

75001-1

NO. 75001-1-I

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

E. DUANE GOLPHENEE, a married individual; and JOHN SOLIN,
a married individual,

Appellants/Plaintiffs

and

WILLIAM and SUSAN GOODMAN, husband and wife; MICHAEL
and JOAN LEDRESSAY, husband and wife; MICHAEL
SZEMILLER, an individual; and HUNTER and ANGELA NEWTON,
husband and wife;

Plaintiffs pursuant to RCW 7.24.110

v.

PONDILLA ESTATES COMMUNITY ASSOCIATION, a
Washington non-profit corporation,

Respondent/Defendant

AMENDED REPLY OF APPELLANTS

E. Duane Golphenee
Appellant *pro se*
583 Seaside Drive
Coupeville WA 98239
(360) 678-6543

John Solin
Appellant *pro se*
558 Pebble Beach Drive
Coupeville WA 98239
(360) 969-1227

2016 JUL 13 PM 12:00
COURT OF APPEALS DIV I
STATE OF WASHINGTON

TABLE OF CONTENTS

	Page
I. ARGUMENT	1
1. Action for Declaratory Judgment is Not Time-Barred	1
2. Trial Court Did Not Decide the Motion to Dismiss Under CR 56	3
3. Howard Patrick Affidavit is Irrelevant Hearsay . . .	4
4. 1991 Agreement is an Ongoing Contract	5
5. 1991 Agreement Lacks Consideration to Current or Former Pebble Beach Drive Lot Owners	6
6. All 31 Lot Owners in Pondilla Estates Benefit From the Bulkhead	8
7. Pebble Beach Drive Lot Owners Did Not "Entice" Gov't Lot 3 Lot Owners to Accept the 1991 Agreement	10
8. The HOA is the Representative and Agent of its Members	11
9. Affirmative Defense of Part Performance is Deemed Waived	13
10. None of the 24 Joint-Owners of Pebble Beach Drive Missing From the Deed Intended to Grant an Easement	14
11. All Servient Estates, Private Road, and Bulkhead Must Be Legally Described	15

TABLE OF CONTENTS (Con't)

12. The 1991 Agreement Must Contain All Terms Necessary to the Undertaking	17
13. Laches is a Disfavored Doctrine, and Not Applicable	17
14. 1991 Agreement is Not Divisible	19
15. 1991 Agreement May Not Be Reformed	21
16. 1991 Agreement is Vague and Ambiguous	21
17. Appeal is Not Frivolous	22
II. CONCLUSION	23

TABLE OF AUTHORITIES

Cases	Page
<i>Ben Holt Indus., Inc. v. Milne</i> , 36 Wn. App. 468, 470, 675 P.2d 1256, 1258 (1984)	13
<i>Berg v. Ting</i> , 125 Wn.2d 544, 549, 886 P.2d 564, 568 (1995)	15, 21
<i>Berst v. Snohomish County</i> , 114 Wash.App. 245, 251, 57 P.3d 273 (2002)	4
<i>Cary v. Mason Cty.</i> , 132 Wn. App. 495, 501, 132 P.3d 157, 160 (2006)	1, 2
<i>Cont'l Ins. Co. v. PACCAR, Inc.</i> , 96 Wash.2d 160, 167, 634 P.2d 291 (1981)	22
<i>Emter v. Columbia Health Servs.</i> , 63 Wash.App. 378, 384, 819 P.2d 390 (1991)	22
<i>Hanna v. Margitan</i> , 193 Wn. App. 596 (2016)	15
<i>Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc.</i> , 143 Wash. App. 345, 362, 177 P.3d 755, 763-64 (2008)	18
<i>Impehoven v. Department of Revenue</i> , 120 Wash. 2d 357, 841 P.2d 752 (1992)	4
<i>Kinney v. Cook</i> , 150 Wn. App. 187, 192, 208 P.3d 1, 3 (2009)	4
<i>Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.</i> , 120 Wash. App. 246, 254, 84 P.3d 295, 299 (2004)	19
<i>Maier v. Giske</i> , 154 Wn. App. 6, 16, 223 P.3d 1265	16

TABLE OF AUTHORITIES (Con't)

	Page
<i>O'Brien v. Hafer</i> , 122 Wn. App. 279, 283-84, 93 P.3d 930, 932 (2004)	12
<i>Pierce County v. State</i> , 144 Wash. App. 783, 813, 185 P.3d 594 (2008)	22
<i>Public Employees Mut. Ins. Co. v. Rash</i> , 48 Wash. App. 701, 740 P.2d 370 (1987)	23
<i>Rainier Nat. Bank v. Lewis</i> , 30 Wn. App. 419, 422, 635 P.2d 153, 155 (1981)	14
<i>Saletic v. Stamnes</i> , 51 Wn.2d 696, 699, 321 P.2d 547, 550 (1958)	20
<i>Schreiner Farms, Inc. v. American Tower, Inc.</i> , 173 Wn. App. 154, 159 (2013)	1
<i>Smith v. Twohy, Supra</i> , 70 Wash. 2d at 725	17
<i>Zunino v. Rajewski</i> , 140 Wn. App. 215, 222, 165 P.3d 57, 60 (2007)	14

Statutes

	Page
RCW 7.24	1, 25
RCW 7.24.020	3
RCW 64.38.025	12

Regulations and Rules

	Page
CR 8(c)	13
CR 12(b)(6)	3, 4

Regulations and Rules (Con't)

	Page
CR 56	3, 4
RAP 18.9	22

Other Authorities

	Page
3 Wash. Prac., Rules Practice RAP 18.9 (7th ed.)	22

I. ARGUMENT

1. Action for Declaratory Judgment is Not Time-Barred.

The HOA argues this action for declaratory judgment is untimely and should be dismissed under the 6-year statute of limitations. However, it concedes the Uniform Declaratory Judgment Act (RCW 7.24) contains no statute of limitations. Resp. p. 10. Courts may determine timeliness by analogy to the time allowed for *similar decisions*. The HOA claims a 6-year statute of limitations for written contracts should be used here, citing *Cary v. Mason Cty.*, 132 Wn. App. 495, 501, 132 P.3d 157, 160 (2006). But *Cary* deals with the challenge to an ordinance Mr. Cary characterized as a "property tax". The HOA also cites *Schreiner Farms, Inc. v. American Tower, Inc.*, 173 Wn. App. 154, 159 (2013). *Schreiner* is an action on a contract for breach of a lease in which the 6-year statute of limitations was found analogous. By contrast, the case at bar is not a challenge to an ordinance or an action on a contract. Rather, it asserts the 1991 Agreement, a deed containing grant of an easement and a covenant running with the land, is void and unenforceable by operation of law because it was never legally formed, lacks consideration, and violates Washington's statute of frauds. Neither case cited by the HOA

includes an analogous statute of limitations that was applied to a decision that is similar to the one now before the Court.

Cary stands for the proposition that the longest analogous statute of limitations that applies to *similar decisions* must be used.

"What constitutes a reasonable time is determined by analogy to the time allowed for appeal of a *similar decision* as prescribed by statute, rule of court, or other provision.' " *Brutsche*, 78 Wash.App. at 376-77, 898 P.2d 319 (quoting *Federal Way*, 62 Wash.App. at 536-37, 815 P.2d 790) (emphasis added). In general, when there is more than one analogous appeal period, "the longer of two ... periods should be applied." *Brutsche*, 78 Wash.App. at 377, 898 P.2d 319."

Cary at 501.

There is no analogous statute of limitations here. No "statute, rule of court, or other provision" exists that limits the time to challenge the validity of a deed under the statute of frauds to six years. That is why this Court has routinely reviewed deeds for compliance with the statute of frauds many years (even decades) after they were executed, consistently finding those that offend the statute of frauds are void and unenforceable by operation of law.

Golphenee and Solin have a statutory right to bring this action. They are among the seven Pebble Beach Drive lot owners negatively impacted by the 1991 Agreement, which is an ongoing agreement with no termination date. To determine the validity of

the agreement, they have brought this action under the UDJA (RCW 7.24) seeking the Court's declaration as to whether or not the 1991 Agreement is valid, and if so, the rights and obligations of the parties under it. CP 292-3.

"RCW 7.24.020. Rights and status under written instruments, statutes, ordinances

A person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder."

2. Trial Court Did Not Decide the Motion to Dismiss Under CR 56.

There is no evidence before this Court that the trial court considered the motion to dismiss pursuant to CR 56, as the HOA now claims. Resp. p 10 ¶ 1. All evidence suggests it was decided under CR 12(b)(6). It was initially noted on the trial court's regular weekly 7-day motion calendar (CP 296-7), without 28 days notice as required by CR 56(c). Golphenee and Solin argued in their motion for reconsideration that the motion to dismiss should be converted to one for summary judgment because the HOA presented a vast number of arguments and exhibits outside the pleadings. CP 46 I. 21 - CP 47 I. 25. The trial court denied the motion for reconsideration without explanation. CP 13-14.

In similar situations where the trial court has dismissed a case pursuant to CR 12(b)(6), this Court has reviewed the matter *de novo* under CR 56 on appeal.

"Further, "[i]f ... matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56." CR 12(b); *Berst v. Snohomish County*, 114 Wash.App. 245, 251, 57 P.3d 273 (2002).

Here, when considering Mr. Cook's motion to dismiss under CR 12(b)(6), the trial court considered materials outside of the pleadings. Accordingly, we review the motion under the summary judgment standards. See CR 12(b); *Berst*, 114 Wash.App. at 251, 57 P.3d 273."

Kinney v. Cook, 150 Wn. App. 187, 192, 208 P.3d 1, 3 (2009). Emphasis added.

Under CR 56, the Court may award summary judgment to Golphenee and Solin (even though they are the non-moving party) if the Court agrees they are entitled to it. *Impecoven v. Department of Revenue*, 120 Wash. 2d 357, 841 P.2d 752 (1992) (summary judgment for non-moving party entered by appellate court).

3. Howard Patrick Affidavit is Irrelevant Hearsay.

The HOA continues to refer to the Howard Patrick affidavit (CP 212-13) and the hearsay account of an unnamed caller's claimed telephone conversation with an unnamed attorney at an unspecified place and time (CP 220 ¶ 3) as "legal opinions", even though no legal opinion was given in either, and both should be inadmissible. Resp. p. 6-7. This is an apparent attempt to lend

credence to the HOA's argument that the 1991 Agreement "resolved a legal ambiguity" over who was responsible to maintain Pebble Beach Drive. Resp. p. 178 ¶ 2. But there was no "legal ambiguity" -- the HOA had obtained a single written legal opinion from its attorney, Kenneth Pickard, that clearly placed the obligation on all 31 lot owners in Pondilla Estates. CP 215-17. The other two "legal opinions" were just a smoke screen, an attempt to discredit Mr. Pickard's legal opinion, by those who did not want to pay their share for the bulkhead. They obviously could not find an attorney who disagreed with Mr. Pickard, albeit not for lack of trying.

4. 1991 Agreement is an Ongoing Contract.

The HOA claims the 1991 Agreement is not an ongoing contract. However, it is by its express terms a covenant running with the land. CP 225 ¶ 8). The HOA contradicts itself by conceding this at Resp. p. 8 ¶ 1. Under its terms, the Pebble Beach Drive lot owners are required to monitor the condition of both the private road and bulkhead, determine the need for repairs when necessary, determine the scope and type of repairs required, conscript consultants as necessary to advise them, negotiate with contractors for any necessary repairs, apply for and obtain all required permits, review competitive bids and award contracts, review contractors' work for adequacy and compliance, collect

funds, and pay the contractors. The HOA concedes this in its answer to an interrogatory. CP 101 ll. 17-21. The 1991 Agreement is clearly an ongoing agreement with no definite termination date.

5. 1991 Agreement Lacks Consideration to Any Current or Former Pebble Beach Drive Lot Owner.

The HOA admits consideration must be "bargained for". Resp. p. 13 ¶ B(1). The HOA also concedes there were no negotiations here -- the 1991 Agreement was forced on the Pebble Beach Drive lot owners. The HOA admits they would not construct the bulkhead unless the Pebble Beach Drive lot owners signed the 1991 Agreement as prepared by its attorney. Resp. p. 15 ¶ 2.

The HOA argues the Pebble Beach Drive lot owners did receive consideration, because the HOA paid \$15,500 it assessed from its members toward construction of the bulkhead. Resp. p. 14. Golphenee and Solin do not dispute the members made this payment, but rather, that they were already obligated to pay it (and more) before the 1991 Agreement was entered. In other words, the 1991 Agreement lacks any *new* consideration, which is required in Washington. The money was spent to improve and protect property jointly and equally owned by all 31 lot owners in Pondilla Estates -- not just the seven Pebble Beach Drive lot owners. It is not consideration to them if all the members vote to improve or protect their jointly-owned property.

The HOA asserts that although Golphenee and Solin raised lack of consideration in its complaint, they did not argue it to the trial court. Resp. p. 13 footnote 4. This is patently false. It was raised at CP 109 and argued extensively at CP 36-8.

The HOA now claims that by arguing the 1991 Agreement lacks consideration to them, "Golphenee and Solin attack the very consideration they promised in order to receive money from the Association." Resp. p. 17 ¶ 1. What money did they receive from the HOA? No portion of the money paid by any of the members under the 1991 Agreement was ever paid to any Pebble Beach Drive lot owner. It was paid on behalf of all members of the HOA to Jesse Allen Construction for building the bulkhead on the members' Community Beach to protect their jointly-owned private road. CP 224. In what way is this payment "new consideration" to the Pebble Beach Drive lot owners?

The HOA also claims that because the Gov't Lot 3 lot owners do not own the Community Beach or Pebble Beach Drive, they had no pre-existing obligation to maintain or repair them. Resp. pp. 14-15. Apparently, the argument is that because some of the members (Gov't Lot 3 lot owners) did not have a pre-existing obligation to share equally in the cost to improve, repair, and maintain the Community Beach and Pebble Beach Drive, the pre-existing obligation of the other members (Pondilla Estates lot

owners) should be ignored. The HOA states at Resp. p. 14 ¶ 3:

"...its membership is broader than the group of Pondilla Estates plat lot owners. The Association also includes eight members who own properties outside the Pondilla Estates plat."

But the owners of the 31 lots in Pondilla Estates all had a pre-existing obligation to maintain their jointly-owned properties. This means each lot owner's *pro rata* share was 3.2 per cent of the total cost ($100 \div 31$). For the 24 lot owners in Pondilla Estates who do not access their lots off Pebble Beach Drive, their combined pre-existing obligation equaled 77 per cent ($24 \times 3.2 = 77$). We do not know how the total amount paid by these 24 Pondilla Estates lot owners and the eight Gov't Lot 3 lot owners was allocated amongst them, but we do know that the combined payments made by all 32 of these parties only totaled 50 per cent of the cost to build the bulkhead. CP 244. So even if the 24 Pondilla Estates lot owners paid the entire sum, it would still be significantly less than their pre-existing obligation.

6. All Members of the HOA Benefit from the Bulkhead.

All of the HOA's members directly benefit from construction of the bulkhead to protect Pebble Beach Drive, because they all enjoy enhanced property values for their individual lots as a result

of their deeded beach rights and their private beach access road. They, as well as their guests and invitees, also enjoy private access to the Community Beach via Pebble Beach Drive, which is the sole beach access road in Pondilla Estates. CP 187.

Even if the Pebble Beach Drive lot owners use the private road more often than the other members, it is no different than any other amenity or common area within a community. Whether the common area is a private road, swimming pool, golf course, tennis court, or private beach, it is inevitable that some members will use it more than others. Some may not use it at all; nevertheless, all members are assessed for their maintenance and repair, because everyone has an *equal right* to use it (irrespective of how often they exercise that right), and even those who make little or no use of the common area still significantly benefit from it. Nevertheless, the HOA insists on characterizing the construction of the bulkhead as having been solely for the Pebble Beach Drive lot owners, as if it benefits only them.

To further this illusion, the HOA now claims the Pebble Beach Drive lot owners approached the HOA to bring the members' attention to the need for a bulkhead on the Community Beach to protect it, and by extension Pebble Beach Drive. Resp. p. 1 ¶ 3. However, the HOA contradicts itself at Resp. p. 5 ¶ 3, as well as in the declarations of two of its officers (Bud Hansen and Pete

Cosmos) it submitted. They make clear that it was the HOA's president, Douglas Shepherd, and *not* the Pebble Beach Drive lot owners, who brought the problem to the attention of the members in September, 1989 and recommended they build a bulkhead.

"The issue of 'erosion potentially threatening the private road now known as Pebble Beach Drive' was first brought to the membership by then Association President Douglas Shepherd in September 1989. Members of the association met on the beach at which time Shepherd pointed out evidence of erosion due to wave action. He said that he believed the private road to be threatened. He further recommended that the association take steps to stop the erosion." CP 203-4 ¶ 2.

In September of 1989 when this took place, Mr. Shepherd did not own a lot on Pebble Beach Drive. He had sold the last one a full year before, as he stated in his Declaration at CP 118 ¶ 4.

Mr. Hansen and Mr. Cosmos went on to say in their declarations that many of the Pondilla Estates lot owners viewed construction of a bulkhead on the Community Beach as the responsibility of Mr. Shepherd as the successor to one of the developers of the plat (his father, Clarence Shepherd), and that for the association to pay for it would be "bailing out Doug Shepherd" -- *not* the Pebble Beach Drive lot owners. CP 203-4 ¶ 3.

7. Pebble Beach Drive Lot Owners Did Not "Entice" Gov't Lot 3 Lot Owners to Accept the 1991 Agreement.

The Pebble Beach Drive lot owners did not "entice" the Gov't

Lot 3 lot owners into helping fund the required bulkhead in exchange for granting them an easement to use Tract A, our Community Beach and Playground, as the HOA now claims. Resp. pp. 2-3. First of all, the Pebble Beach Drive lot owners do not own Tract A -- it is owned jointly and equally by all 31 lot owners in Pondilla Estates. CP 7-8 CL 1B. Second, the 1991 Agreement purports to grant an easement over Pebble Beach Drive, not Tract A. CP 224 ¶ 4). Third, there is no evidence whatsoever before the Court that any of the Pebble Beach Drive lot owners ever communicated with any of the Gov't Lot 3 lot owners about anything. The HOA represented the Gov't Lot 3 lot owners by acting on their behalf in entering the 1991 Agreement. And it was the HOA that benefitted by any funds collected from them; these funds were apparently used to pay part of the HOA's half of the cost to construct the bulkhead. It was not used to reduce the half paid by the Pebble Beach Drive lot owners. CP 224 ¶ 1).

8. The HOA is the Representative and Agent of its Members.

The HOA now argues that it is "not equivalent to the 31 individual lot owners of properties within the Pondilla Estates plat." Resp. p. 14 ¶ 2). However, the HOA was created specifically

to act on their behalf by managing their mutual interests in Pondilla Estates. The members direct the HOA through adoption and amendment of its governing documents, membership votes, and election of its directors. CP 192-201. In fact, each elected director must be a member, and has a fiduciary duty to all the other members. RCW 64.38.025. At all times relevant to this case, the HOA was representing and *acting on behalf of* all of the lot owners in Pondilla Estates and Gov't Lot 3. The 1991 Agreement (CP 224) specifically states at p. 1 ¶ 1):

"Pondilla Estates Community Association, on behalf of its members, being the owners of all of the lots within Blocks 1, 2, and 3 of Pondilla Estates, Division No. 1, and the owners of those properties lying outside the plat of Pondilla Estates in Government Lot 3, Section 25, Township 32 North, Range 1, West of the Willamette Meridian... shall contribute one-half the costs and expenses incurred with respect to the construction of a log pile bulkhead..." (emphasis added)

The HOA assessed its members for part (but not all) of the money the members were already obligated to pay toward the cost of improving and protecting their jointly owned properties. The HOA had been empowered by its members to do so, and to enter into the 1991 Agreement on their behalf, by an affirmative vote of the membership approving this action. CP 203-4 ¶ 5. The acts of an agent are attributable to the principal. *O'Brien v. Hafer*, 122 Wn. App. 279, 283-84, 93 P.3d 930, 932 (2004). The HOA should not

now be heard to say that because it is its members (not the HOA) who jointly and equally own Tract A (Community Beach and Playground) and Pebble Beach Drive, the members' pre-existing obligation to share equally in the cost to improve, repair, and maintain their jointly-owned property should now be ignored in determining whether or not the 1991 Agreement lacks new consideration to the Pebble Beach Drive lot owners. This argument ignores the consequences of representation and agency.

9. Affirmative Defense of Part Performance is Deemed Waived.

Part performance is an affirmative defense in Washington.

Ben Holt Indus., Inc. v. Milne, 36 Wn. App. 468, 470, 675 P.2d 1256, 1258 (1984). It must be pled in the defendant's answer to the complaint.

"Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fault of a nonparty, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitation, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation."

CR 8(c) emphasis added.

The HOA failed to raise part performance as an affirmative

defense to Golphenee' and Solin's claims under the statute of frauds in the HOA's amended answer to the complaint. CP 277-281. The HOA now raises it for the first time on appeal. Therefore, it is deemed waived.

"Here, after Rainier filed its motion and affidavit for summary judgment, Mr. Lewis filed a counter motion for summary judgment and for the first time, raised this defense, having failed to raise it in his answer. In general, if such defenses are not affirmatively pled, asserted with a motion under CR 12(b), or tried by the express or implied consent of the parties, such defenses are deemed to have been waived and may not thereafter be considered as triable issues in the case. *Farmers Ins. Co. v. Miller*, 87 Wash.2d 70, 76, 549 P.2d 9 (1976)."

Rainier Nat. Bank v. Lewis, 30 Wn. App. 419, 422, 635 P.2d 153, 155 (1981)

10. None of the 24 Joint-Owners of Pebble Beach Drive Missing From the Deed Intended to Grant an Easement.

The 1991 Agreement cannot be taken out of the statute of frauds, because these joint-owners did not intend to grant an easement. Such intent is essential. *Zunino v. Rajewski*, 140 Wn. App. 215, 222, 165 P.3d 57, 60 (2007). The 24 joint-owners missing from the deed could not possibly have intended to grant an easement over Pebble Beach Drive, because they did not believe they owned it. They mistakenly thought this private road was owned by the developer or his heirs. CP 182.

11. All Servient Estates, Private Road, and Bulkhead Must Be Legally Described.

The HOA concedes that for an easement to be effective, the servient estate(s) must be described. Resp. p. 17 ¶ 3. This is confirmed in *Berg v. Ting*, 125 Wn.2d 544, 549, 886 P.2d 564, 568 (1995).

"As discussed hereafter, a grant of easement must describe a specific subservient estate; that is an absolute."

Berg at 549

But the HOA claims that only the legal description of the private road is necessary to satisfy this requirement. Resp. p. 20 ¶ 2. This is misguided, because ownership of the Community Beach and Pebble Beach Drive is appurtenant to all 31 lots in Pondilla Estates, as explained in detail in Amended Brief of Appellants pp. 14-17.

This means that a lot owner in Pondilla Estates also owns a joint and equal interest in the Community Beach and Pebble Beach Drive so long as he owns the lot. A joint ownership interest in the Community Beach and Pebble Beach Drive cannot be conveyed separately; they are attached to the lots in Pondilla Estates, not the lot owners.

"An easement appurtenant is an *irrevocable* interest in land which has been obtained for duly given consideration." *Kirk*

v. Tomulty, 66 Wash.App. 231, 238–39, 831 P.2d 792 (1992) (emphasis added). “Easements appurtenant become part of the realty which they benefit. Unless limited by the terms of creation or transfer, appurtenant easements follow possession of the dominant estate through successive transfers. *Green v. Lupo*, 32 Wash.App. 318, 323, 647 P.2d 51 (1982).”

Hanna v. Margitan, 193 Wn. App. 596 (2016)

As a result, the deed must also contain the legal descriptions of each of these 31 lots to which this ownership is appurtenant, together with the notarized signatures of the current owners, as joint-Grantors of the easement over their jointly-owned private road. Otherwise, the recorded deed is missing indispensable parties, because it will not include all the lots to which ownership of Pebble Beach Drive is appurtenant as having consented to the grant. Golphenee and Solin do not argue Pebble Beach Drive is not adequately described in the deed; rather, they argue that only seven of the 31 joint-owners of Pebble Beach Drive have been made parties to the deed as Grantors of an easement over it, and only seven of the lots to which ownership of Pebble Beach Drive is appurtenant have been legally described in the deed.

The HOA claims that this Court has rejected this same argument in *Maier v. Giske*, 154 Wn. App. 6, 16. Resp. p. 20 ¶ 3. Actually, no such argument was even made in *Maier*, a case that does not involve either an appurtenant easement over property owned by multiple parties who are missing from the deed, nor

omission of consent and the notarized signatures of owners of the servient estate. Ironically, in *Maier* this Court reviewed a deed of easement for compliance with Washington's statute of frauds some 30 years after it was granted, belying the HOA's claim that deeds are time-barred from being judicially reviewed after six years.

12. The 1991 Agreement Must Contain All Terms Necessary to the Undertaking.

The HOA concedes the 1991 Agreement is missing essential terms, including the location of the portion of the bulkhead the Pebble Beach Drive lot owners are to maintain, as well as many other essential terms necessary to implement the undertaking. Resp. p. 22-3. However, it argues the statute of frauds does not apply because it "did not involve any conveyance or encumbrance of the proposed bulkhead." Resp. p. 23 ¶ 1. The HOA's proposed solution for these missing essential terms was, and is, for the Pebble Beach Drive lot owners to supply these missing terms for themselves by retaining an attorney to "fix" the deed's deficiencies. Resp. p. 25 ¶ 1. However, Washington's statute of frauds requires a deed to be complete within itself. *Smith v. Twohy, Supra*, 70 Wash. 2d at 725.

13. Laches is a Disfavored Doctrine, and Not Applicable.

The HOA concedes the trial court did not reach the issue of

laches, but argues "the doctrine of laches also bars the Golphenee and Solin action." Resp. p. 11 ¶ 3.

The doctrine of laches is an equitable theory that is not favored. Ordinarily, it should not be employed where the statute of limitations has not run. There is no such statute of limitations that is applicable, by analogy or otherwise, for this action.

"However, laches is an extraordinary remedy that should not, under ordinary circumstances, be employed to bar an action short of the applicable statute of limitations."

Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc., 143 Wash. App. 345, 362, 177 P.3d 755, 763-64 (2008)

The HOA concedes laches requires the defendant to have been materially damaged by the complained-of delay. Resp. 12 ¶ 1. There is no evidence of damage caused to respondent, because no matter when the action was brought, the HOA would have had to defend. The HOA has shown no prejudice to it as a result of any delay.

The HOA claims purchasers of lots in Pondilla Estates after the 1991 Agreement was executed had relied upon it in making their purchase decisions. However, in its motion to dismiss, the HOA submitted to the trial court no less than 14 declarations of such purchasers that belie that assertion. CP 235, 237, 239, 242, 251, 253, 255, 257, 259, 265, 267, 269, 273, and 275.

In each of these 14 declarations, which are in an unusual format, the declarants were asked at the bottom of page 1: "At the

time of purchase, were you aware of the 1991 Agreement?" Each of these declarants answered "No." It is axiomatic that purchasers who did not know about the 1991 Agreement could not possibly have relied upon it in making their purchase decisions.

If the Court agrees with Golphenee and Solin that the 1991 Agreement was fatally flawed at its creation because it lacks consideration to the Pebble Beach Drive lot owners, or because it violates the statute of frauds by omitting indispensable parties to the deed, notarized signatures, legal descriptions, and other essential terms necessary for the undertaking, then it would have been rendered void and unenforceable as a matter of law from the very beginning in August, 1991. The issue of delay would be moot, and no affirmative or equitable defense asserted by the HOA could possibly prevent or reverse the operation of the statute. As a result, the 1991 Agreement would not have been enforceable against the original contracting parties, so it would not be enforceable against the current parties, either. *Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.*, 120 Wash. App. 246, 254, 84 P.3d 295, 299 (2004).

14. 1991 Agreement is Not Divisible.

The HOA argues for the first time in this appeal that the 1991 Agreement is divisible. Resp. p. 22 ¶ 2. But Washington law does not support this contention. The 1991 Agreement contains inextricably connected promises by both sides that are interwoven

to form a single agreement. The grant of an easement over Pebble Beach Drive is integral to funding a bulkhead on the Community Beach, without which funding the bulkhead would not have been built. In turn, construction of the bulkhead saved the private road, without which repair and maintenance of either one would be moot. The 1991 Agreement is a single agreement made up of interrelated parts, and was executed, notarized, and publicly recorded at the same time in a single document. It should be taken as a whole. If any material part of the deed is found to be unenforceable, the deed should fail in its entirety. *Saletic v. Stamnes*, 51 Wn.2d 696, 699, 321 P.2d 547, 550 (1958).

The HOA, through its attorney Mr. Kotschwar, had complete control over what is (and is not) contained in the 1991 Agreement. Mr. Kotschwar took his instructions on what to include in the deed solely from officers of the HOA. He did not negotiate, or even meet with, the Pebble Beach Drive lot owners until after the deed was completed. CP 124. The Pebble Beach Drive lot owners were not represented by counsel during this time. CP 135. If the HOA wanted the terms of the 1991 Agreement to be severable, it could have included a "severability" clause, or "savings" clause, that specified if any provision of the deed was found unenforceable, the remaining provisions would remain in full force and effect. The deed contains no such clause. That was exclusively the HOA's choice.

15. 1991 Agreement May Not Be Reformed.

The HOA refers to the missing legal descriptions of those Gov't Lot 3 lot owners who were to be beneficiaries of the easement in the deed as mere "scrivener's error", and argues the 1991 Agreement can be reformed to cure this defect. Resp. p. 22 ¶

3. To support this contention, the HOA again cites *Berg v. Ting, supra*, 125 Wn.2d at 544. However, once again the decision in *Berg* is not helpful.

"Here, however, there is no evidence of any mutual mistake or scrivener's error resulting in an inadequate description, and reformation of the agreement prior to assessing the sufficiency of the description for statute of frauds purposes is not appropriate."

Berg @ 554.

As in *Berg*, there is no evidence of any mutual mistake in the case at bar. Any mistake was entirely that of the HOA's attorney. Reformation is therefore not appropriate.

16. 1991 Agreement is Vague and Ambiguous.

The language in the 1991 Agreement is in many ways ambiguous. For instance, it states at CP 224, ¶ 2):

"It is the clear expression and understanding of the undersigned parties that in making the above-referenced contribution, the Association or any of its members do not in any way acknowledge responsibility or obligation, past, present, or future, to contribute toward the maintenance or repair of the private road."

As the seven Pebble Beach Drive lot owners are clearly members of the Association, according to this provision they are not responsible for repair or maintenance of the private road. This contradicts the provision at CP 225, ¶ 5), which requires they pay all future repair and maintenance costs, not just of the private road, but also the bulkhead. The 1991 Agreement was prepared entirely by the HOA's attorney, acting under the HOA's instructions. The HOA admits if the Pebble Beach Drive lot owners had not agreed to sign the agreement as drafted by their attorney, Mr. Kotschwar, no bulkhead would have been built. Resp. p. 15. So any errors or ambiguities should be construed against the HOA as the drafting party. *Pierce County v. State*, 144 Wash. App. 783, 813, 185 P.3d 594 (2008); *Emter v. Columbia Health Servs.*, 63 Wash.App. 378, 384, 819 P.2d 390 (1991); *Cont'l Ins. Co. v. PACCAR, Inc.*, 96 Wash.2d 160, 167, 634 P.2d 291 (1981).

17. Appeal is Not Frivolous.

The HOA claims this appeal is frivolous within the meaning of RAP 18.9, and attorneys fees should be awarded to the HOA. Resp. p. 26. But if it raises any debatable issue or has some arguable basis, it is not frivolous. In determining this, all doubt must be resolved in favor of Golphenee and Solin.

"When determining whether an appeal is frivolous, justifying the imposition of terms and compensatory damages, the court will consider: (1) that a civil appellant has a right to appeal under RAP 2.2, (2) that all doubts as to whether the

appeal is frivolous should be resolved in favor of the appellant, (3) that the record should be considered as a whole, (4) that an appeal that is affirmed simply because the arguments are rejected is not frivolous, and (5) that an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there is no reasonable possibility of reversal. *Public Employees Mut. Ins. Co. v. Rash*, 48 Wash. App. 701, 740 P.2d 370 (Div. 1 1987)."

"More often, however, the courts will find that an appeal has some arguable basis and will deny a request for attorney fees. Examples of cases in which fees were denied include *Public Employees Mutual Insurance Company v. Rash*, supra; *Green River Community College v. Higher Education Personnel Board*, supra; *Casa Del Rey by Gemperle v. Hart*, 46 Wash. App. 809, 732 P.2d 1025 (Div. 1 1987), decision aff'd, 110 Wash. 2d 65, 750 P.2d 261 (1988); *Skok v. Snyder*, 46 Wash. App. 836, 733 P.2d 547 (Div. 3 1987)."

3 Wash. Prac., Rules Practice RAP 18.9 (7th ed.)

Golphenee and Solin have brought this appeal in good faith, and believe it sounds in law. RAP 18.9 should not be applied.

II. CONCLUSION

Golphenee and Solin argue the 1991 Agreement was fatally flawed as executed in August, 1991. Contracts lacking the essential element of consideration are unenforceable in Washington as a matter of law.

They further argue the 1991 Agreement violates Washington's statute of frauds because it omits: 1) the names and consent of 24 joint owners of Pebble Beach Drive who are indispensable parties to the deed as Grantors of an easement over

their jointly-owned private road; 2) approximately 24 required legal descriptions of lots to which ownership of Pebble Beach Drive is appurtenant, as well as the notarized signatures of the then-current owners of these lots; 3) the legal descriptions of two intended Grantees of the easement later added by the HOA without authorization; 4) the location of the portion of the bulkhead the Pebble Beach Drive lot owners are to maintain; and 5) many other essential terms necessary to implement this ongoing covenant. Deeds that offend the statute of frauds are rendered void and unenforceable by operation of law.

Consequently, Golphenee and Solin brought an action for declaratory judgment under the UDJA (RCW 7.24) to determine whether or not the 1991 Agreement is valid and enforceable, and if so, to declare the rights and obligations of the parties. The UDJA does not contain a statute of limitations. Golphenee and Solin are not aware of any analogous statute of limitations that limits review of a deed for compliance with the statute of frauds to six years. This Court has often reviewed deeds for compliance with the statute of frauds many years, even decades, after they were executed and recorded.

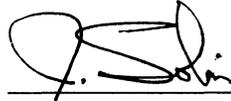
If the Court agrees the 1991 Agreement was fatally flawed from day one, and therefore was unenforceable as a matter of law from the beginning, the question of timeliness is moot. No affirmative or equitable defense asserted by the HOA could "trump"

the statute of frauds so as to prevent its operation. It would then be appropriate to grant Golphenee and Solin summary judgment, and to enter an order declaring the 1991 Agreement unenforceable as a matter of law.

RESPECTFULLY submitted this 11TH day of JULY, 2016.



E. Duane Golphenee, Appellant *pro se*
583 Seaside Drive
Coupeville WA 98239
(360) 678-6543



John Solin, Appellant *pro se*
558 Pebble Beach Drive
Coupeville WA 98239
(360) 969-1227

DECLARATION OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on the 11TH day of JULY, 2016, I caused a true and correct copy of this Amended Reply of Appellants to be served on the following in the manner indicated below:

Mr. Charles Arndt, esq. () U.S. Mail
Kelly, Arndt & Walker () Hand Delivery
Attorneys at Law
504 N. Main Street
Coupeville WA 98239
(Counsel for Respondent)

William and Susan Goodman () U.S. Mail
565 Pebble Beach Drive () Hand Delivery
Coupeville WA 98239

Michael and Joan LeDressay
2792 W. Pondilla Way
Coupeville WA 98239

U.S. Mail
 Hand Delivery

Michael Szemiller
562 Pebble Beach Drive
Coupeville WA 98239

U.S. Mail
 Hand Delivery

Hunter and Angela Newton
P.O. Box 1077
Coupeville WA 98239

U.S. Mail
 Hand Delivery

ORIGINAL AND ONE COPY MAILED TO:

Court Clerk
WA Court of Appeals, Div. 1
One Union Square
600 University St.
Seattle WA 98101-4170

DATED and signed this 11th day of JULY,
2016 in Coupeville, Washington.



John Solin, Appellant *pro se*
558 Pebble Beach Drive
Coupeville WA 98239
(360) 969-1227