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**SUPREME COURT OF THE STATE OF WASHINGTON**

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RIVERVIEW COMMUNITY GROUP,

Petitioner,

v.

SPENCER & LIVINGSTON, a Washington Partnership and/or  
its successors-in-interest; GEORGE T. and SHEILA  
LIVINGSTON, husband and wife, and the marital community  
composed thereof; and S.O.S., LLC, a Washington Limited  
Liability Company, and/or its successors-in-interest,

Respondents.

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**RESPONDENT S.O.S. LLC'S ANSWER TO RIVERVIEW  
COMMUNITY GROUP'S PETITION FOR REVIEW**

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 ORIGINAL

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## I. INTRODUCTION

Riverview Community Group ("Riverview") brought suit in Lincoln County Superior Court seeking an equitable servitude that requires different entities that developed separate subdivisions to collectively operate and maintain a golf course despite express intent written to the contrary. Riverview's suit was dismissed by the superior court and the dismissal was affirmed by Division Three of the Court of Appeals. Riverview now petitions for Supreme Court review.

Respondent S.O.S. LLC submits this Answer requesting that Riverview's Petition be denied. Riverview fails to show that any of the standards governing acceptance for Supreme Court review set forth in RAP 13.4(b) apply here. The Court of Appeals decision is consistent with current Washington law and there is no basis to find that the issues raised in the Petition involve substantial public interest. The Court of Appeals correctly held that Riverview is not entitled to an equitable covenant here, aptly describing Riverview's request for relief as "irrational." The Petition should be denied.

## II. IDENTITY OF RESPONDENT

Respondent S.O.S., LLC ("SOS") is a Washington Limited Liability Company. SOS is represented by the law firm of Breskin Johnson & Townsend, PLLC.

## III. COURT OF APPEALS DECISION

On February 14, 2013, Division Three of the Court of Appeals affirmed an order issued by the Honorable David Frazier granting SOS's motion for summary judgment and dismissing Riverview's suit. Division Three reversed a separate order issued by Judge Frazier finding that Riverview failed to join individual landowners as necessary parties under Civil Rule 19, but Riverview challenges the Court of Appeals decision *only* as it relates to SOS's motion for summary judgment dismissing Riverview's claim for an equitable servitude.

## IV. STATEMENT OF THE CASE

This suit concerns two subdivisions that were separately conceptualized, platted, and sold by different entities. The subdivisions are commonly referred to as "Deer Meadows" and "Deer Heights." CP 2.

### A. Deer Meadows

Deer Meadows consists of three plats which are located south of the Deer Heights subdivision. CP 4-7. The Deer Meadows subdivision was developed by a now inactive partnership, Respondent Spencer and Livingston, and subsequently acquired by Respondent George T. and Sheila Livingston, Deer Meadow Development, Inc., and/or Deer Meadows, Inc.<sup>1</sup> CP 2-3. Deer Meadows is adjacent to an 18-hole golf course commonly known as the "Deer Meadows Golf Course Complex." CP 4-7 and 33; see *also*, CP 291.<sup>2</sup> The golf course is bordered in all directions by the Deer Meadows plats. *Id.*

The golf course was partially opened in 1994 by either the Spencer and Livingston partnership or Deer Meadows, Inc. CP 3, 7. Deer Meadows Golf, Inc. assumed ownership of the golf course in 1995 and remains the current owner.<sup>3</sup> *Id.* The golf course was completed in 1998 and fully operational until approximately 2007, when it fell into disrepair. CP 8, 11-12. Riverview has made no

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<sup>1</sup> Deer Meadow Development and Deer Meadows, Inc. are not parties to Riverview's appeal but were named in Riverview's complaint. CP 1.

<sup>2</sup> Respondent SOS submitted a Google Earth map of the Deer Meadows and Deer Heights subdivisions. CP 291.

<sup>3</sup> Deer Meadows Golf, Inc. is not party to Riverview's appeal but was named in Riverview's complaint. CP 1.

allegation that SOS has – or ever had – any ownership interest in Deer Meadows or the Deer Meadows Golf Course Complex. See CP 1-39.<sup>4</sup>

### **B. Deer Heights**

Deer Heights was subdivided by SOS and consists of three plats which were finalized and recorded between 1998 and 2003. CP 9-10, 378-82. Deer Heights is located north of Deer Meadows and does not border the golf course in any respect. *Id.* at 291. To promote Deer Heights, SOS offered to give purchasers free one-year memberships to the golf course when a lot was acquired in the Deer Heights subdivision. CP 9. Riverview makes no claim that SOS failed to fulfill any promise to provide a purchaser with a free one-year membership to the golf course. CP 1-39.

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<sup>4</sup> Riverview claims that *all* of the defendants “designed, marketed and platted” a golf course community. Petition at 3. However, there is no factual basis in Riverview’s Petition – or elsewhere in the record – to support Riverview’s sweeping claim. Riverview has made no attempt to conduct any discovery in this matter and relies on broad, undeveloped allegations that defendants acted as a joint venture, providing no evidence connecting SOS to the Deer Meadows subdivision, the Deer Meadows Golf Course Complex, or other entities Riverview named in the suit. See CP 9. Riverview claimed in its reply briefing to the Court of Appeals that Charlie Spencer, a member of SOS, was also a member of other entities named as defendants, Reply Br. at 21-22, but it is undisputed that Mr. Spencer died in 2005. CP 10. Riverview does not offer evidence proving the elements of joint venture, citing instead to conclusory allegations in its own briefing. Reply Br. at 21-22 citing CP 167-181 (Riverview’s Memo in Opposition to SOS’s Motion for Summary Judgment). As discussed below, any statements by Riverview’s members are inadmissible.

While Riverview alleges that SOS represented to purchasers that the golf course would continue to operate as a permanent fixture of the community, CP 10, no writing exists to support Riverview's claim. None of the three Deer Heights plats contain any reference to a golf course, nor do the deeds, real estate contracts, Covenants Conditions and Restrictions ("CC&Rs"), and public offering statements.<sup>5</sup> To the contrary, these documents contain integration clauses that disclaim the existence and applicability of any other agreements beyond what was memorialized in writing.<sup>6</sup>

No competent evidence exists to support Riverview's claim that SOS ever promised to affirmatively and perpetually assume responsibility for operating and maintaining a golf course. Riverview relies exclusively on inadmissible extrinsic evidence to support its theory that SOS promised the golf course would

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<sup>5</sup> CP 378, 380, 382 (Deer Heights plats); CP 313-375 (Deer Heights deeds and real estate contracts); CP 403-429 (Deer Heights CC&Rs); CP 383-402 (Deer Heights public offering statements).

<sup>6</sup> CP 330-331, 347, 356, and 374 (real estate contracts with merger clause stating no other agreements exist); CP 337 and 363 (real estate contracts without a merger clause but stating contract constitutes entire agreement); CP 387, 397 (public offering statements expressly disclaiming the existence of any other "promised, advertised or count-required amenities, improvements or structures not already noted elsewhere in this statement").

continue to operate.<sup>7</sup> CP 10. SOS has – and *never had* – an interest in the Deer Meadows Golf Course Complex and is thus without authority or ability to grant Riverview the relief sought. Riverview's Petition should be denied.

## V. ARGUMENT

### A. Riverview's Petition Does Not Meet Standards Governing Acceptance of Review Under RAP 13.4(b)(1) or RAP 13.4(b)(4)

Riverview asks the Court to review the decision below under RAP 13.4(b)(2), contending the order is in conflict with decisions of this Court, and argues that the Petition involves an issue of substantial public interest under RAP 13.4(b)(4). Both arguments should be rejected.

#### 1. The Court of Appeals Decision Does Not Conflict with Supreme Court Precedent

Riverview claims the Court of Appeals decision is in conflict with several decisions of this Court, including *Johnson v. Mt. Baker Park*, 113 Wash. 458 (1920), but fails to identify *how* the Court of Appeals decision conflicts with Supreme Court precedent. See Petition at 5-6. In fact, the Court of Appeals decision is consistent with the decisions cited by Riverview.

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<sup>7</sup> As discussed below, extrinsic evidence modifying a written agreement is not admissible and is also barred by RCW 5.60.030, the dead man statute.

*Johnson* involved the question of whether a church could be constructed in a subdivision that was restricted to residential uses. While the deed to the church did not contain the express residential use restriction, there was no dispute about whether the developer granting the deeds intended to limit the subdivision to residential uses: a residential use restriction was included in approximately 645 of the 650 deeds that had been issued. 113 Wash. at 460-61. Moreover, there was no dispute that the claimant church was aware of the use restriction because it had entered into a written agreement acknowledging the existence of the restriction in other deeds.<sup>8</sup> 113 Wash. at 461-62. *Johnson* stated unequivocally, the church "had complete notice of the restricted use plan[,]" a plan that "has been in all respects made public and known to each purchaser, and has been systematically carried out." *Id.* at 463-64. *Johnson* thus dispensed with the statute of frauds and enforced the use restriction based on equitable principles. *Id.*

The Court of Appeals holding is consistent with *Johnson*. Indeed, the Court of Appeals relied on *Johnson* to conclude that a restrictive covenant in a subdivision *could* be implied and need not

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<sup>8</sup> The church also agreed to hold the developer harmless if an action was filed against the developer for failure to include the restriction in the church's deed. 113 Wash. at 462.

comply with the statute of frauds. See Slip Op. at 23-24 *citing Johnson*, 113 Wash. at 466 (right in equity to demand property used only in a certain manner "is based on conduct, representations and acts which in justice, between man and man may not be repudiated"). Riverview's claim that the appellate court "abandoned" equitable principles, is belied by the appellate court's plain citation to *Johnson* in support of the conclusion that Washington does recognize equitable covenants. See Slip Op. at 24.

The Court of Appeals decision is also consistent with – not contrary to – other decisions of this Court cited by Riverview: these cases all acknowledge equity as a basis for restricting the use of property where the grantor's intent to do so is clear and manifest by *some* document. See, *Finch v. Matthews*, 74 Wn.2d 161 (1968) (rejecting city's claim that county's conveyance of road by ordinance and treasurer's deed to private party was ultra vires on equitable principles); *Nugget Properties, Inc. v. County of Kittitas*, 71 Wn.2d 760 (1967) (rejecting attempt to commence mining operations on property where predecessors expressly cancelled mining application and acquiesced to residential use for 35 years); *Shertzer v. Hillman Investment Co.*, 52 Wash. 492 (1909) (rejecting

developer's attempt to subdivide a platted, mapped, advertised, and improved public park on equitable principles). In each of these cases, the intent of the grantor was manifest not by self-interested testimony of the claimant, but by some written evidence.<sup>9</sup> Moreover, while these cases prevent changing uses which are contrary to clear manifestations of the grantor, they do not support Riverview's demand for relief, which seeks more than a mere use restriction and proposes to hold several parties responsible for affirmatively building, operating, and perpetually maintaining a failing golf course business. Slip Op. at 27.

Riverview also appears to request that the Court resolve a purported conflict between other decisions of this Court. Petition at 5 ("*[t]hese cases are also in conflict with the Supreme Court's decision in *Hollis v. Garwall*, supra...affirmed at the Court of*

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<sup>9</sup> While Riverview argued to the Court of Appeals that a *Deer Meadows plat* identified the Deer Meadows Golf Course Complex, App. Br. at 26, this has no bearing on SOS. *Shertzer*, 52 Wash. 494-95 (park appearing on plat contained within the at-issue subdivision). The plat cited by Riverview stated that it was for "Deer Meadow Tracts Plat No. 3" not Deer Heights. CP 34. Moreover, this argument was not raised to the trial court and it would be improper to consider here. *Talps v. Arreola*, 83 Wn.2d 655, 658 (1974). Riverview argued a contrary position to the trial court: "[n]o writing is required in this case." CP 175 and 181.

Appeals.”) Petition at 5 (emphasis added). This is not a proper use of discretionary review.<sup>10</sup>

To the extent Riverview claims conflict exists between the Court of Appeals decision and *Hollis v. Garwall*, 137 Wn.2d 683 (1999), Riverview again confuses the plain import of the Court of Appeals decision, which distinguishes *Hollis* because its holding “is not a test for creating covenants.” Slip Op. at 20 n. 15. “Rather, it is Professor Stoebuck’s test for interpreting whether an *existing* covenant is capable of binding successors in interest.” *Id. citing Hollis*, 137 Wn.2d at 691 (internal citation omitted) (emphasis added). There is no basis to find the Court of Appeals decision conflicts with *Hollis v. Garwall* because the Court of Appeals did not rely on *Hollis* to support its decision.

Riverview also claims that the Court of Appeals decision is in conflict with *Crafts v. Pitts*, 161 Wn.2d 16 (2007), stating “equity will not suffer a wrong to be without a remedy[.]” Petition at 5. *Crafts* has no bearing on this case and is plainly distinguishable. *Crafts* considered the narrow question of whether the right to specific

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<sup>10</sup> RAP 13.4(b)(1) and (b)(2) provide for review of a Court of Appeals decision if in conflict with a decision of the Supreme Court or another decision of the Court of Appeals, not for review of conflict between prior decisions of the Supreme Court.

performance was discharged in bankruptcy. There are no issues arising out of bankruptcy at issue before the Court here. Also, *Crafts* involved a dispute over a lease provision where there was no dispute about the parties' intent over the use of the land at issue – a lease clearly outlined the terms of the parties' agreement, which provided that the lessee was required to convey land if he failed to exercise a purchase option. Unlike *Crafts*, there is no writing supporting Riverview's claim that S.O.S. promised to operate and maintain a golf course. To the contrary, documents surrounding the purchase of lots in Deer Heights indicate nothing was promised beyond what was written in the real estate contracts and deeds. *Crafts* is inapplicable on its face.

*Crafts* is distinguishable for other reasons. *Crafts* involved the question of whether specific performance was properly compelled in light of a bankruptcy discharge. Specific performance, the court stated, is "uniquely a contractual remedy." 161 Wn.2d at 24. Riverview, by contrast, has not sought "specific performance" because Riverview has not alleged breach of contract.<sup>11</sup> Nor has

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<sup>11</sup> Riverview has not alleged a breach, presumably, because the parties' real estate contracts – and other written documents – rebut Riverview's legal theory. Riverview's claim was in equity, not law, which explains the Court of Appeals conclusion that the "statute of frauds does not apply[.]" Slip Op. at 23-24 citing *Johnson*, 113 Wash. at 464-65.

Riverview made any claim in its Petition for why money damages would be inadequate, a balancing required under *Craft*. 161 Wn.2d at 25-26. Riverview *could* have requested money damages as an alternative to seeking a servitude, but simply chose not to. See CP 1-39.

2. The Court of Appeals Decision Does Not Involve an Issue of Substantial Public Interest

Riverview makes little effort to justify review under RAP 13.4(b)(4), stating summarily that the state "has a significant public interest in regulating the misconduct of large real estate developers, like these defendants, and protecting Washington homeowners." Petition at 6. Riverview's conclusory allegation of "misconduct" should carry no weight: Riverview's suit was dismissed by the superior court and affirmed by the Court of Appeals. There is no factual basis to support Riverview's claim that SOS promised to operate and maintain a golf course, much less that SOS should be held responsible for building, operating and perpetually maintaining one. There is also no basis to conclude that the facts underlying Riverview's dispute are relevant to any other persons or property within Washington. Riverview's claims

against SOS border frivolity. Riverview's Petition should be denied.<sup>12</sup>

3. Riverview's Request for Relief is Inequitable on Other Grounds

SOS raised other issues below which further support denying Riverview's Petition. First, a servitude to build, operate, and perpetually maintain a golf course is contrary to the expressed written intent of SOS. Documents associated with the real estate transaction, including real estate contracts and the public offering statements, expressly disclaim the existence and applicability of any other agreements beyond what was memorialized in writing.<sup>13</sup> No other writing supports the inference that SOS contemplated operating and maintaining a golf course.<sup>14</sup> Riverview cited no case law to the Court of Appeals – and offers no authority to this Court –

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<sup>12</sup> Whether Riverview finds other conflict between the Court of Appeals decision and the cases cited is not discernible from Riverview's tersely written Petition. Riverview has failed to offer the "direct and concise statement of the reason why review should be accepted under one or more of the tests established in subsection (b)[.]" RAP 13.4(c)(7).

<sup>13</sup> CP 330-331, 347, 356, and 374 (real estate contracts with merger clause stating no other agreements exist); CP 337 and 363 (real estate contracts without a merger clause but stating contract constitutes entire agreement); CP 387, 397 (public offering statements expressly disclaiming the existence of any other "promised, advertised or count-required amenities, improvements or structures not already noted elsewhere in this statement").

<sup>14</sup> CP 378, 380, 382 (Deer Heights plats); CP 313-375 (Deer Heights deeds and real estate contracts); CP 403-429 (Deer Heights CC&Rs); CP 383-402 (Deer Heights public offering statements).

supporting the proposition that a grantor should be subject to a servitude which not only is unsupported by a writing but contrary to it.<sup>15</sup>

Second, extrinsic evidence which varies, contradicts or modifies the written word is inadmissible. *Hollis v. Garwall*, 137 Wn.2d 683, 695 (1999). Even if the Court were to conclude, despite inconsistencies with a written contract, a servitude *could* be created in equity, this is extrinsic evidence and inadmissible under well-established principles described in *Hollis*.<sup>16</sup> Riverview's reliance on oral statements SOS allegedly made to purchasers to modify the purchasers' real estate contracts with SOS is not admissible and contrary to *Hollis*. 137 Wn.2d at 695.

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<sup>15</sup> It would be inequitable to find a servitude against SOS based on the facts before the Court. If the purpose of equitable estoppel is to "prevent or avoid an injustice[.]" App. Br. at 21 *citing Chemical Bank v. WPPSS*, 102 Wn.2d 874, 904 (1984), this policy supports at least some writing describing the scheme to glean the grantor's intent, not adopting Riverview's position that dispenses with one. All of the cases cited by Riverview involve some evidence supporting the claim that the grantor intended to restrict the use of at-issue property. For this reason, even *Hollis* stated, the "elements which are necessary for finding an equitable restriction in the subdivision setting are: (1) a promise, in writing..." 137 Wn.2d at 691. While *Johnson* did not require a writing, there was nonetheless a written scheme creating restrictions on the land in the development. 113 Wash. at 460, 471.

<sup>16</sup> While extrinsic evidence may be admissible where there is ambiguity in a contract, 137 Wn.2d at 694, there is nothing ambiguous about the clauses in the purchasers' real estate contracts stating "there are no verbal or other agreements which modify or affect this agreement" or "this contract constitutes the entire agreement of the parties and supersedes all prior agreements written or oral." CP 330-31, 347, 356, 374 and CP 337, 363.

Third, even if the Court were to look to extrinsic evidence, the dead man statute, RCW 5.60.030, prevents interested parties from giving self-serving testimony about conversations or transactions with a dead person. See, *In re Marriage of Himes*, 136 Wn.2d 707, 728-29 (1998). Riverview's theory relies on testimony regarding statements made by former SOS members Charlie and Gloria Spencer. CP 168-70. Mr. and Mrs. Spencer are deceased. CP 200. This evidence would be stricken.

Finally, SOS has no possessory interest in the golf course and thus has no authority to grant Riverview the relief sought. This distinguishes SOS from *Johnson and Shertzer*, supra, which involved at least some written representation that corroborates claims about the grantor's intent and arose out of a developer's common ownership of property at issue.<sup>17</sup> It is undisputed that SOS does not have – and *never* had – a possessory interest in the golf course. CP 1-24. Riverview's relief – to the extent any is

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<sup>17</sup> This rationale also distinguishes SOS from the Oregon case heavily relied upon by Riverview below, *Mountain High Homeowners Ass'n v. Ward Co.*, 228 Or. App. 424 (2009), where the developer constructed the golf course within the subdivision, remained the owner of the golf course, and did not dispute responsibility for it financially and operationally. 228 Or. App. at 427. The Court of Appeal acknowledged these differences but it is unclear how this impacted the court's decision. See Slip Op. at 26.

available – is limited to an “original party or successor in possession.” *Hollis*, 137 Wn.2d at 691. SOS is neither.

## VI. CONCLUSION

The Court should deny Riverview’s Petition for Review because the Court of Appeals decision is consistent with precedent and Riverview has otherwise failed to meet any of the standards governing acceptance of a petition for Supreme Court review.

DATED this 15<sup>th</sup> day of April, 2013.

BRESKIN JOHNSON & TOWNSEND

A handwritten signature in black ink, appearing to read "B W Donckers", written over a horizontal line.

Brendan W. Donckers, WSBA No 39406  
Attorneys for Respondent S.O.S. LLC

**CERTIFICATE OF SERVICE**

I, Melissa Vizzare, certify and declare:

I am over the age of 18 years, make this Declaration based upon personal knowledge, and am competent to testify regarding the facts contained herein. On this 15th day of April 2013, I served true and correct copies of the document to which this Certificate is attached on the following in the manner listed below.

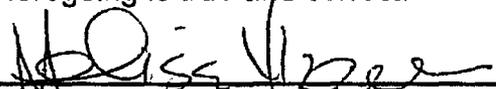
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I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

  
\_\_\_\_\_  
Melissa Vizzare, Legal Assistant

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The attached Answer to Petitioners' Petition for Review is for filing. Thank you.

*Riverview Community Group, vs. S.O.S LLC et al.*  
No. 88575-3

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