NO. 46802-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CHRISTOPHER GUEST and SUZANNE GUEST,

Appellants,

v.

DAVID LANGE and KAREN LANGE,

Respondents.

APPELLANTS' BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 2

III. ISSUE STATEMENTS 3

IV. STATEMENT OF THE CASE 5

V. ANALYSIS 17

A. The Trial Court Abused its Discretion in Denying the Guests' Motion to Amend their Complaint. 17

B. The Trial Court Erred in Granting Summary Judgment Dismissing the Guests' Breach of Contract Claim Based on the CC&Rs and in Refusing to Modify the Partial Grant of Judgment as to the Validity of the 1987 Recorded Document. 20

1. Standard of Review 20

2. The Trial Court Erred in Dismissing the Guests' Breach of Contract Claim based on the CC&Rs. ..20

3. Given the Interlocutory Nature of Grants of Partial Summary Judgment, the Trial Court Erred in Disregarding Evidence Regarding the Ownership of Lot 5 at the Time of the Creation of the 1987 Recorded Document. 24

C. The Trial Court Erred in Granting the Langes' Motion for Summary Judgment as to the Guests' Claims regarding Section D, because the Court's Ruling is Contrary to the Plain Language of the 1987 Recorded Document. 27

D. The Trial Court Erred in Giving Jury Instruction No. 17 Relating to the 1987 Recorded Document, Jury Instruction No. 9 Defining "Consideration," and in Failing to Instruct the Jury on the Definition of "Good Faith and Fair Dealing." 31

E. Cumulative Error Denied the Guests of a Fair Trial.....35

F. Pursuant to RAP 18.1 and the 1987 Recorded Document, the Guests Request an Award of Attorney Fees, Costs, and Expenses. 36

VI. CONCLUSION.....37

TABLE OF AUTHORITIES

CASES

Beebe v. Swerda,
58 Wn. App. 375, 793 P.2d 442 (1990) 27

Berg v. Ting,
125 Wn.2d 544, 886 P.2d 564 (1995) 27

Brower v. Ackerley,
88 Wn. App. 87, 943 P.2d 1141 (1997) 21

Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.,
166 Wn.2d 475, 209 P.3d 863 (2009) 28

Caruso v. Local Union No. 690 of Intern. Broth. of Teamsters, Chauffeurs, Warehousemen, and Helpers of Am.,
100 Wn.2d 343, 670 P.2d 240 (1983) 19

City of Tacoma v. City of Bonney Lake,
173 Wn.2d 584, 269 P.3d 1017 (2012) 13

Doe v. Dep't of Transp.,
85 Wn. App. 143, 931 P.2d 196 (1997) 20

Froman v. Davis,
371 U.S. 178, 83 S. Ct. 227, 9 L. Ed. 2d (1962) 18

Haselwood v. Bremerton Ice Arena, Inc.,
137 Wn. App. 872, 155 P.3d 952 (2007) 18

Herron v. Tribune Publ'g. Co.,
108 Wn.2d 162, 736 P.2d 249 (1987) 18

Kaintz v. PLG, Inc.,
147 Wn. App. 782, 197 P.3d 710 (2008) 28

Keller v. City of Spokane,
146 Wn.2d 237, 44 P.3d 845 (2002) 33

Kim v. Dean,
133 Wn. App. 338, 135 P.3d 978 (2006) 35

Kirkham v. Smith,
106 Wn. App. 177, 23 P.3d 10 (2001) 17

Labriola v. Pollard Grp., Inc.,
152 Wn.2d 828, 100 P.3d 791 (2004) 35

Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc.,
168 Wn. App. 86, 285 P.3d 70 (2012),
rev. denied, 175 Wn.2d 1015 (2012) 29

Piepkorn v. Adams,
102 Wn. App. 673, 10 P.3d 428 (2000) 22

Quality Rock Prods., Inc. v. Thurston Cnty.,
126 Wn. App. 250, 108 P.3d 805 (2005) 18

Ruff v. Cnty. of King,
125 Wn.2d 697, 887 P.2d 886 (1995) 21

Tagliani v. Colwell,
10 Wn. App. 227, 517 P.2d 207 (1973) 18

Taylor v. Browning,
129 Idaho 483, 927 P.2d 873 (1996) 13

Thomas v. French,
99 Wn.2d 95, 659 P.2d 1097 (1983) 33

Thompson v. King Feed & Nutrition,
153 Wn.2d 447, 105 P.3d 378 (2005) 32

Tran v. State Farm Fire & Cas. Co.,
136 Wn.2d 214, 961 P.2d 358 (1998) 20

Tri-M Erectors, Inc. v. Donald M. Drake Co.,
27 Wn. App. 529, 618 P.2d 1341 (1980) 29

Union Pacific R. R. v. Ross Transfer Co.,
64 Wn.2d 486, 392 P.2d 450 (1964) 29

United States v. Hougham,
364 U.S. 310, 81 S. Ct. 13, 5 L.Ed.2d 8 (1960) 18

Viking Bank v. Firgrove Commons 3, LLC,
183 Wn. App. 706, 334 P.3d 116 (2014) 28, 29

W. Plaza, LLC v. Tison,
180 Wn. App. 17, 322 P.3d 1 (2014)
rev. granted, 336 P.3d 1165 (2014) 28

Walla v. Johnson,
50 Wn. App. 879, 751 P.2d 334 (1988) 18

Wallace v. Lewis County,
134 Wn. App. 1, 137 P.3d 101 (2006) 18

Washburn v. Beatt Equipment Co.,
120 Wn.2d 246, 840 P.2d 860 (1992) 25

Wilson v. Horsley,
137 Wn.2d 500, 974 P.2d 316 (1999) 18

Young v. Key Pharm., Inc.,
112 Wn.2d 216, 770 P.2d 182 (1989) 20

Zunino v. Rajewski,
140 Wn. App. 215, 165 P.3d 57 (2007) 27

RULES

Civil Rule 15(a) 17

Civil Rule 54(b) 27

RAP 18.1 37

OTHER AUTHORITY

2 Moore's Federal Practice 3d § 8.04(1)(b) 20

6A WASH. PRAC.,
Wash. Pattern Jury Instr. Civ. WPI 302.11 (6th ed.) 36

Stoebuck & Weaver, Wash. Prac.,
Real Estate: Property Law, § 3.9 (2nd ed. 2014) 22

I. INTRODUCTION

The trial court below permitted the Langes to have a deck that not only encroaches on the Guests' property, but that abuts the Guests' house and extends beyond the Guests' master bedroom window.

The Guests are left with no privacy, as the Langes concede that they can hear and see what goes on in the Guests' bedroom when the Langes use the deck. The Guests have also lost the use of their property. The Langes promised the Guests in 2010 and in 2011 that when the Langes tore down their deck that the Langes' new deck would stay within the bounds of the Langes' adjacent Lot 4 property or would only be constructed on Lot 5 with the Guests' advance permission and consent. The Langes submitted and received approval from the Spinnaker Ridge Community Association, Inc.'s ("SRCA") Architectural Control Committee ("ACC") and from the Guests to build a reduced deck. Despite these promises, the Langes built a new deck while the Guests were out of town that encroached on the Guests' property and abutted their home. The Langes did so without a permit from the City of Gig Harbor and with full knowledge that the deck improperly encroached on Lot 5.

The Guests filed suit trying to preserve their property and other rights and their privacy in their own home, arguing that the Langes breached contractual promises to not build their deck up against and beyond the Guests' bedroom window, breached the restrictions imposed on SRCA members by the Covenants, Conditions and Restrictions ("CC&Rs"),

breached the Langes' duties of good faith and fair dealing to the Guests, and trespassed on Lot 5.

A number of errors operated to deny the Guests a fair trial, including the trial court's dismissal of the Guests' breach of the CC&Rs claim; refusal to modify a partial summary judgment order when confronted with evidence that the document on which the Langes based their right to an easement was invalid; ignoring the plain language of the Langes' indemnity, release, and hold harmless agreement; and the trial court's erroneous instruction of the jury.

Due to these prejudicial errors, the Guests request that this Court vacate the judgment and orders in the Langes' favor and remand to the trial court for a new trial. The Guests also ask that this Court direct the trial court to enter judgment in the Guests favor indemnity, release, and hold harmless agreement with a hearing on the Guests' trial and other related damages, costs and expenses and fees. Finally, the Guests ask that this Court award them their costs, expenses, and fees on appeal pursuant to RAP 18.1 and the defense, hold harmless, release and full indemnity provisions.

II. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in denying the Guests' motion to amend their complaint.

2. The trial court erred in dismissing the Guests' breach of contract claim based on the 1986 CC&Rs and other SRCA governing documents.

3. The trial court erred in finding that the document recorded under Pierce County Assessor No. 8704290509 (the "1987 recorded document") created a valid easement for the benefit of Lot 4.

4. The trial court erred in refusing to modify the summary judgment order upholding the validity of the 1987 recorded document.

5. The trial court erred in denying the Guests' motion in limine as to the invalidity of the 1987 recorded document.

6. The trial court erred in instructing the jury as to the definition of "consideration" in Jury Instruction No. 9.

7. The trial court erred in failing to instruct the jury as to the duty of good faith and fair dealing.

8. The trial court erred in instructing the jury that the 1987 recorded document created a valid easement.

9. The trial court erred in granting the Langes' motion for summary judgment as to the Guests' claim for indemnity and denying the Guests' motion for partial summary judgment that the Langes' counterclaims against the Guests were barred by the 1987 recorded document.

10. The trial court erred when it entered judgment in favor of the Langes and quieted title in their favor.

III. ISSUE STATEMENTS

1. The trial court abused its discretion in denying the Guests' motion to file an amended complaint when the Guests' amended complaint was necessitated by delayed discovery from the Langes, the Langes failed

to show substantial prejudice by the amendment, and mere delay of the trial date is insufficient to deny the relief. (Assignment of Error No. 1).

2. The trial court erred in granting the Langes' motion for summary judgment as to the Guests' claim for breach of contract regarding the CC&Rs when a member of an association has a right to bring a claim for breach of the CC&Rs. (Assignment of Error No. 2).

3. The trial court erred in refusing to modify the partial summary judgment order finding that the 1987 recorded document created a valid easement in favor of Lot 4 when partial summary judgment orders are interlocutory in nature and the Guests timely presented evidence demonstrating a genuine issue of material fact as to whether the purported "grantor" of the 1987 recorded document actually owned Lot 5 as well as other evidence that the 1987 recorded document was null, void and invalid. (Assignments of Error Nos. 3, 4, 5, 8).

4. The trial court erred in giving Jury Instruction No. 9 which misstates the definition of "consideration." (Assignment of Error No. 6).

5. The trial court erred in failing to give a jury instruction defining the duty of good faith and fair dealing after agreeing to do so. (Assignment of Error No. 7).

6. The trial court erred in giving Jury Instruction No. 17 instructing the jury that the Court had found that the Langes had the right to construct a deck on the Guests' Lot 5 property and use and maintain that deck as a matter of law under the 1987 recorded document. (Assignment of Error No. 8).

7. The trial court erred in construing the defense, release, hold harmless and indemnity provision of the 1987 recorded document ("Section D") to exclude claims between the Guests and the Langes when the plain language of the indemnity contract includes claims by any parties and was not ambiguous. (Assignments of Error Nos. 9, 10).

8. Did the trial court's errors with regard to motions in limine and jury instructions constitute cumulative error that deprived the Guests of their right to a fair trial? (Assignments of Error 5, 6, 7, and 8).

IV. STATEMENT OF THE CASE

The Guests and the Langes are adjoining property owners who share a single border along the north-south portion of Lot 4 and Lot 5 in the Spinnaker Ridge development in Gig Harbor.[1] The Langes have owned Lot 4 since 1993 and the Guests have owned Lot 5 since 2004.[2] This matter involves a deck constructed by the Langes that encroaches onto Lot 5 and abuts the Guests' house and extends beyond their master bedroom window.[3]

There are two alleged easements at issue in this case. One concerns an approximately 5' wide by 21' long strip that encroaches onto the Guests' Lot 5 property. The Langes contend that this is permitted by a document purportedly executed by Nu-Dawn Homes, Inc. in 1987 and recorded under Pierce County Auditor No. 8704290509 (the "1987 recorded document").[4] The second alleged easement involves an area approximately 3' long by 5'

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[1] CP at 340.
[2] CP at 358 – 59.
[3] *See* CP at 533 – 34, 561, 580.
[4] CP at 1093.

wide that also extends onto the Guests' Lot 5 property, which is not covered by the 1987 recorded document.[5] The 1986 CC&Rs on which the Langes relied to support their claim to the 3' by 5' alleged easement severely restricted the creation of easements on adjoining parcels.[6]

In September 2010, the Langes notified the Guests that they planned to tear down and rebuild their deck the next spring in 2011.[7] The Langes also disclosed that their existing deck encroached on the Guests' property by approximately 5' wide down the length of Lot 5. At or around the same time, the Guests disclosed to the Langes their intent to build a wrap-around deck on the back, south, and west sides of Lot 5, which would include the portion of Lot 5 occupied by the Langes' deck.[8] In January 2011, the parties had further discussions about the decks and the Guests showed the Langes the 1987 recorded document and reminded the Langes that the 1987 recorded document "required shared and/or mutual use of any deck that any Lot 4 owner constructed on any portion of Lot 5. . ." and that there was an indemnity provision in the document that required that the Langes indemnify the Guests.[9]

The Guests also objected to the Langes building a deck on Lot 5, particularly the southwest side and corner of Lot 5.[10] The Langes stated that they did not want to encroach on Lot 5, agreed to back the new deck away

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[5] VRP (April 19, 2013) at 12 – 13.
[6] CP at 424; Exhibit 14.
[7] CP at 341.
[8] CP at 341.
[9] CP at 341 – 42; VRP (July14, 2014) at 124:13 to 125:13.
[10] CP at 342.

from the Guests' master bedroom, and affirmed that the deck they built would not encroach.[11] The Langes later informed the Guests that they did not want to build a continuous, shared deck on Lots 4 and 5 and did not want to share the area at issue.[12]

In the spring of 2011, the Langes provided the Guests with deck plans that included a graph paper hand drawing created by David Lange that outlined the previous alleged easement area and the 3' by 5' encroachment with the words "Vacated Easement" written inside that area.[13] As demonstrated in Suzanne Guest's declaration in support of the plaintiffs' motion for partial summary judgment, the computer schematic deck plans showing the entire removal of the Lange deck from Lot 5 and the hand drawing "graphically confirmed the removal of the 3' x 5' encroachment [and was] consistent with the Langes' confirmation to [the Guests] in January 2011 that the[Langes] would not encroach on [Lot 5] and . . . did not want to build a continuous Lot 4 and Lot 5 deck."[14] The Guests then notified the Langes that they approved of the proposed plans.[15]

On March 12, the Langes submitted a letter to the ACC requesting approval of this reduced deck, stating that the City of Gig Harbor had informed the Langes that their prior deck impermissibly encroached on Lot 5 and that they were vacating the easement on Lot 5.[16] The letter

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[11] CP at 342, 580.
[12] CP at 342.
[13] CP at 342 – 43, 347 – 48.
[14] CP at 343. *See also* CP at 581(Plaintiff's Response to Defendants' Motion for Summary Judgment).
[15] CP at 343.
[16] CP at 395, 397, 399, 401.

referred to and attached the hand drawn schematic the Langes had previously provided to the Guests and the Trex computer schematics showing complete removal of the Lange deck from Lot 5. The same day, the Langes notified the Guests of their submission to the ACC and asked for the Guests' permission to build their new deck up to the southwest corner of the Guests' house.[17] The Guests declined to consent. On March 14, 2011, after the ACC approved the Langes' deck plans, the Langes emailed the Guests stating, "David just returned from the Architectural Committee meeting and they have approved the deck as we outlined it for you – we will not build to the end of your house on the 5' alley as we had requested in our email."[18] However, while the Guests were out of town and with knowledge that they were exceeding the legal boundaries of Lot 4, the Langes built their new deck on Lot 5 contrary to their express agreement with the Guests.[19] The Langes did not seek permission from the ACC or the Guests before acting on the new revised deck plans. Instead, the Langes simply notified the ACC Chair by letter that they were going to rebuild the deck as it previously existed.[20] Construction of the deck began in early April 2011 while the Guests were out of town.[21]

The Guests filed their original complaint on December 6, 2011, and their First Amended Complaint on October 15, 2012.[22] These complaints

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[17] CP at 344, 354.
[18] CP at 356.
[19] CP at 345.
[20] CP at 408.
[21] CP at 410.
[22] CP at 1, 32.

asserted four claims against David and Karen Lange: (1) breach of contract, (2) trespass to land and injunction, (3) breach of covenant of good faith and fair dealing, and (4) indemnity.[23] The Guests sought damages, attorney fees, equitable and prejudgment interest, leave to amend the complaint as necessary, injunction and other legal and equitable relief as the court deemed appropriate.[24] The Langes answered, denying the Guests' claims and counterclaiming to quiet title in the alleged easement areas, for trespass, for an injunction enjoining the Guests from trespassing on the Langes' deck, an injunction to prevent the Guests from invading the Langes' privacy, and for exclusive use of the Langes' deck.[25]

On January 29, 2013, the Guests moved to file their second amended complaint.[26] The Guests also requested a six-month continuance, due to the Langes' failure to comply with their primary witness disclosure deadline, the Langes' late discovery responses and new facts recently learned by the Guests.[27] In their proposed second amended complaint, the Guests sought to add David Lange in his capacity as a Spinnaker Ridge Trustee, the SRCA, Karen Lange in her capacity as a de facto and former Spinnaker Ridge Trustee, the Spinnaker Ridge Board of Trustees, and individual Board of Trustees including John English, John Farrington, Gary Williamson, and John and Jane Doe defendants.[28] The Guests sought to assert causes of

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[23] CP at 38 – 40.
[24] CP at 41.
[25] CP at 42 – 51.
[26] CP at 213.
[27] CP at 62 – 63, 213 – 217.
[28] CP at 76 – 77.

action against the defendants for breach of contract; trespass to land; breach of the covenant of good faith and fair dealing; contractual and common law indemnity; negligence and negligence per se; breach of fiduciary duties; violation of RCW 4.24.630; promissory, equitable, and judicial estoppel; malicious abuse of process; civil conspiracy; the tort of outrage; false light; spoliation and concealment of evidence; insurance bad faith; prima facie tort and violations of the trustees' code of ethics and business practices.[29]

The Langes objected, arguing that the deadline to file confirmation of joinder had passed eight months before, and that the Guests were trying to file "a monstrous 135-page Second Amended Complaint asserting eleven new causes of action against the Langes and five-plus new co-defendants."[30] The Langes' claimed prejudice due to the expanded scope of litigation and delay in resolving a divisive dispute.[31] The Langes disputed that Guests' motion was filed late because of delayed discovery, claiming that correspondence showed the Guests were aware of the role various parties played.[32] The Langes also opposed the motion because the claims asserted by the Guests were allegedly futile.[33]

The trial court denied the Guests' motion to amend because the deadline for confirmation of joinder had passed, the trial date would have to be continued if so many additional parties were added, and there was prejudice to Langes. The trial court found that there was no good cause for

[29] CP at 159 – 205.
[30] CP at 222.
[31] CP at 222.
[32] CP at 227, 247 – 80.
[33] CP at 227.

amending the Guests' complaint past the deadline for the confirmation of joinder.[34]

The Guests moved for summary judgment as to the Langes' counterclaims, arguing, *inter alia,* that the Guests could not trespass on their own land and that Section D of the 1987 recorded document required the Langes to indemnify, defend and hold the Guests harmless for this matter. The Guests also raised the Langes' unclean hands as an additional bar to any Lange suit and/or recovery.[35]

The Langes also moved for summary judgment, seeking dismissal of all of the Guests' claims and their affirmative defense of unclean hands.[36] The Langes argued that the court should dismiss the Guests' breach of contract claim because the parties did not enter into a binding agreement to vacate or terminate a portion of their alleged rights under the 1987 recorded document or the CC&Rs.[37] The Langes argued that any alleged agreement failed because (1) any document revoking an express easement must comply with the requirements of a deed in RCW 64.04.010, and (2) a contract for the conveyance of real property must be in writing and supported by consideration.[38] The Langes claimed that the contract between the Guests and Langes failed because the Langes agreed to

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[34] VRP (Feb. 8, 2013) at 7.
[35] CP at 302 – 320; 341-356: CP 604:4 – 15.
[36] CP at 357.
[37] CP at 365.
[38] CP at 365 - 68.

relinquish a portion of their deck without a corresponding promise by the Guests to perform.[39]

The Langes also argued that there is no implied duty of good faith and fair dealing because the Guests had failed to demonstrate the existence of an enforceable contract.[40]

Further, the Langes argued that the trial court should dismiss the Guests' trespass claim because they have a legal right to maintain their deck in its current location and are entitled to exclusive possession of the deck, and that the CC&Rs create a right to use the 3' x 5' overhang.[41]

Finally, the Langes argued Section D of the 1987 recorded document did not apply because the Guests' alleged harm arose from the Guests' choice to sue the Langes, not from the use of the easement. However, by so arguing, the Langes acknowledged and admitted that they were subject to the terms of Section D.[42] The Langes claimed that a contract for indemnity protects the promisee against claims arising from liability only to a third party.[43]

The trial court granted the Langes' motion as to all but the claim of unclean hands, duty of good faith and fair dealing, trespass, and breach of contract to vacate the easement and the 3' x 5' encroachment.[44] The trial court dismissed the Langes' trespass claim because the Guests had a right

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[39] CP at 368.
[40] CP at 369 – 70.
[41] CP at 370 – 74.
[42] CP at 374.
[43] CP at 375 – 76 (also citing *City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584, 593, 269 P.3d 1017 (2012); *Taylor v. Browning*, 129 Idaho 483, 493, 927 P.2d 873 (1996)).
[44] CP at 940 – 41.

to be on the Langes' deck because the Guests owned the underlying land and also because any alleged damages were de minimus.[45] However, the trial court denied the Guests' motion to dismiss all of the Langes' claims pursuant to Section D of the 1987 recorded document.[46]

The Guests also moved for reconsideration of the trial court's dismissal of their claims regarding Section D of the 1987 recorded document.[47] The trial court denied the motion.[48]

As a result of the pre-trial rulings, three issues remained for trial. The first was whether the Langes had entered into a contract with the Guests not to build a new deck in an area where it had previously existed. The second, related, issue was whether the Langes had breached their covenant of good faith and fair dealing with the Guests by building the deck despite their promises. The third was whether the Langes and the Langes' deck trespassed on the Guest's property.

A six-day jury trial was held between July 8, 2014 and July 16, 2014. Shortly before trial commenced, the parties filed written motions in limine.[49] One of the Guests' motions asked the trial court to exclude "[a]ny testimony, evidence and/or argument that there is any Lot 4 deck or any other easement on Lot 5."[50] The trial court briefly considered this motion,

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[45] VRP (April 19, 2013) at 38 – 40.
[46] VRP (April 19, 2013) at 38 – 39. In their motion for reconsideration, the Langes expressly noted that the trial court's dismissal of the Langes' trespass claim against the Guests could result in inconsistencies at trial. CP at 802 – 803.
[47] CP at 1037 – 41, 1247 – 49.
[48] CP at 1437 – 38.
[49] CP at 4032 – 38, 4049 – 52.
[50] CP at 4033.

but denied it.[51] The primary basis for the judge's decision was that he viewed the summary judgment decision on this point to be "the law of the case" which he was unwilling to change.[52]

On the second day of trial, Mrs. Guest attempted to ask Mr. Lange if "we had an agreement with you that you would not build . . . on part of our land in March of 2011."[53] Counsel for the Langes objected to the form of the question, and was sustained.[54] Mrs. Guest rephrased the question as "[w]e had an agreement, and you made a promise to us that you would not build on that section of our land in March of 2011, did you not?"[55] This too was subject to objection, and the objection was sustained on the grounds that the question was argumentative.[56] As a result, Mrs. Guest was not able to ask Mr. Lange if the parties in fact had an agreement that the Langes would not build their deck on the Guest's land.

The Guests submitted evidence at trial that Nu-Dawn Homes Limited Partnership (not Nu-Dawn Homes, Inc.) was the developer and that Nu Dawn Homes Limited Partnership (not Nu-Dawn Homes Inc.) was also a joint fee simple titled owner of the SRD real property including all the SRD Lots along with Seafirst Mortgage Corporation.[57] The Guests also argued at trial that the SRCA Articles of Incorporation did not permit any Lot 4 easement on any part of Lot 5, and that the SRCA recorded plat and

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[51] VRP (July 8, 2014) at 28:3 to 31:22.
[52] VRP (July 8, 2014) at 30:6 to 31:9.
[53] VRP (July 9, 2014) at 84:1-3.
[54] VRP (July 9, 2014) at 84:4 – 6
[55] VRP (July 9, 2014) at 84:10 – 14.
[56] VRP (July 9, 2014) at 84:10 – 14.
[57] Ex. 20; VRP (July 10. 2014) at 39:15 – 40:5; VRP (July 14, 2014) at 165:3 – 166:7.

its certified survey did not evidence any Lot 4 deck easement on any part of Lot 5.[58]

Shortly before the end of the trial, the parties presented the court with proposed jury instructions.[59] The Langes presented a proposed jury instruction that the trial court had already determined as a matter of law that the 1987 recorded document permitted the Langes to build their deck on Lot 5.[60] The Guests objected, arguing that the instruction was contrary to the evidence they had introduced demonstrating the invalidity of the 1987 recorded document and asked that the jury at least be able to review the issue.[61] The court overruled the Guest's objection, and subsequently gave Jury Instruction No. 17, which instructed the jury that "[t]he court has determined as a matter of law that defendants had the right to rebuild in and occupy the area described in the Patio or Deck Easement recorded under Pierce County Auditor Document Number 87094290509."[62]

The Guests' trial counsel also objected to Defendants' Proposed Instruction No. 8, which concerned consideration, and which stated that "[i]f you find that plaintiffs justifiably relied on the defendants' promise not to build a new deck in the area identified in the patio or deck easement, then there is consideration."[63] The court initially reserved its ruling on this

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[58] Exhibits 20 and 23; VRP (July 15, 2014) at 10:7 – 12:1
[59] CP at 4609 – 61. *See also* VRP (July 15, 2014) at 86:5 – 115:2.
[60] CP at 4660 – 61.
[61] VRP (July 15, 2014) at 98:11-14.
[62] CP at 4755 (Jury Instruction No. 17); VRP (July 15, 2014) at 132:10 – 13.
[63] The Guests' objections are at VRP (July 15, 2014) at 89:5 – 9 and VRP (July 15, 2014) at 101:20 – 25.

objection, but ultimately included Defendants' Proposed Instruction No. 8 as the Court's Instruction No. 9.[64]

In addition, the trial court agreed to give Plaintiffs' Proposed Instruction No. 7, concerning the implied duty of good faith and fair dealing.[65] The trial court stated that the instruction "fairly defines the duty of good faith and fair dealing."[66] However, when it actually instructed the jury, the trial court omitted this instruction.[67] The jury picked up on the omission, asking the trial court during its deliberations to define "covenant of good faith and fair dealing."[68] The trial court's only response was to state that "words are to be given their ordinary meaning."[69]

On July 16, 2014, the jury entered its verdict in favor of the Langes.[70] The jury found that the Langes did not breach a contract with the Guests to refrain from building their deck in an area where it had previously existed, and did not breach their covenant of good faith and fair dealing with the Guests. In addition, the jury found that the deck as presently constructed did not trespass on the Guests' Lot 5 property.[71] After the trial, the trial court entered judgment quieting title in the Langes to "exclusively use, maintain, repair and replace the deck . . . as it now exists against any claim of the plaintiffs."[72]

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[64] VRP (July 15, 2014) at 89:10 – 11; 102:1 – 103:3; 128:22 – 25.
[65] VRP (July 15, 2014) at 103:12 – 104:4.
[66] VRP (July 15, 2014) at 103:18 – 19.
[67] VRP (July 15, 2014) at 122:25 – 136:10; *see* CP at 4736 – 60.
[68] CP at 4761. *See also* VRP (July 16, 2014) at 42:14 – 17.
[69] CP at 4761. *See also* VRP (July 16, 2014) at 42:16 – 43:7.
[70] CP at 4763 – 64. *See also* VRP (July 16, 2014) at 44:18 – 45:10.
[71] VRP (July 16, 2014) at 45:2 – 10.
[72] CP at 4855 – 56.

The Guests timely appealed.

V. ANALYSIS

A. The Trial Court Abused its Discretion in Denying the Guests' Motion to Amend their Complaint.

Due to the permissive nature of the standard for filing an amended complaint, the trial court abused its discretion when it denied the Guests' Motion for Leave to File Second Amend[ed] Complaint and for Continuance.[73]

Civil Rule 15(a) requires that leave to file an amended pleading be "freely given when justice so requires" unless it would result in prejudice to the nonmoving party.[74] Rule 15 is based on Fed. R. Civ. P. 15, which "was designed to facilitate the amendment of pleadings except where prejudice to the opposing party would result."[75] In determining prejudice, the court may consider facts such as undue delay, unfair surprise, and jury confusion.[76] The court may deny a motion for leave to amend only where such amendment causes an "undue hardship or prejudice."[77]

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[73] CP at 213 – 217; 300 – 301.
[74] *Kirkham v. Smith*, 106 Wn. App. 177, 181, 23 P.3d 10 (2001) (quoting CR 15(a)).
[75] *United States v. Hougham*, 364 U.S. 310, 316, 81 S. Ct. 13, 18, 5 L. Ed. 2d 8 (1960).
[76] *Wilson v. Horsley*, 137 Wn.2d 500, 505-06, 974 P.2d 316 (1999); *accord Haselwood v. Bremerton Ice Arena, Inc.*, 137 Wn. App. 872, 889, 155 P.3d 952 (2007) ("In determining prejudice, a court may consider undue delay and unfair surprise as well as the futility of amendment"), *aff'd*, 166 Wn.2d 489, 210 P.3d 308 (2009); *see also Herron v. Tribune Publ'g. Co.*, 108 Wn.2d 162, 165-66, 736 P.2d 249 (1987) ("The factors a court may consider in determining prejudice include undue delay and unfair surprise . . . . A court may consider whether the amendment to the complaint is likely to result in jury confusion, the introduction of remote issues, or a lengthy trial").
[77] *See Wallace v. Lewis Cnty.*, 134 Wn. App. 1, 25, 137 P.3d 101 (2006).

Civil Rule 15 is designed to "facilitate proper decisions on the merits."[78] "[A] motion's timeliness alone, without more, is generally an improper reason to deny a motion to amend."[79] An allegation of undue delay must be accompanied by actual prejudice to the nonmoving party.[80] The "mandate [to freely amend pleadings] is to be heeded. . . . If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits."[81]

Moreover, the Supreme Court has approved the granting of a motion to amend a complaint with as much as a *five year* delay between filing the initial complaint and filing a motion to amend.[82] In that case, the Court found that the passage of five years and four months was not sufficient to justify denying the plaintiff's motion to amend. The Court held that the defendant failed to demonstrate prejudice when (1) the original complaint included language similar to that required for his new claim; and (2) defendant did not show "actual prejudice and . . . bad faith" when it claimed prejudice because it lacked "prior knowledge of this claim so as to prepare the defense, contact witnesses and otherwise secure evidence."[83]

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[78] *Quality Rock Prods., Inc. v. Thurston Cnty.*, 126 Wn. App. 250, 273, 108 P.3d 805 (2005).
[79] *Quality Rock Prods.*, 126 Wn. App. at 273 (citing *Herron*, 108 Wn.2d at 166).
[80] *Walla v. Johnson*, 50 Wn. App. 879, 883, 751 P.2d 334 (1988) (emphasis added).
[81] *Tagliani v. Colwell*, 10 Wn. App. 227, 233, 517 P.2d 207, 211 (1973) (quoting *Froman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d (1962)).
[82] *Caruso v. Local Union No. 690 of Int'l Bhd.. of Teamsters, Chauffeurs, Warehousemen, and Helpers of Am.*, 100 Wn.2d 343, 349 – 351, 670 P.2d 240 (1983).
[83] *Caruso*, 100 Wn.2d at 351.

Here, less than one year passed before the Guests filed their motion to amend their complaint. Although the Langes objected to the timeliness of the motion, timeliness alone is not sufficient to deny a motion to amend. The Langes' desire for a swift resolution also does not demonstrate prejudice. The Langes did not demonstrate, for instance, that they could not prepare for trial with a short continuance. Their own desire to avoid a continuance also should not have been accepted as prejudice; no party wants litigation to drag on for years on end and if a desire to quickly end litigation sufficed to establish prejudice, motions for leave to amend would never be granted. This is especially true where, as here, no prior motion to continue had been filed. In the end, in response to a motion to intervene by a non-party, the trial court wound up continuing the case for six months anyway.

Additionally, although the proposed amended complaint is lengthy, this is not a basis for denying a motion to amend. "Although Rule 8 requires that a pleading be short as well as plain, a court ordinarily should not dismiss a complaint merely because it contains repetitious and irrelevant matter, provided it also includes allegations sufficient to put the defendant on notice."[84] The proposed amended complaint was sufficient to put the defendants on notice of the claims and the trial court erred by denying the Guests' motion based on the addition of defendants, claims and causes of action.

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[84] 2 Moore's Federal Practice 3d § 8.04(1)(b).

B. The Trial Court Erred in Granting Summary Judgment Dismissing the Guests' Breach of Contract Claim Based on the CC&Rs and in Refusing to Modify the Partial Grant of Judgment as to the Validity of the 1987 Recorded Document.

1. *Standard of Review.*

Summary judgment shall be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.[85] While a material fact is one upon which the outcome of the case depends,[86] it is the job of the moving party to show the absence of an issue of material fact.[87] When a motion for summary judgment is before the court, it may decide questions of fact as a matter of law only when reasonable minds could reach but one conclusion.[88] Matters decided as a matter of law by the trial court will be reviewed by the appellate court de novo with no deference to the trial court's rulings.[89]

2. *The Trial Court Erred in Dismissing the Guests' Breach of Contract Claim based on the CC&Rs.*

The trial court erred in finding that the CC&Rs do not create an enforceable contract between the individual homeowners. Restrictive covenants are enforceable by the owners. The Langes never argued otherwise. The jury should have been allowed to decide whether the Langes breached the CC&Rs when they rebuilt the 3' by 5' overhang on their deck.

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[85] CR 56(c); *Doe v. Dep't of Transp.*, 85 Wn. App. 143, 147, 931 P.2d 196, *rev' denied*, 132 Wn.2d 1012 (1997).
[86] *Tran v. State Farm Fire & Cas. Co.*, 136 Wn.2d 214, 223, 961 P.2d 358 (1998).
[87] *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).
[88] *Ruff v. Cnty. of King*, 125 Wn.2d 697, 703 – 04, 887 P.2d 886 (1995).
[89] *Brower v. Ackerley*, 88 Wn. App. 87, 89, 943 P.2d 1141 (1997), *rev. denied*, 134 Wn.2d 1021 (1998)..

The Guests argued that the Langes breached the 1986 CC&Rs as to 3' by 5' overhang because (1) the original Lot 4 deck was not built by developer and (2) the Langes rebuilt their deck with knowledge that encroachment exceeded the 1987 recorded document.[90] The Langes responded that none of the alleged contracts on which the Guests based their breach of contract claim, including the CC&Rs, was supported by consideration.[91] The trial court dismissed the Guests' breach of the CC&Rs claim, finding that the CC&Rs are not a contract between the Langes and Guests.[92]

"Restrictive covenants. . . are enforceable by injunctive relief."[93] Additionally, because real covenants are the creation of common law, "the usual common law remedy, damages, must be available when they have been breached."[94] The Guests sought injunctive relief to remove the encroachment as well as damages. The trial court's ruling was error.

Moreover, even if the trial court had not erred in interpreting the law on this issue, genuine issues of material fact prevented judgment on the Langes' breach of the CC&Rs. The August 1986 CC&Rs granted an

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[90] VRP (April 19, 2013) at 61 – 62; CP at 571 – 72.
[91] CP at 643 – 44. The Langes did not deny that the CC&Rs create a basis on which the Guests could sue, likely because Section 14.1 of the 1986 CC&Rs states clearly that the "Association and each Lot Owner. . . shall have the right to enforce, by any proceeding at law or in equity, all restrictions, conditions, covenants, reservations, liens and charges now or hereafter imposed by the provisions of this Declaration." Exhibit 14 at § 14.1.
[92] VRP (April 19, 2013) at 67 – 68; CP at 941.
[93] *Piepkorn v. Adams*, 102 Wn. App. 673, 684, 10 P.3d 428, 434 (2000) (adjoining landowners in subdivision were entitled to injunction to prevent another owner from building fence in violation of covenants).
[94] 17 Stoebuck & Weaver, WASH. PRAC., REAL ESTATE: PROPERTY LAW, § 3.9 (2nd ed. 2014).

easement for minor and unintended deck and other minor and unintended encroachments constructed by Developer:

> There shall be valid easements for the maintenance of said encroachments so long as they shall exist...provided, however, that in no event shall a valid easement for encroachment be created in favor of an Owner or Owners if said encroachment occurred due to the willful act or acts with full knowledge of said Owner or Owners.[95]

The August 1986 CC&Rs significantly also stated that "the rights and obligations of Owners shall not be altered in any way by said encroachment."[96]

The Guests introduced evidence sufficient to raise a question of fact as to whether the Lot 4 deck was constructed by the developer and the Langes' lack of good faith in rebuilding their deck. The Guests raised questions of fact whether the Langes' breached their duties under the CC&Rs. David Lange testified at his deposition that he believed the Lot 4 deck had been built in approximately 1990.[97] In a March 12, 2011 letter to the ACC, the Langes also admitted that "the deck [was] built by the original owners."[98] If the Lot 4 deck was not built by the Developer, the Langes would not be entitled to rely on the August 1986 CC&Rs to grant them any

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[95] CP at 424.
[96] CP at 424. There were issues as to whether the purported 2007 CC&R amendments removed the requirement that any unintentional minor encroachment easement would only apply to an encroachment created by the developer, but the Langes asserted on summary judgment that they were not relying on the 2007 CC&Rs, so the issue was not addressed. *See* VRP (April 19, 2013) at 13:18 – 14:23.
[97] CP at 697.
[98] CP at 395.

minor unintended "encroachment" easement on Lot 5 or over the 3' by 5' encroachment onto Lot 5.

Additionally, because the Langes were on notice that their original deck exceeded the boundaries of the 1987 recorded document, the Langes willfully rebuilt their deck with knowledge of the encroachment, thus further removing the Langes from the potential protection offered by the August 1986 CC&Rs. At summary judgment, the Langes claimed that any statements they made about their prior deck unlawfully encroaching on Lot 5 were based in part on representations by the Guests about the 1987 recorded document.[99] However, a March 12, 2011 memorandum from the Langes to the ACC stated that "[t]o ensure that our deck is constructed within legally surveyed limits[,] we contacted the city engineers to help us outline our lot boundaries and the deck easement that was laid out by the developers, Nu-Dawn Homes. . . . We found that the deck, built by the original owners, was not constructed within our easement limits."[100] Despite the notification from the City of Gig Harbor that the proposed deck exceeded the boundary limits of the 1987 recorded document, the Langes undertook to rebuild their deck with the 3' by 5' and other encroachments.

The question of fact regarding the Langes' knowledge was acknowledged by the trial court's ruling on the Langes' request to dismiss the Guests' claim regarding clean hands, where the trial court noted that there was a "question of fact as to the clean hands. . . [I]t seems to me that

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[99] CP at 359 – 61, 384 – 85, 397.
[100] CP at 395.

Mr. Lange did know that this was a dispute when the Guests claimed he couldn't build there."[101] As such, there was an issue of fact as to whether the Langes rebuilt their deck with full knowledge of the encroachment. If so, the Langes were not entitled to an easement under either the August 1986 or 2007 CC&Rs.

The trial court erred in dismissing the Guests' breach of contract claim based on the CC&Rs. Given the Langes' summary judgment stipulation that they would not rely on the 2007 alleged CC&Rs to support their motion for summary judgment, there were issues of fact whether the August 1986 CC&Rs governed the Langes' and the parties' conduct, whether the developer built Lot 4's original deck, and what the Langes knew about the 3' by 5' encroachment prior to rebuilding their deck. The trial court should have denied summary judgment on this issue.

3. *Given the Interlocutory Nature of Grants of Partial Summary Judgment, the Trial Court Erred in Disregarding Evidence Regarding the Ownership of Lot 5 at the Time of the Creation of the 1987 Recorded Document.*

Additionally, the trial court erred in refusing to consider as untimely the Guests' argument that, as a defense to the Langes' quiet title claim, the 1987 recorded document is invalid as an easement because the alleged grantor did not own Lot 5 and, therefore, could not grant any easement to Lot 4 or to any other person or entity.

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[101] VRP (April 19, 2013) at 38; CP at 942, 945.

An order granting partial summary judgment is not a final judgment and the trial court retains authority to modify the order at any time prior to final judgment.[102]

On April 17, 2013, the Guests submitted and filed CR 56(f) declarations in support of a request to deny the Langes' motion for summary judgment or to continue.[103] On May 6, 2013, before an order was entered on the partial summary judgment motions, the Guests submitted a declaration in support of a CR 56(f) motion to continue arguing, in part, that the 1987 recorded document, on which the Langes base their quiet title action as to the 21' by 5' strip, was invalid for additional reasons.[104] First, the purported easement was granted by Nu-Dawn Homes, Incorporated, yet at that time Nu-Dawn Homes Limited Partnership, a separate legal entity, owned Lot 5. Second, the purported grantor's signature on the 1987 recorded document was not the grantor's signature.[105] The 1987 recorded document was purportedly signed by Nu-Dawn Homes, Inc. with no identification or acknowledgment of the authority or capacity for that person to sign or bind Nu-Dawn Homes, Inc.[106] Nu Dawn Homes Limited Partnership sold Lot 4 on May 6, 1987 to the Urbauers, the Langes' predecessors.[107] The declaration also included testimony arguing that Nu-Dawn Homes Limited Partnership also owned Lot 5 at the relevant times.[108]

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[102] CR 54(b); *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 300, 840 P.2d 860 (1992).
[103] CP at 724 – 44.
[104] CP at 870 – 86.
[105] CP at 880.
[106] CP at 431.
[107] CP at 925.
[108] CP at 880.

The trial court declined to consider these arguments and facts, finding them to be untimely.[109] The Guests revisited the issue multiple times over the next year of pretrial issues, including in their motions in limine[110] and in opposing the Langes' proposed instruction to the jury stating that the 1987 recorded document created a valid easement.[111] At trial, the Guests elicited testimony demonstrating that Nu-Dawn Homes Limited Partnership was the owner of Lot 5 at the time the 1987 recorded document was executed.[112] Despite the proof offered by the Guests, the trial court repeatedly refused to revisit the issue, finding that the May 6, 2013 partial summary judgment order was the "law of the case."[113] This was error.

Motions for partial summary judgment are interlocutory in nature and may be revised at any time before final judgment.[114] An easement deed is required to grant or convey an easement that encumbrances a specific servient estate.[115] The agreement to the easement by the owner of the servient estate is a vital element in the creation of an easement.[116]

Here, the Guests submitted sufficient evidence to raise a genuine issue of material fact as to whether Nu Dawn Homes, Inc. was in fact the

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[109] VRP (May 6, 2013) at 8 – 9.
[110] VRP (July 8, 2014) at 28:3 – 31:22.
[111] VRP (July 15, 2014) at 98.
[112] VRP (July 10, 2014) at 39 – 40; VRP (July 14, 2014) at 165 – 69; Exhibit 20.
[113] *See* VRP (July 8, 2014) at 28:3 – 31:22; VRP (July 9, 2014) at 114:6 – 116:1; VRP (July 10, 2014) at 57:16 – 21; VRP (July 15, 2014) at 98:10 – 99:18.
[114] CR 54(b).
[115] *Berg v. Ting*, 125 Wn.2d 544, 551, 886 P.2d 564 (1995).
[116] *Zunino v. Rajewski*, 140 Wn. App. 215, 222, 165 P.3d 57 (2007); *Beebe v. Swerda*, 58 Wn. App. 375, 382, 793 P.2d 442, *rev. denied*, 115 Wn.2d 1025 (1990).

owner of Lot 5 and could have been the grantor of an easement as to that parcel. If Nu Dawn Homes, Inc. did not own Lot 5, it had no right to attempt to grant an easement to Lot 4, and the 1987 recorded document would be null, void, and invalid. The motion for partial summary judgment could have been revisited at any time prior to the entry of judgment. The Guests raised this issue before entry of the orders on partial summary judgment and multiple times before entry of final judgment, including through trial testimony. The Guests again challenged the finding that the 1987 recorded document created an easement in their motions in limine and in objecting to the jury instructions.[117] The Guests ask that this Court find that the trial court erred in not considering the ownership of Lot 5 in assessing the validity of the 1987 recorded document and remand for a new trial as to the validity of the 1987 recorded document and alleged easement.

C. The Trial Court Erred in Granting the Langes' Motion for Summary Judgment as to the Guests' Claims regarding Section D, because the Court's Ruling is Contrary to the Plain Language of the 1987 Recorded Document.

The trial court erred in interpreting the plain language of Section D of the 1987 recorded document.[118]

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[117] CP at 4033; VRP (July 15, 2014) at 98:11 – 14.

[118] If the 1987 recorded document is not invalid, the Guests are entitled to the benefit of the indemnity agreement. If the 1987 recorded document is invalid because, *inter alia*, the purported grantor did not have title to Lot 5, the Guests are still entitled to be indemnified, defended, released, and held harmless because the Langes repeatedly adopted, ratified and admitted that Section D applied to them with knowledge of the Guests' challenges to the document. In any event the Guests may still rely on the indemnity provision for damages, including attorney fees. *Kaintz v. PLG, Inc.*, 147 Wn. App. 782, 787, 197 P.3d 710 (2008) (a party who prevails by proving that a contract is invalid may seek attorney fees if the invalid contract provided for attorney fees).

The Court of Appeals reviews interpretation of contract provisions de novo and applies fundamental contract construction rules when interpreting a contract.[119] The meaning of a writing and a contract will be determined as a question and a matter of law and reviewed de novo when it does not depend on extrinsic terms and the writing and contract is not ambiguous.[120] A contract is construed to give controlling weight to the parties' intent, as expressed in the contract's plain language.[121] The Court of Appeals "give[s] words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent."[122] The Court "view[s] the contract as a whole, interpreting particular language in the context of [the] other contract provisions."[123]

Washington courts have long held that indemnity contracts should be given a reasonable construction and should not be "so narrowly or technically interpreted as to frustrate their obvious design."[124] "Although clauses purporting to exculpate an indemnitee from liability flowing solely from its own acts or omissions are not favored and are strictly construed, [Washington Courts] will enforce such provisions where the language of the agreement unquestionably demonstrates that this was the intent of the

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[119] *Viking Bank v. Firgrove Commons 3, LLC,* 183 Wn. App. 706, 713, 334 P.3d 116 (2014); *Cambridge Townhomes, LLC v. Pac. Star Roofing, Inc.,* 166 Wn.2d 475, 487, 209 P.3d 863 (2009).
[120] *Viking Bank,* 183 Wn. App. 711 – 12.
[121] *W. Plaza, LLC v. Tison,* 180 Wn. App. 17, 22, 322 P.3d 1 (2014) *rev. granted,* 336 P.3d 1165 (2014).
[122] *Viking Bank,* 183 Wn. App. at 713.
[123] *Viking Bank,* 183 Wn. App. at 713.
[124] *Tri-M Erectors, Inc. v. Donald M. Drake Co.*, 27 Wn. App. 529, 532, 618 P.2d 1341 (1980) (quoting *Union Pacific R. R. v. Ross Transfer Co.*, 64 Wn.2d 486, 488, 392 P.2d 450 (1964)), *rev. denied*, 95 Wn.2d 1002 (1981).

parties."[125] Finally, a court will enforce a duty to indemnify regardless of whether the indemnified party prevails when the agreement's plain language does not depend upon whether the indemnified party prevails against the claims covered by the agreement.[126]

The parties argued below over whether Section D barred the Langes from asserting or defending against any claims in this matter, and whether it required the Langes to indemnify, defend, and hold the Guests harmless in the instant litigation. The trial court dismissed the Guests' indemnity claim, finding that Section D "is in case someone gets hurt and there's a lawsuit the Langes have to pay the Guests for. It's not a bar to this claim. This is a claim over what the extent of the easement is."[127]

Section D states:

> Grantee promises, covenants, and agrees that the Grantor shall not be liable for any injuries incurred by the Grantee, the Grantee's guests and/or third parties arising from the utilization of said easement and further Grantee agrees to hold Grantor harmless and defend and fully indemnify Grantor against any and all claims, actions, and suits arising from the utilization of said easement and to satisfy and [sic] all judgments that may result from said claims, actions and/or suits.[128]

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[125] *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wn. App. 86, 100, 285 P.3d 70 (2012), *rev. denied*, 175 Wn.2d 1015 (2012).
[126] *Newport Yacht Basin*, 168 Wn. App. at 101 (holding that indemnitor was required to indemnify indemnitee for claims regardless of whether indemnity prevailed when agreement provided for indemnification of "any and all claims" and did not require that the indemnity prevail).
[127] VRP (April 19, 2013) at 35.
[128] CP at 431.

Section D contains two separate hold harmless, release, and indemnification clauses. In the first, the Langes "promise[d], covenant[ed], and agree[d] that the [Guests] shall not be liable for *any injuries* incurred by the [Langes], the [Langes'] guests and/or third parties arising from the utilization of said easement. . ."[129] That is, the 1987 recorded document specifically includes claims between the Guests and the Langes and is not just limited to third parties. Moreover, the second clause is even less limiting. Section D goes on to state that "and further [the Langes] agree to hold [the Guests] harmless and defend and fully indemnify [the Guests] against any and all claims, actions, and suits arising from the utilization of said easement and to satisfy [any] and all judgments that may result." Unlike the first clause, this portion of Section D is not limited to claims brought by any class of person or the nature of said claims. The trial court erred by adding words to Section D, and by holding that it applied only to claims brought by third parties for torts arising out of the use of the Langes' deck.

Additionally, the trial court decided *sua sponte* that the issues in this case did not arise from the utilization of the easement, but rather involved the extent of the easement. Taking the evidence in the light most favorable to the Guests, the Guests' trespass and injunction claims[130] related to the Langes' utilization of the alleged easement. Inherent in the trial court's finding that this dispute did not involve the utilization of the easement is a

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[129] CP at 431 (emphasis added).
[130] CP at 39.

belief that Section D applies only to the use of the Langes' *deck*, not the *easement* itself, a legal interest separate from the actual deck built on the area covered by the 1987 recorded document. This is an overly restrictive interpretation of Section D, particularly on summary judgment. The Langes' and Guests' claims related to the use of the easement to the extent that the Langes had already built their deck in the area covered by the 1987 recorded document and the use of that alleged easement formed the basis of the Guests' claims.

The Guests request that this Court vacate the trial court's summary judgment order dismissing their indemnity, defense, release, and hold harmless claims, and remand for entry of judgment in the Guests' favor on these issues and for a hearing on the Guests' damages, costs, and fees.

D. The Trial Court Erred in Giving Jury Instruction No. 17 Relating to the 1987 Recorded Document, Jury Instruction No. 9 Defining "Consideration," and in Failing to Instruct the Jury on the Definition of "Good Faith and Fair Dealing."

The trial court's jury instructions erroneously stated that the 1987 recorded document created a valid easement and defined "consideration" imposing a higher standard than required by law. These instructions were prejudicial to the Guests and likely affected the outcome of the trial. Moreover, the trial court agreed to give an instruction defining the duty of good faith and fair dealing, and then failed to do so. The Guests respectfully request that this Court remand with instructions for a new trial.

The Court of Appeals reviews jury instructions de novo. If an instruction contains an erroneous statement of the applicable law that prejudices a party, it is reversible error.[131] Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.[132]

Even if an instruction is misleading, it will not be reversed unless prejudice is shown. Error is prejudicial if it affects or presumptively affects the outcome of the trial.[133] A clear misstatement of the law, however, is presumed to be prejudicial.[134]

The trial court erred in giving Jury Instruction No. 17, which instructed the jury that the trial court had already decided as a matter of law that the Langes had a right to use the area referred to in the 1987 recorded document. The Guests had demonstrated at trial that the 1987 recorded document was invalid for multiple reasons, including that Nu-Dawn Homes, Inc. was not the owner of Lot 5 at the time the document was executed or recorded.[135] With Jury Instruction No. 17 in place, the Langes argued during closing that the jury could disregard the Guests' evidence:

> So the plat document doesn't change anything in this case. It's just another attempt by the Guests to say, "Well, look, the easement wasn't here at this point in time." But the Court

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[131] *Thompson v. King Feed & Nutrition,* 153 Wn.2d 447, 453, 105 P.3d 378 (2005).
[132] *Id.*
[133] *Thomas v. French,* 99 Wn.2d 95, 104, 659 P.2d 1097 (1983).
[134] *Keller v. City of Spokane,* 146 Wn.2d 237, 249 – 50, 44 P.3d 845 (2002).
[135] VRP (July 10, 2014) at 39 – 40; VRP (July 14, 2014) at 165 – 69; Exhibit 20.

> has instructed you this is a valid easement. All right. So that is what narrows the issues in this case.
>
> The same thing with the Articles of Incorporation. We formed this – Nu-Dawn Homes forms this and builds Spinnaker Ridge. It forms this association, et cetera. And they want to use that form to spin, "Well, you know, they never had a right to do this," or "It wasn't this or it wasn't that, and it didn't bind us to that." Well, you've got to go back to the law and what the issues are in this case. Did the Langes have a right to rebuild the deck? And this instruction here says yes.[136]

The trial court erred in refusing to revisit this issue and instructing the jury that the issue had been decided as a matter of law.

The trial court also erred in giving Jury Instruction No. 9 defining "consideration." Defendants' proposed instruction No. 8, which ultimately became Jury Instruction No. 9, stated "If you find that the plaintiffs justifiabl[y] relied on defendants' promise not to build a new deck in the area identified in the patio or deck easement, then there was consideration."[137] In contrast, the Guests' proposed instruction states that

> If you find that the Guests, in return for a Lange promise did anything legal which they were not bound to do, or refrained from doing anything that they had a right to do, whether there is actual loss or detriment to the Guests or actual benefit to the Langes or not, then there was consideration.[138]

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[136] VRP (July 16, 2014) at 11.
[137] CP at 4646.
[138] CP at 4619.

The Guests objected to the Langes' proposed instruction, noting that it did not include forbearance of a legal right as consideration.[139] The trial court granted the Langes' request, finding that

> as I read the Plaintiffs' I just don't frankly understand it. . . . I think that [it] includes language in the standard WPI that is confusing. I think that the question is whether the Plaintiffs justifiably relied on the Langes' promise not to build a new deck in the area that was identified in the easement. If they did, there was consideration. It's justifiable reliance. And, if not, they didn't. I guess what the Plaintiffs' consideration instruction is attempting to convey is forbearance of a legal right is also consideration, but it doesn't – I just think in reading it, it's confusing. I don't think it's going to help the jury sort through this.[140]

Justifiable reliance is not a form of consideration but is instead an alternative to it that will support a claim for promissory estoppel.[141] Consideration includes the forbearance of a legal right.[142]

The Guests' proposed instruction attempted to instruct the jury that forbearance of a legal right could constitute consideration. The testimony would have supported such a finding. Because of the jury instructions, the jury incorrectly analyzed whether the Guests justifiably relied on the Langes' statement rather than whether the Guests provided consideration.

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[139] VRP (July 15, 2014) at 89:5 – 9, 101: 20 – 25.
[140] VRP (July 15, 2014) at 102:6 – 24.
[141] *See Kim v. Dean*, 133 Wn. App. 338, 345, 135 P.3d 978, 982 (2006) (noting that "American courts adopted the Chancery court's equitable cause of action based on good-faith reliance to enforce promises unsupported by consideration--not as a consideration substitute, but rather as a doctrine based on reliance that the courts could use to prevent injustice. Eventually, the American courts characterized this line of cases as "promissory estoppel").
[142] *Labriola v. Pollard Grp., Inc.*, 152 Wn.2d 828, 833, 100 P.3d 791 (2004).

This clear misstatement of the law is presumptively prejudicial. The Guests respectfully request that this Court remand for a new trial.

Additionally, the trial court erred in not instructing the jury as to the duty of good faith and fair dealing. The trial court agreed to give the Guests' proposed instruction on the duty of good faith and fair dealing, but then failed to do so.[143] The jury's confusion at the failure is evident by the jury question asking for a definition.[144] And contrary to the trial court's statement, there is a standard jury instruction on the implied duty of good faith and fair dealing.[145]

This error is especially prejudicial when taken in connection with the incorrect instruction defining "consideration" as both errors served to undermine the Guests' main claims. The Guests respectfully request that this Court remand for a new trial.

E. Cumulative Error Denied the Guests of a Fair Trial.

The cumulative errors in this case justify remand for a new trial. The doctrine of cumulative error recognizes that multiple errors might combine to deny a litigant a fair trial, even where each individual error does not prejudice the litigant in isolation.[146]

The trial court erred in dismissing the Guests' breach of contract claim based on the CC&Rs, erred in refusing to modify the grant of partial

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[143] VRP (July 15, 2014) at 103:12 – 104:4; 122:25 – 136:10. *See also* CP at 4736 – 60.
[144] CP at 4761. *See also* VRP (July 16, 2014) at 42:14-17.
[145] 6A WASH. PRAC., Wash. Pattern Jury Instr. Civ. WPI 302.11 (6th ed.).
[146] *State v. Davis*, 175 Wn.2d 287, 345, 290 P.3d 43 (2012); *Storey v. Storey*, 21 Wn. App. 370, 374, 585 P.2d 183 (1978) (applying cumulative error in the civil context).

judgment based on the alleged validity of the 1987 recorded document, erred in instructing the jury on the validity of the alleged easement after being presented with undisputed evidence of the document's invalidity, erred in defining "consideration," and erred in failing to instruct the jury on the duty of good faith and fair dealing. As a result, the Guests were unable to argue that the 1987 recorded document was not a valid easement, that the CC&Rs supported their arguments for breach of contract, that the Guests provided adequate consideration based on their forbearances of legal rights, and that the Langes owed the Guests a duty of good faith and fair dealing. These errors undermine the heart of the Guests' claims and denied them the right to a fair trial.

F. Pursuant to RAP 18.1 and the 1987 Recorded Document, the Guests Request an Award of Attorney Fees, Costs, and Expenses.

The Guests respectfully request an award of attorney fees, costs and expenses from this Court pursuant to RAP 18.1 and Section D of the 1987 recorded document.

Under the 1987 recorded document, the Langes are required to hold the Guests harmless and "defend and fully indemnify" the Guests from "all claims, actions and suits."[147] The requirement for "defense" and "full[] indemni[ty]" can only be satisfied in the circumstances of this case by the Langes paying the Guests' costs and expenses incurred on appeal.

[147] CP at 325.

Moreover, the trial court should be instructed to award the Guests their fees for any further proceedings on remand.

VI. CONCLUSION

Based on the foregoing, the Guests respectfully request that this Court reverse the orders challenged and vacate the judgment entered in favor of the Langes. The Guests also ask that this Court remand with direction to enter judgment in the Guests' favor under Section D of the 1987 recorded document and for a hearing on the Guests' damages, costs, and fees. The Guests also ask that this Court remand for a new trial as requested and indicated. Additionally, the Guests request an award of attorney fees and costs on appeal.

RESPECTFULLY SUBMITTED this 6th day of July, 2015.

LEDGER SQUARE LAW, P.S.

By: _____

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

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DATED this 6th day of July, 2015 at Tacoma, Washington.

Amy Shackelford, P.L.S.
Legal Assistant to Chrystina R. Solum