gate Over the Road Easement is Protected by the Business Judgment Rule.	35
2.	Appellants’ Claim that the Gate was Installed With Permission of the Association Was Unsubstantiated and Irrelevant.	39
E.	Appellants’ Newly Raised Defenses to Enforcement of the CC&Rs are Legally Inapplicable and Should Not Be Considered.	39
1.	Appellants’ Arguments Regarding Interference with Easement Rights Ignores the Applicability of HOA Law.	41
2.	Appellants’ Statute of Limitations Defense is Unsupported.	42
3.	Appellants Cannot Prevail on a Defense of Prescriptive Easement when they have Already Sworn that the Use as Permissive.	42
F.	This Case Epitomizes the Need for Strict Adherence to Panther Lake.	44
V.	CONCLUSION	49

TABLE OF AUTHORITIES

Washington Cases

<i>Albice v. Premier Mortg. Servs. of Washington, Inc.</i> , 174 Wn. 2d 560, 276 P.3d 1277 (2012).....	34
<i>Baldwin v. Silver</i> , 165 Wn. App. 463, 269 P.3d 284 (2011).....	36
<i>Fuller v. Employment Sec. Dep't of State of Wash.</i> , 52 Wn. App. 603, 762 P.2d 367 (1988).....	27
<i>In re Dependency of E.P.</i> , 136 Wn. App. 401, 149 P.3d 440 (2006).....	35
<i>Leighton v. Leonard</i> , 22 Wn. App. 136, 589 P.2d 279 (1978)	21
<i>Mathis v. Ammons</i> , 84 Wn. App. 411, 928 P.2d 431 (1996)	37
<i>McCormick v. Dunn & Black, P.S.</i> , 140 Wn. App. 873, 167 P.2d 610 (2007).....	38
<i>Merry v. Northwest Trustee Services, Inc.</i> , 188 Wn. App. 174, 352 P.3d 830 (2015).....	34
<i>Mithoug v. Apollo Radio of Spokane</i> , 128 Wn.2d 460, 909 P.2d 291 (1996).....	42
<i>Nursing Home Bldg. Corp. v. DeHart</i> , 13 Wn. App. 489, 535 P.2d 137 (1975).....	38
<i>Panther Lake Ass'n v. Juergensen</i> , 76 Wn. App. 586, 887 P.2d 465 (1995).....	<i>passim</i>
<i>Para-Med. Leasing, Inc. v. Hangen</i> , 48 Wn. App. 389, 739 P.2d 717 (1987).....	39
<i>Plein v. Lackey</i> , 149 Wn.2d 214, 67 P.3d 1061 (2003)	34
<i>Riss v. Angel</i> , 131 Wn.2d 612, 934 P.2d 669 (1997)	38, 40
<i>Santore</i> , 28 Wn. App. 319, 323, 623 P.2d 702, <i>review denied</i> , 95 Wn.2d 1019 (1981).....	27
<i>State v. Townsend</i> , 2 Wn. App.2d 434, 409 P.3d 1094 (2018).....	34

Non-Washington Cases

<i>Rivers Edge Condominium Ass'n v. Rere, Inc.</i> , 390 Pa.Super. 196, 568 A.2d 261 (1990).....	47
--	----

Statutes

RCW 24.03.095	23
---------------------	----

RCW 24.03.127	23
RCW 64.38.020	8, 25, 28, 31, 32
RCW 64.38.025	23, 28
RCW 64.38.050	31
RCW 64.90.525	28

Rules of Appellate Procedure

RAP 9.12.....	31, 41, 43
---------------	------------

I. INTRODUCTION

Though difficult to tell from Appellants' Opening Brief, this case is about members of a small homeowners association who refused to pay their assessments for over three years, resulting in debt to the Spring Creek Easement Owners Association ("Association") of almost \$70,000 at the time of the judgment in 2019. Appellants James Hebert and Cynthia Sullivan ("Appellants" or "Heberts") violated the Homeowner Association Act and the specific covenants of the community with impunity, relying upon bullying and filing frivolous legal claims against the Association to avoid following the rules and paying their fair share. This case is not about home security, maintenance of an easement, or individual property rights; this case is about homeowner association law and Appellants' inexcusable refusal to comply therewith.

Appellants claim that the trial court erred in granting summary judgment, but they cannot dispute the basic fact that Assessments were levied and the Heberts did not pay. Nor can they dispute that the Association's actions were in strict compliance with procedures of the HOA Act. Appellants' Brief wholly ignores the HOA Act in an attempt to shift focus away from the Heberts' clear violations of homeowner association law, instead citing easement law that is inapplicable in this context and affirmative defenses that were never *alleged* in the case below, much less argued on summary judgment. Throughout this case, Appellants have cycled through ever-changing excuses for not paying

assessments, none of which are tenable under homeowner association law. Yet their strategy has worked: they have not paid assessments for over three years and have caused the Association to incur significant costs to bring them into compliance with the Association's covenants, yet they continue to enjoy use of their property while their seven neighbors shoulder the burden of their nonpayment and noncompliance. This exact scenario is why the court held in *Panther Lake*, that whatever an owner's dispute with its homeowner association may be, an owner has no right to withhold assessments. What *Panther Lake* sought to prevent is exactly what Appellants have attempted to do here: leverage their nonpayment to force the Association to capitulate to their demands. There being absolutely no indication that any of the material facts before the trial court were disputed, summary judgment, entry of judgment pursuant thereto, and denial of the motion for consideration were not only appropriate, they were required. Thus, the judgment must be affirmed.

II. ASSIGNMENTS OF ERROR & ISSUES

Appellants' Brief contains five assignments of error, all of which relate to the Association's successful summary judgment on the foreclosure and dismissal of Appellants' related claims, but the issue statements are omitted. The issue addressed in this Brief is: Was summary judgment in the collection and foreclosure action appropriate under the HOA Act and the Association's CC&Rs where it is undisputed that the Association lawfully levied Regular Assessments and Compliance

Assessments that Heberts never paid? Co-Counsel from Meyer Fluegge & Tenney, P.S. defended the Association with respect to the Heberts' affirmative claims and will address that issue in their brief.

III. STATEMENT OF THE CASE

A. The Community and the CC&Rs

In 2003, developer Sapphire Skies, LLC created the Spring Creek community near Cle Elum, by recording a short plat and subjecting the eight lots therein to the recorded "Declaration and Covenants, Conditions, Restrictions and Reservations of Spring Creek Road Maintenance Association," (the "CC&Rs"). CP 981-1007. Of the roughly 20-acre lots, two are now owned by full-time residents, three house recreational homes, and three are undeveloped. CP 977. In accordance with the CC&Rs, the Association's only common area is a road easement that runs through each of the eight properties ("Road Easement"). CP 977, 982, 996.

B. The Association and its Authority under the CC&Rs

Respondent Association is the homeowners' association for Spring Creek. CP 976-79, 982. The CC&Rs originally stated that the "primary function" of the Association "shall be the maintenance, operation and repair of the private road easements over and across the Property for the purpose of ingress and egress to Lots." CP 982 at §1.2. This maintenance obligation is crucial due to the amount of snow the area typically gets. Thus, the CC&Rs originally provided: "The roads shall be snowplowed, at a minimum, 16 feet wide, upon 6 inches of snowfall. It is the intent of

these standards to maintain the Roads passable by four-wheel-drive vehicles.” CP 987 at §4.2.¹ The CC&Rs provide each owner with “nonexclusive easements for access, ingress and egress, over and under all of the Easements.” CP 988 at §5.1. The Association is assigned to maintain the Road Easement in a section entitled “Repair and Maintenance Rights and Duties of Association, while Owners are required to maintain “the exterior of their residence and all other buildings and improvements located upon their Lot.” CP 986 at §§ 3.2; 3.1.

When Spring Creek became a homeowners association under the Homeowner Association Act, the duties and powers of the Association enumerated in the CC&Rs were significantly broadened, and extended to cover enforcement of the CC&Rs:

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 ***the enforcement of the covenants***, maintenance, operation and repair and insurance of the entry statement, private road easements over and across the Property for the purpose ingress and egress to the Lots,

¹ When the Association incorporated as an HOA, some of the “original” provisions were replaced with provisions in Exhibit D to the CC&Rs, but the language remains relevant to show the developer’s intent. CP 348-49; 991 at §9.3.

CP 997 at §1.2 (emphasis added). The CC&Rs provide the Association with an easement over the various lots for the purposes of making repairs “or for any other purpose reasonably related to the performance by the Board of its responsibilities under this Declaration.” CP 986 at §3.3.

Because the Road Easement is the only common area of Spring Creek, most of the Association’s usual budget is for clearing snow from the Road Easement in the winter and otherwise maintaining it in the spring and summer. CP 977. The CC&Rs provide that each property owner is responsible for an equal share of the Association's budget. CP 1002 at §4.6. Article 4 of the CC&Rs provides the Association with the power to levy and collect assessments to pay these common expenses. CP 986-88.

C. The Heberts and Their Payment Obligation

The Heberts own lot 7 within the Spring Creek community. CP 269; CP 375. Owners of lots within the boundaries of Spring Creek are bound by the provisions of the CC&Rs:

Declarant hereby declares that the Property shall be held, conveyed, sold, and improved, subject to the following declarations, limitations, covenants, conditions and restrictions” and that “[a]ll of the limitations covenants, conditions and restrictions shall constitute covenants and encumbrances which shall run with the land and shall be binding upon Declarant and its successors-in-interest and assigns for its term and all parties having or acquiring any right, title, or interest in or to any part of the Property.

CP 982. Relevant to this case, owners have a specific obligation to pay:

[E]ach Owner by acceptance of a deed or contract therefore, whether or not so expressed in such deed or

contract, is deemed to covenant and agree to pay to the Association regular, extraordinary and special Assessments, which shall be established and collected by the Association.

CP 986 at § 4.1.

D. Formalization of Association's Budgets & Assessments

Although incorporated as a homeowners association since 2004, the Association had been operating informally under the sole control of Appellant, James Hebert, who resigned in February 2017. CP 269-70. Once Mr. Hebert resigned, the remaining owners took control of the Association, elected three directors, hired counsel, and began to formalize the Association's processes to ensure consistency with the HOA Act. *Id.*

For 2017 through 2019, the Board prepared budgets by estimating the Association's annual expenses. CP 978. These budgets were then approved by the membership during owner meetings as required by the HOA Act. Notably, Ms. Sullivan attended the budget meetings in 2017 and 2018, but never conveyed any concern about the plowing of areas outside of Spring Creek, though that became their primary argument in response to the Association's first motion for summary judgment. CP 413-14; 539-41. The Heberts admit they never paid their assessments. CP 359-60, 415, 1046, 1049. At the time of the judgment, the Heberts had a delinquency of almost \$70,000. CP 792-96.

E. The Association's Enforcement Activities

There is no dispute that the Heberts had placed a number of large boulders within the Road Easement and installed a locked gate over the

road. CP 652, 654. Evidence submitted by the Heberts demonstrated that the gate had been installed over the Association's objection, that the Heberts refused a request to leave the gate open on weekends, and that they insisted the gate "would not be removed even if the association voted for its removal." CP 495-96. As for the boulders, Ms. Sullivan admitted they were well within the roadway and "were spaced initially in such a way that it would be difficult to drive a car through them." CP 654.

In July of 2017, well in advance of snow season, the Board considered the problem. CP 271. The Board noted that the boulders narrowed the width of the Road Easement, making passing difficult and dangerous. *Id.* It also made snow plowing the Road Easement "inefficient, dangerous and costly," as sworn by the Association's snow plow contractor, Benito Chavez. CP 261. In fact, the engineer hired by the Heberts to assess the condition stated that "the boulders will definitely hinder snow removal." CP 402. Mr. Chavez also testified that the gate was an impediment to ingress and egress due to its narrow width and the fact that the Heberts locked it with a padlock and changed the combination frequently. CP 261-62.

Through counsel, the Board sent notice to the Heberts on July 26, 2017, advising them that both the gate and the boulders impeded the Association's ability to maintain the Road Easement, prevented free ingress and egress over the road, and needed to be removed. CP 271, 452, 467-73. The notice cited the Association's authority and advised Appellants of their statutory "opportunity to be heard" before the Board

under RCW 64.34.020(11). CP 468-69. After some initial back and forth between counsel, the compliance hearing was set by mutual agreement for September 5, 2017. CP 452.

On August 31, 2017, the Heberts' counsel wrote two separate letters to the Association referencing the "'Hearing' now scheduled for Tuesday September 5, 2017." CP 452, 474-76, 477-80. In the first letter, counsel stated, "it doesn't make sense to hold the hearing next Tuesday," and instead, demanded that the Association mediate the claim. CP 475. The second letter asserted the Heberts' "right" to maintain the easement and made suggestions with respect to the roadway repairs. CP 452, 478- 80. This letter made it very clear that the Heberts staunchly believed that they had a right to modify the common area Road Easement at their whim. *Id.* To confirm waiver of the hearing, the Association sent an email the next day asking for clarification, stating:

Thank you for the attached letters relating to the Hebert/Sullivan hearing scheduled for next week. The Association will take the materials into consideration with regard to the alleged violations. The hearing was scheduled at your request on behalf of your clients in accordance with the Spring Creek governing documents and the HOA Act. Based on your comment that "it doesn't make sense to hold the hearing next Tuesday," I presume that you do not want to proceed with the hearing and would like the Board to consider the materials and your suggestions therein in lieu of a hearing. ***Please confirm if that is the case and the hearing will be stricken.*** In lieu of a hearing, the board will meet to discuss the allegations and your letters and will issue a written decision shortly thereafter.

CP 452, 482. Heberts' counsel replied that same day, suggesting that the Board "defer any decision on the alleged 'violations', and that instead, we engage in a discussion about how the owners can achieve their goals of properly maintaining the road." CP 484.

The next day – September 2 – the Heberts' counsel forwarded an email from Mr. Hebert from 8:35 p.m. on September 1st complaining of trespassing by people on ATVs. CP 453, 486. In the email, Mr. Hebert suggested that "the HOA and its Board address the owners' security, in addition to road maintenance, on September 5th, ***rather than the items in your July 26 correspondence.***" CP 486 (emphasis added).

When it came time for the hearing, the Association again contacted the Heberts, reiterating that the Board would proceed with consideration of the materials provided, but that the hearing would be "stricken." CP 488. No hearing was held on September 5 and no complaint was received from the Heberts or their counsel at that time. CP 454. Instead, the Board considered the Heberts' multiple written submissions in lieu of a hearing and issued its decision by letter dated September 15, 2017. CP 271, 454, 490-93.

In the decision letter, the waiver of the hearing was again noted and again, no objection to that characterization was ever raised. CP 490-93. The letter identified all of the information that was considered and ultimately, demanded that the Heberts remove the boulders and the gate by the end of September. *Id.* The letter warned that if they failed to do so, the Association would remove the obstructions and charge the

Heberts for the costs. *Id.* The Association did not actually take action to remove the boulders until it became absolutely necessary to do so to clear the roadway of snow. CP 414, 454, 520-21. The snow plow contractor, Mr. Chavez, completed the work in October and billed the Association \$2,030.40. CP 406, 408, 522. The Heberts were provided with the invoice and demand for payment by letter dated October 20, 2017, stating that the amount would be added to their assessment ledger. CP 520-22. The gate was removed by Mr. Chavez some time later at a cost of \$1,987.20 to the Association. CP 406, 414-15. None of these facts are disputed. *See, generally*, CP 370-398.

F. The Association's Attempts to Collect from the Heberts

By March of 2018, the Heberts' had been provided with numerous notices of delinquency and the debt had grown to \$15,433.10. CP 1088-90, 1092-1100. The Board therefore directed counsel to proceed with a notice of foreclosure, which was delivered to the Heberts' counsel on March 29, 2018. CP 1089, 1096-99. The letter gave the Heberts one last chance to bring their account current by April 30, 2018. *Id.*

G. Ms. Sullivan's Pro Se Lawsuit

Shortly after receiving the foreclosure notice, while still represented by counsel, Ms. Sullivan filed a preemptive *pro se* lawsuit against the Association on April 5, 2018. CP 1-5. The Complaint asserted that the Heberts had permission to install the gate and alleged damages for a year-old injury to a fence caused by the snow plow service, a claim they

admitted had already been paid by their insurance. *Id.* The Complaint reflected the Heberts' persistent belief that the Association's CC&Rs did not apply to them, ultimately asking the court to order the Association to replace the gate and boulders, to absolve them of responsibility for assessments, and to make the Association obtain *their permission* to maintain or alter the Road Easement. CP 4-5.

H. The Collection & Foreclosure Suit

Consistent with its March foreclosure notice, the Association filed a straightforward foreclosure action on August 9, 2018. CP 955-61. The Association moved for summary judgment in November 2018 ("First Motion"). CP 965-75. In the motion, the Association produced evidence that the Association had levied Regular and Compliance Assessments in an amount that would total almost \$33,000, \$17,000 of which was for Regular Assessments plus interest, and over \$15,000 of which were the costs of removing the gate and boulders, plus the costs and fees incurred in enforcement and collection efforts. CP 974-75.

Three days after receiving the Association's First Motion, the Heberts moved to consolidate the collection action with their lawsuit, claiming that their alleged damages were an "offset" to the assessments owed.² The Association opposed the motion on the basis that the *pro se* claims were irrelevant to the collection action, retaliatory, and designed to

² The Motion to Consolidate was not included in the Appellant's Designation of Clerk's Papers, but the contents are not at issue here.

complicate the foreclosure. CP 1079-83. Unfortunately, the trial court consolidated the actions on December 13, 2018. CP 167-68.

Appellants ultimately filed a *two-page* Opposition to the Association's First Motion that cited no facts,³ and contained no reference to the HOA Act or other legal authority. CP 1043-45. Instead, it consisted mostly of allegations and conclusions, such as:

The Defendants have denied that the assessments are appropriate, have denied that the amount is owing, and that the amount is calculated, and believe that the facts and evidence will show that the assessments are for far more than the maintenance and repair of the "easements . . ."

CP 1044. There being no facts or authority to dispute, the Association believed that summary judgment would be granted, but during oral argument, Appellants expanded on their allegation that the Association paid for areas outside of Spring Creek to be snow-plowed, but submitted no evidence. CP 351-52. Nor was any legal authority cited that would make the Hebert's disagreement with the Board over these plowing expenses relevant in any way. *See* CP 1043-45.

I. The Heberts Promised to Pay Undisputed Amounts

Noting that this was the only dispute raised by Appellants, however, the trial court deferred ruling on the First Motion to give the

³ The Heberts filed, but did not cite, a declaration of Ms. Sullivan. CP 1046-78. Review of the declaration reveals it contains no indication of personal knowledge and merely restates allegations and conclusions. Stunningly, she also objected that the assessments were "more than they should be" based on the Association's treasurer's statement that the assessments had to be higher to accommodate the [Heberts'] non-payment of assessments." *Id.*

Heberts the opportunity to deposit the *undisputed* portion of the Regular Assessments into the court registry. CP 349-51; 451; 905-06. Having successfully delayed the ruling on summary judgment indefinitely, the Heberts never followed through with their representation despite the Association's demand therefore. *Id.* With no summary judgment order, the parties conducted discovery on the Hebert's affirmative claims and the Association renewed its summary judgment motion in June of 2019 in order to obtain the judgment it should have been awarded a year before. CP 346-403. At the same time, co-counsel for the Association moved for summary judgment asking for dismissal of the claims against the Association. CP 233-58.

J. The Renewed Motion for Summary Judgment

In the Renewed Motion for Summary Judgment ("Renewed Motion"), the Association again established its *prima facie* case that Regular and Compliance Assessments were lawfully levied and that the Heberts simply refused to pay. CP 346-403. The Association also provided evidence of its multiple, futile attempts to get Appellants to deposit undisputed assessments into the court registry. CP 349-51, 458-66. Lastly, the Renewed Motion expanded upon the issue relating to the Association's broad authority to plow roads outside of Spring Creek. CP 351, 363-64.

The Heberts' opposition expanded on their prior *allegation* that the Association spent some money plowing roads outside of Spring Creek, but

again, failed to establish that any such expenditure was outside the Association's authority. CP 536-46. The Heberts also addressed the Compliance Assessments for the first time, arguing that "The CC&Rs do not prohibit lot owners from installing gates," focusing mostly on the lack of the specific word "gate" in the CC&Rs. CP 541. Addressing the boulders in a single paragraph, they argued that the "same reasoning" applied, yet admitted that "The only instance in which the boulders caused any issue was, according to Mr. Chavez, in regard to plowing snow." CP 542-43. Not only were citations to evidence again omitted, nowhere in the 10-page response did Appellants challenge the applicability of the HOA Act or respond to the fact that the Association had established a prima facie case of nonpayment of assessments. CP 536-46.

On August 5, 2019, more than two years since the Heberts stopped paying their assessments, the trial court granted the Association's Renewed Motion in a letter order emphasizing the applicability of the HOA Act and *Panther Lake*:

As has been the law in this state for many years, land owners who own property subject to an HOA have diminished rights over their property included in the HOA. "Lot Owners' remedies are limited to making their wishes known to the Association, casting their votes, and seeking declaratory relief if the Association acts beyond its authority. Lot Owners are not permitted to compound the Association's problems by unilaterally withholding assessments." *Panther Lake Ass'n v. Juergensen*, 76 Wn. App. 586, 591 (1995).

CP 685-86. The court also awarded reasonable attorneys' fees. *Id.* Shortly thereafter, the Association submitted a proposed Order and Judgment containing updated fee and cost information. CP 687-72.

K. Additional Post-Judgment Delay

Even though the court had already ruled on the motion and fees, the Heberts delayed the judgment by re-challenging portions of the fees. CP 792-96. To address these new arguments, the Court deferred ruling on fees to be awarded to the Association for *defense* of the Heberts claims, but explicitly found all of the Association's fees relating to the foreclosure to be reasonable and included them within the Order and Final Judgment and Decree of Foreclosure, entered on September 12, 2019. CP 786-91; 792-96. The judgment amount was \$69,345.40. CP 793. In addition, the Judgment and Decree ordered specific relief:

The Board of Directors of the Association is the governing body of the Association with authority to make maintenance decisions relating to the common area road easement, not the Heberts; the Heberts are ordered to cease any work within the 60-foot road easement, and are further Ordered not to place anything within or on the road easement and not to interfere with the Association's maintenance thereof.

CP 794-95. The judgment also required the Heberts to "remove the fence posts that are currently on the road easement." CP 795.

Despite the entry of judgment, and the fact that the Heberts had now had multiple opportunities to raise issues in two summary judgment motions and argue fees, the Heberts filed a belated "motion for

reconsideration” of the summary judgment motions that rehashed arguments already made, but also added wholly new theories of why their claims against the Association should not be dismissed. CP 800-06. The motion was accompanied by a declaration of counsel that contained a review of evidence provided by the Association *prior to the ruling on summary judgment* in relation to fees. CP 807-839. Despite the clear language and Order in the Judgment, this motion claimed that the court had not answered their request for declaratory relief as to:

whether or not the Heberts had the right to establish their own gate on the property owned by them encumbered by the easement in favor of the homeowners’ association and whether or not they could place boulders to protect the integrity and slope of the road as well as to provide safety to users of the road.

CP 800-806. Giving the Heberts yet another chance at issues argued on summary judgment, the Court requested briefing on the issues raised by the post-judgment motion for reconsideration. CP 840. Ultimately, the court denied the Motion for Reconsideration by letter order dated October 21, 2019. CP 857.

But Appellants still wouldn’t quit. In January 2020, Appellants moved for stay of execution of the judgment and decree of foreclosure pending this appeal, offering nothing more than the collateral that was already subject to foreclosure. CP 873-76. Not having been paid for over three years, the Association was now forced to incur additional fees to oppose the Motion to Stay. CP 900-921. Ultimately, the court denied the Heberts their request to put up “alternate” security, but ordered that

execution would be stayed upon the posting of \$90,000 cash or supersedeas bond. CP 951-52. Not surprisingly, the Heberts have not paid nor complied with the specific relief ordered.

IV. ARGUMENT

A. Summary of Argument

In the motions for summary judgment below, the Association applied fundamental and unchallenged principles of homeowner association law and the specific language of this community's CC&Rs to the undisputed relevant facts, establishing its prima facie case that Appellants failed to pay two types of assessments lawfully levied by the Association: "Regular Assessments" and "Compliance Assessments."

The Association established that it created budgets and levied Regular Assessments against the Heberts pursuant thereto in strict accordance with the HOA Act and the CC&Rs, yet the Heberts simply refused to pay. Despite the broad scope of Appellants' assignments of error, the Brief of Appellant contains no challenge to any relevant factual or legal issue relating to the levy of Regular Assessments and the Heberts' nonpayment thereof. Thus, at the very least, the judgment as to Regular Assessments must be affirmed.

The second type of assessments the Heberts refused to pay are "Compliance Assessments," which arose out of the Association's enforcement of its rights and obligations to maintain the common area Road Easement and keep it clear for ingress and egress. Under the HOA

Act, the costs of enforcement become assessments that a member of the HOA must pay, so long as the Association demonstrates compliance with statutory due process under the HOA Act, referred to as “notice and an opportunity to be heard.” In the Renewed Motion, the Association demonstrated that the Board determined in July 2017 that the Heberts’ admitted placement of boulders within the Road Easement and a locked gate across the Road Easement interfered with the Association’s maintenance and blocked ingress and egress. The Association sent the Heberts multiple notices of this determination along with specific demands for them to remove the obstructions, and provided the opportunity for a compliance hearing, all in strict adherence to the HOA Act’s procedures. When the Heberts refused to remove the obstructions and then declined to attend the compliance hearing, the Board had no choice but to incur costs to remove the boulders and gate in the fall of 2018 in order to fulfill its duties under the CC&Rs.

Appellants do not identify any facts that were presented to the trial court that create a material dispute of fact sufficient to defeat summary judgment. They do, however, argue wholly new legal theories not presented to the trial court that are inapplicable in the context of a homeowner association. First, their claim that they did not violate the CC&Rs misses the mark because the decision of the Board is protected by a form of business judgment rule espoused in *Riss v. Angel*, which prohibits members or the court from substituting their judgment for the judgment of the Board in the absence of any evidence that a duty had been

breached. Second, wholly new arguments relating to affirmative defenses of prescriptive easement and statute of limitations were not presented to the trial court and cannot, therefore, be considered on appeal, but even if they were to be considered, they are clearly inapplicable.

Lastly, the undisputed facts and procedural posture of this case show how failure to require owners to pay their assessments during the pendency of their challenge encourages frivolous claims and unreasonable delay, culminating in additional damage to their communities regardless of the validity of their claims. Thus, this Court should adopt and enforce the rule in *Panther Lake* that homeowners must pay their assessments even as they challenge some aspect thereof to prevent members from attempting to use their nonpayment as leverage against the Association.

B. The HOA Act and the Governing Documents Establish the Applicable Law.

As a threshold matter, it is important to know that there is an entire body of homeowner association law that exists separate from other, less-specific real property law relating to easements or rights between neighbors. “Common interest communities” as they are now called, are governed in part by statutes specific to the type of community: condos are governed by the Horizontal Property Regimes Act and the Condominium Act; homeowner associations are governed by the HOA Act; and all common interest communities created after July 1, 2018 are governed by

the newly enacted Washington Uniform Common Interest Ownership Act (“WUCIOA”).⁴ Few questions of homeowner association law can be answered without reference to these statutes.

But community association law is only partially statutory, with additional “laws” deriving from the unique provisions of each HOA’s “governing documents,” which generally include the “CC&Rs”, the corporate bylaws and articles, and any board-imposed rules. The recorded CC&Rs enjoy the highest priority among governing documents because they are recorded and generally state an intent to bind all owners and successors-in-interest of the property within the jurisdiction, so that the provisions therein “run with the land.” *Leighton v. Leonard*, 22 Wn. App. 136, 139, 589 P.2d 279 (1978).

As cited above, the Spring Creek CC&Rs contain grants of authority to the Association, procedures for operation of the Association, restrictions upon the use of lots and common areas within the community, and clearly state that all purchasers of the land described therein are bound by these provisions. Thus, in addition to provisions of the HOA Act, the quasi-factual-but-quasi-legal provisions of the CC&Rs govern this case.

⁴ These statutes are found in RCW Title 64, Chapters 32, 34, 38, and 90 respectively.

1. The Board has the Exclusive Authority to Act on Behalf of the Association Unless the Governing Documents Say Otherwise.

Under the HOA Act and the Nonprofit Corporations Act (“NPCA”), the Association’s Board has the exclusive authority to act on behalf of the Association, except where a vote of the owners is explicitly required by either the HOA Act or the governing documents. Appellants’ argument that the Board’s authority to act on behalf of the Association is *not exclusive* – that any member of the Association has authority to act on behalf of the Association – contradicts the HOA Act, the NPCA, the plain language of the CC&Rs, and frankly, defies common sense.

The HOA Act provides the default rule that the Board acts on behalf of the Association unless a more specific provision says otherwise: “Except as provided in the association’s governing documents or this chapter, the board of directors shall act in all instances on behalf of the association.” RCW 64.38.025(1). Appellants’ challenge to the Board’s exclusive authority to act on behalf of the Association wholly ignores this statutory provision. Moreover, like most homeowner associations, the Association here is not just an informal group of neighbors; it is a corporate entity formed under the NPCA, which even more clearly provides: “The affairs of a corporation shall be managed by a board of directors.” RCW 24.03.095. Consistent with this managerial role, an

HOA Board is required to exercise the same duties of care and loyalty towards the Association as any other nonprofit corporation board has to its members. RCW 64.38.025(1); RCW 24.03.127.

Appellants cite no provision of the HOA Act or CC&Rs that support their theory that any owner may act on behalf of the corporation. In fact, the CC&Rs are replete with language to the contrary. In short, “The affairs of the Association shall be managed by a Board of Trustees.” CP 998 at §1.7. Owner authority is generally limited to voting on specific matters and requires support of other owners: “no action of the members shall be taken without a quorum of Members participating directly or by proxy.” *Id.* Numerous other sections reinforce the Board’s authority to act on behalf of the Association. *See, e.g.*, Sections 1.9 (Board’s authority to contract for management); 2.13 (Board authority to enact rules); 2.14 (signs require Board approval). CP 998-1000. Moreover, the terms “Association” and “Board” are used interchangeably throughout the CC&Rs, most notably with respect to enforcement powers in Section 9.3, which provides, “Any such HOA shall . . . have the enforcement rights set for [sic] in Paragraph 10.1 below, as well as the powers and responsibilities set forth in Exhibit D attached hereto.” CP 991. Numerous other provisions treat the Association and the Board interchangeably. *See, e.g.* Section 3.3 (providing the “Association” with

an easement for maintenance “or for any other purpose reasonably related to the performance *by the Board of its* responsibilities under this Declaration.”); Section 4.1 (requiring owners to pay the Association assessments “in a manner prescribed by the Board.”); Section 5.2.2 (owner disputes “addressed to the Association” shall be decided by the Board, “and the decision of the Board shall be final and binding on all parties); and Article 6 (authorizing the “Board” to obtain insurance in section 6.1, then referring to the “insurance procured by the Association” in Section 6.2) CP 986, 989-90. Thus, the Association’s assertion that the Board has the exclusive authority to act on its behalf unless the documents say otherwise, is neither “inaccurate and/or misleading,” as Appellants claim,⁵ it is the result of fairly straightforward reading of the HOA Act and the CC&Rs and a fundamental understanding of how corporations function.

2. *The Association has the Exclusive Authority to Maintain the Road Easement.*

Appellants also appear to claim that members of an association have concurrent authority to maintain common areas like the Road Easement, but have cited no authority in support of this claim. The Association is charged with maintaining the common areas which, in Spring Creek, is the Road Easement. Under the HOA Act, the Association

⁵ Brief of Appellant, p. 13.

is given the power to not just maintain, but to “*Regulate* the use, maintenance, repair, replacement, and modification of common areas.” RCW 64.38.020(6) (emphasis added). Consistent with this charge, the CC&Rs, in a section called “Repair and Maintenance *Rights and Duties* of Association,” specifically state that the Association is to maintain the “Easements.” Appellants’ claim that the maintenance duty is not a maintenance “right” completely contradicts the plain language of the CC&Rs themselves. Nowhere in the HOA Act or the CC&Rs does it state that any individual owner has a right to make any determination as to the common areas other than the Association Board, which makes sense because the whole point of having an elected Board is to make those types of decisions. Allowing individual owners to interfere with the Association’s maintenance would, as this case demonstrates, create significant, unresolvable conflict.

As demonstrated in its summary judgment motions in superior court and here, the Association reasonably exercised its authority to maintain the common areas, enforce its CC&Rs, and assess its members in strict compliance with the HOA Act and the CC&Rs, while Appellants, on the other hand, interfered with that maintenance, refused to comply with the CC&Rs, and refused to pay. Thus, the trial court’s decision should be affirmed.

C. Summary Judgment on the Association’s Affirmative Claims Was Appropriate.

In the exercise of the rights and obligations enumerated above, the Association levied two types of assessments against the Heberts: Regular Assessments and Compliance Assessments. Regular Assessments, more commonly known as “HOA dues,” are levied pursuant to the Association’s budget representing the estimated common expenses of the Association. Compliance Assessments are assessments arising out of the Association having incurred costs to enforce the provisions of the governing documents. Appellants’ undisputed nonpayment of those assessments properly resulted in summary judgment below, but not before Appellants inflicted additional injury upon the Association and its other members by continually refusing to pay while delaying the inevitable judgment. These actions reinforce the need to strictly adhere to the decision in *Panther Lake*, which provides that nonpayment of assessments is *not* a remedy available to owners, even if members have a legitimate dispute as to the basis of those assessments. As was demonstrated to the trial court and is repeated below, the Heberts’ ever-changing excuses for nonpayment were far from legitimate, yet the Association has suffered – and continues to suffer – significant damage resulting from the Heberts’ nonpayment.

1. Summary Judgment with respect to Regular Assessments was Appropriate.

In its Renewed Motion, the Association established all elements of its prima facie case that Appellants were delinquent in the payment of

Regular Assessments. None of the facts in support of these elements was disputed then and none are disputed now. In fact, Appellants do not even address the delinquency for Regular Assessments in their Opening Brief *at all*. As a general rule, unchallenged findings of the trial court will be treated by this Court as “verities on appeal.” *Fuller v. Employment Sec. Dep't of State of Wash.*, 52 Wn. App. 603, 605, 762 P.2d 367 (1988) (citing *In re Santore*, 28 Wn. App. 319, 323, 623 P.2d 702, *review denied*, 95 Wn.2d 1019 (1981)). The Association’s prima facie case is restated briefly below.

Both the HOA Act and the Spring Creek CC&Rs give the Board the authority to levy assessments for the Association’s common expenses. RCW 64.38.020(2) provides that the Association may “adopt and amend budgets for revenues, expenditures and reserves, and impose and collect assessments for common expenses from owners.” The budgets are then to be approved in accordance with RCW 64.38.025(3), which requires that the Association set an owner meeting to consider the budget and unless, at that meeting, owners holding a majority of the voting rights vote *against* the budget, the budget passes. Each owner’s share of the budget are the Regular Assessments determined by the CC&Rs. The Spring Creek CC&Rs require that each of the eight lots pay an equal share of the Association’s common expenses.

As noted in detail in the Association’s Renewed Motion and

above, the Association proposed and ratified budgets for 2017, 2018 and 2019 in strict accordance with the statutory budget ratification requirements⁶ and produced evidence that the budgets passed each year. None of these facts or the applicable law has been disputed. Similarly, Appellants do not dispute that have not paid a single dime of their Regular Assessments since 2017. Having established through the use of undisputed facts applied to unchallenged HOA law and provisions of the Spring Creek CC&Rs that the Association lawfully levied Regular Assessments upon the Heberts since 2017 that the Heberts have never paid, summary judgment was more than appropriate – it was mandatory. Thus, the trial court’s decision with respect to Regular Assessments should be affirmed.

2. Summary Judgment With Respect to Compliance Assessments Was Appropriate.

In its motions for summary judgment, the Association demonstrated that the Compliance Assessments the Heberts refuse to pay resulted from the Association’s enforcement of the CC&Rs in strict compliance with the HOA Act. In response to the First Motion, the Heberts wholly ignored the issue of the Compliance Assessments. In

⁶ The HOA Act applied to the budgets in 2017 and 2018, but the Washington Uniform Common Interest Ownership Act (“WUCIOA”) applied in 2019. *See* RCW 64.90.080. However, the relevant procedures in the WUCIOA provision at RCW 64.90.525, remained the same as those in the HOA Act in RCW 64.38.025(3).

response to the Renewed Motion, they concocted a dispute of fact, but it directly contradicted their counsel's representations and therefore, was inadmissible. Now, on appeal, they have doubled down on the patently false statements and added an entirely new legal argument – that the Association had no authority to enforce the CC&Rs. Both of these arguments are without merit and therefore, the trial court's decision should be affirmed.

a. The Association Produced Evidence in Support of its Prima Facie Case of Unpaid Compliance Assessments.

Some of the Assessments sought to be collected in this matter derive not from the budget process, but from the Association's enforcement of rights and obligations under the CC&Rs and the Heberts' refusal to comply. These "Compliance Assessments" are chargeable to the owners under the HOA Act and the CC&Rs as long as the homeowner association complies with statutory prerequisites designed to provide owners with a modest amount of due process known as "notice and an opportunity to be heard."

As detailed above, the Board determined in July of 2017 that the boulders that the Heberts admittedly placed within the roadway and the often-locked gate that blocked the road interfered with the Association's maintenance of the Road Easement and with ingress and egress. This determination was supported by testimony of owners and the Association's snow plow contractor, Benito Chavez, who described the

dangerous situation the boulders and gate created. Thus, the Board directed counsel to prepare and send notice to the Heberts regarding the violation, to demand removal of the obstructions, and advise the Heberts of their right to a compliance hearing. A hearing was scheduled, but when the Heberts declined to attend, the Association waited as long as was reasonably possible before snow threatened, then hired Mr. Chavez to remove the boulders and gate and charge the Association. The Association then provided the Heberts with the invoices and demanded payment. But the Heberts never paid. These undisputed facts clearly establish their Association's right to enforce the CC&Rs and collect the costs thereof from the Heberts.

b. The Argument that the Association Had No Authority to Enforce Its Governing Documents Ignores HOA Law and the CC&Rs.

The Heberts never before argued, as they now do, that the Association was without legal authority to enforce the CC&Rs. As such, this argument should be disregarded under RAP 9.12, but because it can also be easily disproven, the merits of the argument are addressed here. Appellants' claim that the Board does not have the authority to determine whether the CC&Rs have been violated or to enforce the governing documents in general wholly ignores the provisions of the HOA Act and the CC&Rs and defies common sense.

The HOA Act provides the Association with the authority to levy charges against owners for acts in violations of the governing documents

“after notice and an opportunity to be heard by the board of directors.” RCW 64.38.020(11). In addition to this specific power, the Association is given the broad authority to exercise “any other powers” that are conferred by the governing documents, that could be exercised by a nonprofit corporation, or that are “necessary and proper for the governance and operation of the association.” RCW 64.38.020(12), (13), (14). These broad powers are reinforced by the broad remedy and fee provision in RCW 64.38.050 which provides, “Any violation of the provisions of this chapter entitles an aggrieved party to any remedy provided by law or in equity,” adding “The court, in an appropriate case, may award reasonable attorneys’ fees to the prevailing party.” Finally, because the definition of “Assessment” in the HOA Act includes “all sums chargeable” to owners in the exercise of the Association’s powers in RCW 64.38.020, the costs of enforcing the governing documents constitute assessments.

Directly contrary to Appellants’ unsupported claim that “the plain language of the CC&Rs do not endow the Association with such broad powers,”⁷ the CC&Rs’ endowment could not be much broader, giving the Association the power to do “any and all things” a corporation can 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.” CP 997. Moreover, the exact

⁷ Brief of Appellant, p. 10.

power that Appellants claim the Association does not have directly follows this incredibly broad grant of authority and is described as a *primary function* of the Association:

Without limiting the generality of the foregoing, the primary functions of the Association shall be ***the enforcement of the covenants***, maintenance, operation and repair and insurance of the entry statement, private road easements over and across the Property for the purpose ingress and egress to the Lots, . . .”

Id. (emphasis added). Thus, there can be no doubt that the Association had the authority to enforce the provisions of the CC&Rs subject only to explicit restrictions on that authority. Because Appellants have identified no such explicit restrictions, their new legal argument fails.

Appellants’ claims also defy common sense. If a homeowner association Board does not have the authority to determine that a violation has occurred, then how would the provisions be enforced? Is it Appellants’ position that every homeowner who ever violated a covenant or rule is immune unless a lawsuit is commenced against them? And why would the HOA Act require the Association to give an owner “notice and an opportunity to be heard” regarding a violation if HOA Boards have no authority to determine if such a violation occurred?

The clear answer to these questions is that the Board *does* have the authority to make determinations regarding violations of the governing documents and that to protect owners, the HOA Act requires some modest amount of due process in the form of notice and an opportunity to be heard

before the Board before corrective action can be taken. Thus, Appellants' new argument, even if considered, does not require reversal here.

c. The Supposed Dispute as to Whether Appellants Received an Opportunity to be Heard was Properly Disregarded by the Court.

Perhaps to justify their failure to deposit undisputed assessments into the court registry as promised, when the Association's motion was renewed, the Heberts attempted to create a dispute of fact by concocting an excuse for not attending the September 5 compliance hearing that contradicted real-time assertions by their own attorneys. This conflict rendered the so-called "evidence" inadmissible and therefore, insufficient to prevent summary judgment.

As detailed above, evidence was produced showing that a compliance hearing was scheduled at the Heberts' request for September 5, only to be cancelled by them on August 31 – *five days before the hearing*, when the Association would not accede to the Heberts demands to convert the compliance hearing into "mediation" with someone they had personally hired or a work session where the Heberts planned to tell the Board how the Association should be run. Remember that the HOA Act only requires that the Association provide its members with an "opportunity" to be heard; the statutes do not actually require a hearing. Failing to exercise a known right results in waiver. "Waiver is an equitable principle that can apply to defeat someone's legal rights where the facts support an argument that the party relinquished their rights by

delaying in asserting or failing to assert an otherwise available adequate remedy.” *Albice v. Premier Mortg. Servs. of Washington, Inc.*, 174 Wn. 2d 560, 569, 276 P.3d 1277 (2012). In numerous contexts, Washington courts have held that failing to take advantage of the “opportunity” for a hearing results in waiver of that right. *See Plein v. Lackey*, 149 Wn.2d 214, 67 P.3d 1061 (2003) (failure to object to foreclosure waives right to hearing); *State v. Townsend*, 2 Wn. App. 2d 434, 409 P.3d 1094 (2018) (despite constitutional right thereto, evidentiary hearing in criminal case may be waived); *In re Dependency of E.P.*, 136 Wn. App. 401, 149 P.3d 440 (2006) (parental rights hearing is waived by failing to appear).

Appellants never produced any admissible evidence tending to show that the Association had somehow failed to meet its prima facie case relating to the Compliance Assessments. In response to the Association’s First Motion, Appellants did not dispute the Compliance Assessments at all. As a result, the trial court gave Appellants a chance to narrow the issues in the case by depositing the undisputed assessments into the court registry. Despite their representations to the court, the Heberts failed to make any such deposit, forcing the Association to bring a second motion to obtain the relief it was entitled to in the First Motion.

The evidence produced in support of the Renewed Motion established that the Association gave the Heberts specific notice of the problems and an opportunity to attend a compliance hearing scheduled for September 5. In her deposition, Ms. Sullivan attempted to create a dispute of fact by telling a dramatic story of how “the hearing couldn’t happen

because we were evacuating our horses and our family . . . because the Jolly Mountain fire was coming up over the ridge” and that “the board said, Well, we’re sorry, but that’s your shot and we’ll evaluate everything you’ve turned in” and that “they never heard from them again.” CP 385-86. This fictional tale was not only uncorroborated, it directly contradicted their attorney’s correspondence and Mr. Hebert’s email cancelling the hearing *days prior* to September 5. CP 657. A party cannot create a dispute of fact sufficient to defeat summary judgment by contradicting their own statements. *Baldwin v. Silver*, 165 Wn. App. 463, 472, 269 P.3d 284 (2011). Nor can they do so with “conclusory statements of fact.” *Id.* Thus, the court was justified in disregarding these claims, summary judgment was appropriate then and affirming that decision is appropriate now.

D. Appellants’ Argument that the Heberts Did not Violate the Governing Documents is Misplaced.

Perhaps because the Heberts’ liability under homeowner association law is so clear, Appellants insist on ignoring the applicable provisions of the HOA Act and the CC&Rs and instead, focus on legal theories that are completely inapplicable to the present case. This refusal to acknowledge the existence of HOA law is not just the fundamental flaw of this appeal, it underlies all of the Heberts’ actions to date: The Heberts simply refuse to acknowledge that the purchase of their property came with specific restrictions of the CC&Rs and a governance structure that they alone do not control.

Appellants' claims fail for two primary reasons. First, the Board's decision as to whether or not the Heberts' actions violated the CC&Rs is protected by Washington's business judgment rule as specifically applied to homeowner associations. Second, their claim that the Association previously permitted them to install the gate was unsubstantiated and irrelevant.

1. *The Board's Determination that Appellants Violated the CC&Rs By Placing Boulders and a Gate Over the Road Easement is Protected by the Business Judgment Rule.*

As addressed in co-counsel's motion to dismiss the Heberts' affirmative claims, the Board is the exclusive manager of the Association under both the HOA Act and the NPCA and as such, its decisions are subject to the *Riss v. Angel* business judgment rule, which prohibits a court from substituting its judgment for that of the Board unless the board breached some duty in making that determination.

The Association's Board is the exclusive manager of the Association's affairs under both the NPCA and the HOA Act and as such, the directors are required to exercise the degree of care and loyalty required of an officer or director of a corporation organized under the NPCA in the performance of their duties. 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).

The point of these duties is to set a standard for Board decisions; if the standard is met, the decision stands, but if has not been met, then the decision is assailable. In other words, the business judgment rule gives effect to the duties by insulating 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). Otherwise, any member of a homeowners' association or nonprofit corporation to sue to have its decisions and ideas substituted for that of the Board and such communities and corporations would not be able to do business.

Courts are reluctant to interfere with the internal management of corporations and generally refuse to substitute their judgment for that of the directors. . . . The "business judgment rule" immunizes management from liability in a corporate transaction undertaken within both the power of the corporation and the authority of management where there is a reasonable basis to indicate that the transaction was made in good faith.

Nursing Home Bldg. Corp. v. DeHart, 13 Wn. App. 489, 498, 535 P.2d 137 (1975) (internal citation omitted).

In the context of a corporation that is also a homeowner association, a version of the business judgment rule applies as espoused in *Riss v. Angel*, which specifically states that 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 612, 632, 934 P.2d 669 (1997). This analysis defers to the Board's authority to manage the HOA and gives effect to the Board's duty of care to its members.

Applying the *Riss* business judgment rule, whether or not the Heberts violated the CC&Rs is really not the issue; the issue is whether the Board violated some duty or engaged in fraud, dishonesty or incompetence in making the determination that it did. The Heberts did not produce any evidence in support of a breach of a duty to the trial court. Instead, they ask this Court to do what the trial court properly declined to do: to find that *in their judgment*, the placement of the boulders and gate were no problem. This challenge to the sufficiency of evidence produced by the Association is wholly misplaced on summary judgment.

While Appellants correctly state that the business judgment rule only applies to "management",⁸ their argument appears to be that business judgment rule only applies to immunize individual directors from personal liability. Yet they cite no authority equating "management" with the individual directors. In fact, the only authority cited in their entire argument is to *Para-Med. Leasing, Inc. v. Hangen*, 48 Wn. App. 389, 395, 739 P.2d 717 (1987), which reinforces of the applicability of the business judgment rule to management functions:

⁸ Brief of Appellant, p. 33.

Although the ‘business judgment’ rule is usually stated in terms of director functions, it is no less applicable to officers in the exercise of their authority and may be applicable to controlling shareholders when they exercise their more extraordinary management functions.

Id. In other words, the court explained that the rule protects management decisions, not specific people.

Appellants refusal to acknowledge this fundamental concept of corporate and HOA law – that the Board manages the HOA – underlies most of their inapplicable arguments as well as their misplaced outrage that the Board “considered it their job to make a legal determination of whether the language of the CC&Rs prohibited the Heberts’ gate and Boulders.”⁹ This *is* the Board’s job. The directors have duties to the Association as a whole to act in the best interests of the Association and are specifically charged in the CC&Rs with enforcement of its provisions. If interpretation of its own documents is not the role for the Board, then whose role is it? The Heberts obviously want it to be their job, but under both homeowner association law and corporate law, *the Board manages the corporation.*

Under Washington law, where, as here, the corporate management is charged with enforcing, and therefore interpreting, its own governing documents, and where the board does so consistent with its statutory duties, that decision is protected by the *Riss v. Angel* business judgment rule, requiring Appellants to produce some evidence of wrongdoing on the

⁹ *Id.*, p. 18.

part of the decision maker to survive summary judgment. They have completely failed to do so and therefore, summary judgment was appropriate.

2. *Appellants' Claim that the Gate was Installed With Permission of the Association Was Unsubstantiated and Irrelevant.*

The Heberts admit that they installed their gate blocking the Road Easement, but have doubled down on their unsubstantiated claim that the 2005 meeting minutes show that the Association approved the installation. Importantly, however, whether the gate was placed there permissively years ago is simply not relevant. As detailed above, the Association submitted clear evidence in support of its Renewed motion that the gate obstructed the Road Easement, made it more difficult to plow snow off of the roads, and posed a serious safety concern. Thus, the Board reasonably determined that the gate violated the provisions of the CC&Rs and needed to be removed.

E. *Appellants' Newly Raised Defenses to Enforcement of the CC&Rs are Legally Inapplicable and Should Not Be Considered.*

In its Opening Brief, Appellants raises a number of brand new legal arguments in defense of the Heberts' placement of the gate and boulders across the Road Easement that were not only not argued on summary judgment, they *were never even asserted in the case*. See CP 1035-42. As a threshold matter, these defenses were waived by failure to

assert them in the Answer and under RAP 9.12, but even if considered, they are simply not applicable in this context.

Affirmative defenses are waived if a defendant has been dilatory in asserting the defense. *Lybbert v. Grant County*, 141 Wn.2d 29, 39, 1 P.3d 1124 (2000). Having never raised the issues of statute of limitations or prescriptive easement before now, these defenses have clearly been waived. As noted in *King v. Snohomish Cty.*, 146 Wn.2d 420, 424, 47 P.3d 563, 565 (2002), “The doctrine is designed to prevent a defendant from ambushing a plaintiff during litigation either through delay in asserting a defense or misdirecting the plaintiff away from a defense for tactical advantage.”

Moreover, appellate review of summary judgment is restricted to the issues called to the attention of the trial court. 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. The purpose of the longstanding Rule is to “effectuate the rule that the appellate court engages in the same inquiry as the trial court.” *Mithoug v. Apollo Radio of Spokane*, 128 Wn.2d 460, 462, 909 P.2d 291 (1996). Appellants should not treat an appeal from summary judgment as a second – or in this case, third – opportunity to produce better evidence or argument than they presented to the trial court. The Association therefore

moves to strike all portions of the Brief of Appellants relating to prescriptive easement or statute of limitations. Out of an abundance of caution, however, the Association addresses the inapplicability of each of the novel theories below.

1. Appellants' Arguments Regarding Interference with Easement Rights Ignores the Applicability of HOA Law.

Appellants' argument that "the only grounds" for the Association to complain about the boulders and gate across the common area Road Easement would be interference with the Association's easement rights¹⁰ completely ignores the entire body of homeowner association law including the specific citations to the HOA Act referenced in the Association's summary judgment motions and here. This is not a case where one landowner has an easement over another landowner's property and in the absence of specific guidance, a court has to determine whether one of the parties interfered with the other's property rights. Here, we have specific guidance. We have 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. Only by ignoring all of this would the cases cited by Appellants be applicable in any way. Even had Appellants raised these defenses with the trial court, they would not have prevented summary judgment. Thus, the court should affirm.

¹⁰ Brief of Appellants, p. 18.

2. *Appellants' Statute of Limitations Defense is Unsupported.*

While raising the affirmative defense of statute of limitations on appeal from summary judgment is clearly estopped under fundamental concepts of waiver and RAP 9.12, the defense itself is fundamentally flawed. Appellants baldly assert that “If, in fact, the Heberts’ gate and/or boulders constituted a breach or violation of the CC&Rs, such occurred in 2004-2005.” Brief of Appellants, p. 27. This conclusory statement about when a cause of action for violation of the governing documents would have accrued is wholly without support. The Association, on the other hand, produced evidence that the existence of the boulders and gate interference with its obligatory maintenance of the Road Easement *in 2017*. In other words, up until they boulders and gate were removed at the Association’s expense in 2017, the violations were ongoing. Thus, the statute of limitations claim, in addition to being a new claim on appeal, is unsupported and cannot be considered now.

3. *Appellants Cannot Prevail on a Defense of Prescriptive Easement when they have Already Sworn that the Use as Permissive.*

Despite never mentioning this defense before, Appellants now claim that they *could have* established a prescriptive easement in defense to their violation of the CC&Rs *if* they had not already testified that the use was permissive. The idea that this Court should reverse the trial court’s order on summary judgment based the *hypothetical possibility* that

Appellants *could have* demonstrated a prima facie case of prescriptive easement is galling, but to ask the Court to consider evidence in direct contravention of their sworn testimony that completely vitiates one of the primary elements of the defense is truly absurd.

From the very beginning of their argument, Appellants admit, “The Heberts did not bring a claim of prescriptive use because they considered their use to be permissive rather than hostile.”¹¹ But they didn’t just “consider” their use to be permissive, they asserted permissive in the allegations of their *pro se* complaint and submitted sworn statements claiming that the use was permissive all along. The fact that Association produced evidence showing that the installation was not approved would not allow them to contradict their prior, sworn statements in order to manufacture evidence in support of this defense.

Nor have Appellants even tried to establish that the Association somehow had the ability to prevent the use before 2017. As the Court will recall, the undisputed facts establish that Mr. Hebert controlled the Association for a significant amount of time, only resigning in early 2017. CP 269-70. Thus, even if Appellants could lawfully and ethically reverse

¹¹ Brief of Appellant, p. 29.

course and claim that the use was hostile, the “evidence” of the existence of a prescriptive easement is far from established.

F. This Case Epitomizes the Need for Strict Adherence to *Panther Lake*.

In the summary judgment motions below, the Association demonstrated the significant harm the Heberts’ nonpayment has caused to the Association and the community. Not only have the other seven lot owners had to cover the Heberts’ fair share for the last three years, the costs of collecting and bringing the Heberts into compliance have been borne by those same seven lot owners. But more than that, the Heberts’ actions in refusing to pay assessments during the case in violation of *Panther Lake*, demonstrate the need for this Court to affirm its holding and enforce its use.

This case represents the exact scenario the *Panther Lake* court was trying to prevent when it held that “lot owners are not permitted to compound the Association’s problems by unilaterally withholding assessments.” *Id.* at 591. Under *Panther Lake*, a lot owner simply has no right to refuse to pay homeowner association assessments, even if they disagree with the basis of those assessments. *Panther Lake Ass’n v. Juergensen*, 76 Wn. App. 586, 590-91, 887 P.2d 465 (1995). In *Panther Lake*, several owners stopped paying assessments based on their contention that “the Association’s decision to build, pay for or otherwise

accept the road as built [was] unreasonable and an abuse of discretion.” *Id.* at 589. In other words, the objecting owners claimed that they were entitled to refuse to pay their assessments because they challenged the basis of those assessments. The court rejected this argument, holding that while owners may dispute association actions, their remedies are limited to “making their wishes known to the Association, casting their votes, and seeking declaratory relief if the Association acts beyond its authority.” *Id.* at 590-91.

Despite Appellants’ superficial attempt to distinguish *Panther Lake* from the situation here, a closer review reveals that the *Panther Lake* facts are not distinguishable in any relevant way. First, both cases arose out of the Association’s suit to foreclose on a member of the association for failure to pay assessments. *Id.* at 586. Second, contrary to Appellants’ claim that “the homeowners were not contesting the HOA assessments themselves,”¹² that is *exactly* what the defendants were doing. The second sentence of the reported case provides: “Homeowners defended based on alleged deficiencies in capital improvement *for which assessments were made.*” *Id.* at 586.

In *Panther Lake*, the owners’ nonpayment of assessments related to construction of a new road resulted in the Association being unable to

¹² Brief of Appellant, p. 30.

pay the contractor who did the work. *Id.* at 588. Thus, the contractor filed a lien against the lots. *Id.* In defense of their nonpayment of assessments, defendants claimed an “offset”, arguing that such offsets are typically allowed in lien foreclosure actions, but the court disagreed, stating:

Allowing such an offset would prevent the Association from recovering the amount it expended on [Defendants’] behalf. Such an offset would impoverish the Association and its other members and create a windfall for [Defendants].

Id. at 591. Since *Panther Lake* was a case of first impression, the homeowner association in that case relied upon a Pennsylvania case that held: “Appellant’s actions in withholding his condominium assessments, even assuming that he has suffered the property damage he alleges, is not justified by the language of the [bylaws], the statutes of this Commonwealth, or general public policy decisions.” *Id.* at 590 (citing *Rivers Edge Condominium Ass’n v. Rere, Inc.*, 390 Pa.Super. 196, 568 A.2d 261 (1990)). While expressly adopting the public policy expressed in *Rivers Edge*, the *Panther Lake* court acknowledged the stronger argument in *Rivers Edge*: “the bylaws of the association in *Rivers Edge* specifically required that assessments be paid even if the owner was not receiving the required services. . . . No such provision appears in this Association’s bylaws.” *Id.*, n. 2 (internal citation omitted). In this respect, the present case is even stronger than *Panther Lake*, as the Spring Creek

CC&Rs provide:

No owner of a Lot may exempt himself or herself from liability for his or her contribution toward the Common Expenses by waiver of the use or enjoyment of the [roads] or by the abandonment of his or her Lot.

CP 986 at §4.1. If abandonment of a lot or nonuse of the roads is not a legitimate basis to refuse to pay assessments, then disagreeing with decisions of the Board or alleging offsets based on as-yet-unproven property damage claims simply cannot justify nonpayment.

The “policy” referred to in *Panther Lake* is the concept that while owners have the right to disagree with Board decisions, they cannot be allowed to withhold payment in protest because of the damage it does to the Association and the unfair leverage it provides to the owner. This long-established rule may sound harsh, but the policy is sound. A homeowners’ association depends upon the income from assessments to pay its expenses. If owners could refuse to pay assessments whenever they disagreed with the elected Board’s decisions, the Association would not be able to operate. This is especially true where, as here, an Association has so few members. When one of only eight members refuses to pay, the Association cannot simply reduce the budget or refuse to pay for services because it has an obligation under the HOA Act and the CC&Rs to maintain common areas, and it necessarily has costs associated with doing so. When an owner refuses to pay, an Association can become “impoverished” requiring additional assessments to make up the shortfall, resulting in a disproportionate burden on the other lots.

The scenario *Panther Lake* is designed to prevent is exactly what occurred in this case. Throughout the pendency of the case, the Heberts excuses for nonpayment changed and varied dramatically. Even now, three years later and after three summary judgment motions, they continue to raise new inapplicable defenses and other red herrings in the hope that their obligation to pay will forever be forestalled. Meanwhile, the Association has had to increase its budgets to account for the Heberts' nonpayment and the neighbors have to pay more because the Heberts' refuse to pay. On top of that, the other owners have to pay the significant costs and fees reluctantly but necessarily incurred by the Association to get the Heberts to comply.

Put bluntly, in a situation like this, nonpayment is *leverage*: every dollar spent on this case and every day that goes by without collection represents another chance that the Association breaks; that the other members get fed up with paying more than their fair share, wondering why they should pay when the Heberts haven't had to for three years. In short, this is how communities fail.

By not requiring members of a homeowner association to pay their assessments while they dispute them, courts encourage the Heberts and other homeowners like them to make every frivolous claim, cause every delay, ignore the existence of clearly applicable law, and raise every red herring that might possibly forestall payment, all in the hope that the Association will not be able to continue the fight. That is why this Court must not only affirm the trial court's ruling in this case, but affirm the

holding of *Panther Lake* and unambiguously require homeowners to pay their assessments, even during the pendency of any challenge thereto.

V. CONCLUSION

There are no genuine issues of material fact regarding Appellants' nonpayment of the assessments lawfully levied by the Association. The Heberts have blatantly violated the CC&Rs and have demonstrated time and time again that they will not recognize the authority of the Association or the CC&Rs. As a result, the Association was entitled to summary judgment in the trial court and is entitled to denial of this appeal. But just as important is the need for this court to affirm the decision in *Panther Lake* to prevent homeowners from holding their communities and neighbors hostage to their malfeasance. Many communities and Boards may have backed down in the face of the damage that the Heberts have repeatedly inflicted. Spring Creek has not. The Association therefore respectfully requests that this Court affirm *Panther Lake* and give good communities relief from owners who seek to do them harm.

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For all of the above reasons, Appellant respectfully requests that this Court affirm the judgment remand for proceedings consistent therewith.

Respectfully submitted this 15th day of June, 2020.

BARKER MARTIN, P.S.

A handwritten signature in blue ink, appearing to read "M. Hawkins", written over a horizontal line.

Marlyn Hawkins, WSBA No. 26639
Alexis Ducich, WSBA No. 40445
Attorneys for Respondent

BARKER MARTIN, P.S.

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