SC#93677-3

No. 46802-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CHRISTOPHER GUEST and SUZANNE GUEST,

Petitioners,

v.

DAVID LANGE and KAREN LANGE,

Respondents.

PETITION FOR REVIEW

Philip A. Talmadge, WSBA #6973
Sidney Tribe, WSBA #33160
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661
Attorneys for Petitioners Guest

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A. IDENTITY OF MOVING PARTIES

The petitioners Guest ask this Court to review the Court of Appeals decision set forth in Part B.

B. COURT OF APPEALS DECISION

The Court of Appeals filed its opinion in this case on June 14, 2016. That opinion is in the Appendix at pages A-1 through A-21. That court denied the Guests' motion for reconsideration in an order entered on August 31, 2016. A copy of that order is in the Appendix at page A-22.

C. ISSUES PRESENTED FOR REVIEW

1. Where there are factual issues concerning the legal authority of a neighbor to build a deck on an alleged easement, including a number of documents prohibiting it and a contrary city ruling, did the trial court err in granting summary judgment on the neighbors' entitlement to build the deck on the alleged easement, and in subsequently instructing the jury that the court had ruled as a matter of law that the neighbors had the right to construct and maintain the deck?

2. Did the trial court err in failing to give an instruction defining the neighbors' duty of good faith and fair dealing in connection with the construction of the deck, particularly in light of juror questions as to that definition, left unanswered by the trial court?

3. Did the trial court err in construing an unambiguous release, defense, and indemnification provision in a 1987 recorded document, precluding claims by the property owners whose property rights were invaded by neighbors who built a deck that encroached upon those rights, despite those neighbors' promise not to do so?

D. STATEMENT OF THE CASE

The Court of Appeals' recitation of the facts is largely correct, but too brief to give this Court a real sense of the issues here.

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. CP 340. There are two alleged easements at issue in this case. One is 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. and recorded in Pierce County in 1987. CP 1093. *See* Appendix. The second alleged easement involves an area approximately 3' long by 5' wide that also extends onto the Guests' Lot 5 property, which is not covered by that 1987 document. RP (4/19/13):12-13.

In September 2010, the Langes notified the Guests that they planned to tear down and rebuild their house's deck the next spring. CP 341. The Langes also disclosed that their existing deck encroached on the Guests' property by approximately 5' wide down the length of Lot 5, but that the Guests should not worry because the new deck would not encroach. 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. *Id.* The parties had further discussions about the decks and the Guests showed the Langes the 1987 document and reminded the Langes that the 1987 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. CP 341-42; RP (7/14/14):124-25.

The Guests objected to the Langes building a deck on Lot 5, particularly the southwest side and corner of Lot 5. CP 342. The Langes stated that they did not want to encroach on Lot 5, agreed to back the new deck away from the Guests' master bedroom, and affirmed that the deck they built would not encroach upon the Guests' property. CP 342, 580.

Moreover, the Guests learned that a City of Gig Harbor ("City") engineer had informed the Langes that their former deck on Lot 5 had been in the wrong place and that the easement purportedly noted in the 1987 document was also in the wrong place where no Lot 4 structure could be on any part of Lot 5 according to the original design of the Spinnaker Ridge Development. Ex. 20. Thus, it would have been improper for the Langes to build the new deck on its original footprint, or any previous footprint on any part of Lot 5.

In the spring of 2011, the Langes then 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. CP 342-43, 347-48. They provided 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." CP 343, 581. The Guests told the Langes that they approved of the proposed plans. CP 343.

The Langes submitted a letter to the Spinnaker Ridge Community Association ("SRCA") Architectural Control Committee ("ACC") requesting approval of this reduced deck, noting that the City had informed the Langes that their prior deck impermissibly encroached on Lot 5 and that they were vacating the easement on Lot 5. CP 395, 397, 399, 401. The letter referenced and attached schematics showing complete removal of the Lange deck from Lot 5. *Id.* 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. CP 344, 354. The Guests declined to consent, but 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." CP 356. However, while the Guests were out of town, 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. CP 345. The Langes did not seek permission from the ACC or the Guests before acting on the new revised deck plans, constructing a deck on the footprint of the former deck, instead, simply notifying the ACC Chair by letter. Construction of the deck began while the Guests were out of town. CP 410.

After the Guests filed suit, the trial court granted summary judgment to the Langes, ruling that they could construct their deck on the footprint of their former deck, notwithstanding its encroachment on Lot 5. The trial court later instructed the jury to this effect in Instruction Number 17,[1] and indicated that this ruling was the law of the case as to whether legitimate easements actually existed. RP (7/8/14):30-31.[2]

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[1] The trial court precluded questions to the Langes at trial about the Langes' agreement not to build their deck on the Guests' property. RP (7/9/14):84.

[2] 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. Ex. 20; RP (7/10/14):39-40; RP (7/14/14):165-66. The Guests also argued at trial that the SRCA Articles of Incorporation did not permit any Lot 4 easement on any

The trial court also dismissed the Guests' indemnity claim arising out of section D of the 1987 document, concluding that it did not apply because the Guests' alleged harm arose from the Guests' choice to sue the Langes, not from the use of the putative easement; the court concluded that a contract for indemnity only protects the promisee against claims arising from liability only to a third party. CP 375-76. The Guests moved for reconsideration and the trial court denied that motion. CP 1437-38.

The trial court granted the Langes' motion for summary judgment as to all but claims 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. CP 940-41.

At trial on those claims, the trial court gave Instruction 17, telling 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." CP 4755.

The trial court initially agreed to give Plaintiffs' Proposed Instruction 7, concerning the implied duty of good faith and fair dealing, stating that the instruction "fairly defines the duty of good faith and fair

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part of Lot 5, and that the SRCA recorded plat and its certified survey did not evidence any Lot 4 deck easement on any part of Lot 5. Exs. 20, 23; RP (7/14/14):10.

dealing." RP (7/15/14):103-04. However, when it actually instructed the jury, the trial court omitted this instruction. *Id.* at 122; CP 4736-60. The jury picked up on the omission, asking the trial court during its deliberations to define "covenant of good faith and fair dealing." CP 4761. The trial court's only response was to state that "words are to be given their ordinary meaning." *Id.*

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. CP 4763-64. The Court of Appeals, Division II, affirmed the judgment on the jury's verdict. Appendix at pages A-1 through A-21.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED[3]

This Court has recognized the importance of addressing property rights affected by CC&Rs in the subdivision setting, even granting direct review to address them. *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wn.2d 241, 327 P.3d 614 (2014). This case presents issues pertaining to easements and indemnity in that setting, meriting review. RAP 13.4(b)(4).

[3] This Court is fully familiar with the criteria for review in RAP 13.4(b), and the Guests will not repeat them here.

The Court of Appeals here erroneously affirmed the trial court's decision to permit the Langes to have a deck that not only encroached on the Guests' property, but that abutted the Guests' house and extended beyond the Guests' master bedroom window. 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. 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 City permit and with full knowledge that the deck improperly encroached on Lot 5.

This Court should grant review because the Guests were denied a fair trial by the trial court's determinations as a matter of law that the Langes' easement was legitimate, allowing them to encroach on the Guests' property, and the trial court's misreading of the indemnification agreement here. On the oral agreement of the parties as to a reduced deck, the trial court failed to instruct the jury on a definition of good faith and fair dealing.

(1) <u>The Trial Court Erred in Granting Summary Judgment to the Langes as to the Validity of the 1987 Recorded Document</u>

The trial court erred in granting summary judgment to the Langes to rebuild their deck so as to encroach on the Guests' property. The Court of Appeals erred in affirming that determination. Fact issues existed as to whether the Langes were entitled to rebuild that deck in the fashion that they did.

Attention to the formalities of such matters as the identity of the grantor or whether a homeowners association existed to address CC&R changes is important under Washington law. *E.g.*, *Halme v. Walsh*, 192 Wn. App. 893, 370 P.3d 42 (2016) (homeowners association was not established).

First, as noted *supra* at n.2, there was a fact issue as to the identity of the grantor. 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 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.

The 1987 document, on which the Langes base their quiet title action as to the 21' by 5' strip, was invalid. CP 870-86. First, the purported easement was granted by Nu-Dawn Homes, Inc., 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 document was not the grantor's signature. CP 880. The 1987 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. CP 431. Nu Dawn Homes Limited Partnership sold Lot 4 on May 6, 1987 to the Urbauers, the Langes' predecessors. CP 925. The declaration also included testimony arguing that Nu-Dawn Homes Limited Partnership also owned Lot 5 at the relevant times. CP 880. At trial, the Guests also elicited testimony demonstrating that Nu-Dawn Homes Limited Partnership was the owner of Lot 5 at the time the 1987 recorded document was executed. Ex. 20; RP (7/10/14):39-40; RP (7/14/14):165-69. Despite the proof offered by the Guests, the trial court refused to revisit the issue, finding that the May 6, 2013 partial summary judgment order was the "law of the case." RP (7/8/14):28-31; RP (7/7/14): 114-16; RP (7/10/14):57; RP (7/15/14):98-99.

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 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 document would be invalid.

Second, there was a fact issue as to whether the new deck violated the SCRA CC&Rs. The Langes breached the 1986 CC&Rs as to 3' by 5' overhang because (1) the original Lot 4 deck was not built by the developer and (2) the Langes rebuilt their deck with knowledge that encroachment exceeded the 1987 recorded document. CP 571-72; RP (4/19/03):61-62.[4]

Finally, and most critically, because the Langes were on notice that their original deck exceeded the boundaries outlined in the 1987 document, recorded in Pierce County, the Langes willfully rebuilt their deck with knowledge of the encroachment, removing them from the potential protection offered by the August 1986 CC&Rs.[5] The Langes'

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[4] The August 1986 CC&Rs granted an 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.

CP 424. The August 1986 CC&Rs also stated that "the rights and obligations of Owners shall not be altered in any way by said encroachment." CP 424.

The Guests introduced evidence raising 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. David Lange testified that he believed the Lot 4 deck had been built in approximately 1990. CP 697. In a March 12, 2011 letter to the ACC, the Langes also admitted that "the deck [was] built by the original owners." CP 395. 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 minor unintended "encroachment" easement on Lot 5 or over the 3' by 5' encroachment onto Lot 5.

[5] The Guests do not concede that the 1986 CC&Rs were valid and enforceable.

March 12, 2011 memorandum 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." CP 395. Despite the notice from the City that the proposed deck exceeded the boundary limits of the 1987 document, the Langes rebuilt their encroaching deck anyway. If the Langes rebuilt their deck with full knowledge of the encroachment, they were not entitled to an easement under any allegedly valid CC&Rs.

Instruction 17, which incorporated the trial court's ruling as a matter of law that the Langes had a right to use the area referred to in the 1987 document, erroneously stated that the 1987 document created a valid easement. This compounded the error of the trial court's summary judgment ruling, prejudicing the Guests. With Instruction 17 in place, the Langes argued during closing that the jury could disregard the Guests' evidence. RP (7/16/14):11.

The Court of Appeals erred in approving of the trial court's decision to instruct the jury that the issue of easement validity was decided as a matter of law when there were fact questions attendant upon such a decision. Review is merited. RAP 13.4(b)(4).

(2) The Court of Appeals Misapplied the Law of Indemnification Agreements in Upholding the Trial Court's Summary Judgment on Section D of the 1987 Document

The trial court concluded as a matter of law that Section D, the broad indemnification provision in the 1987 document that purportedly gave the Langes an easement over the Guest property, did not apply.[6] In doing so, the trial court and Court of Appeals misread the provision that required the Langes to indemnify the Guests for any claims actions "arising from the utilization of said easement" by the Langes. CP 431.

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." *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)), *review denied*, 95 Wn.2d 1002 (1981). Thus, the intent of the parties in negotiating such an indemnification must be carried out by the courts. *Scott Galvanizing Inc. v. Nw. EnviroServices, Inc.*, 120 Wn.2d 573, 580, 844 P.2d 428 (1993). Such provisions are designed to allocate risk of loss or damage arising out of a contract.

[6] The trial court dismissed the Guests' indemnity claim because 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." RP (4/19/13):35.

Nunez v. American Bldg. Maintenance Co. West, 144 Wn. App. 345, 351, 190 P.3d 56, *review denied*, 165 Wn.2d 1008 (2008). Any ambiguities in such agreements are construed against their drafter. *Id.*

The Court of Appeals was oblivious to the plain purpose of section D here was for parties like the Guests, adversely affected by claims of an easement over their property, to avoid legal expense in resisting such an encroachment upon their property. To read Section D as narrowly as the Court of Appeals did, eviscerates the purpose of such an indemnity provision.

The Court of Appeals seemingly adopted the argument of the Langes that *City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584, 269 P.3d 1017 (2012) precludes the Guests from recovering their defense costs or damages from the Langes under section D. Op. at 13-14.

But there is authority in Washington, not overruled or even addressed by *City of Tacoma*, that a court must enforce a duty to indemnify regardless of whether the indemnified party prevails when the agreement's plain language does not require the indemnified party to prevail in order for the agreement to be operative. *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wn. App. 86, 100, 101, 285 P.3d 70 (2012), *review denied*, 175 Wn.2d 1015 (2012). The Court of

Appeals did not address this authority anywhere in its opinion. Op. at 13-14.

The two lines of authority can be reconciled. In *City of Tacoma*, this Court was confronted with a dispute between municipal governments over the provision of water services, specifically water hydrants. The Court readily concluded that Tacoma had the obligation under the franchise agreement to provide and maintain such hydrants for various cities including Federal Way. It held that an indemnification provision in the franchise agreement between Tacoma and Federal Way did not obligate Tacoma to defend Federal Way because the agreement did not contemplate that "Tacoma would be forced to bear all costs for litigation when any dispute over contractual performance between parties arises. *That result cannot be obtained from reading the provision as it currently exists*." *Id.* at 594. As such, to enforce the agreement between the cities would frustrate the ability of the parties to enforce their actual contract.

This Court did not say that an indemnification agreement can *never* indemnify parties to the contract from claims *inter se* and that third party claims are invariably required, as the Court of Appeals seems to conclude. Rather, as in *Newport Yacht*, this is a question to be derived from the language of the parties' indemnity agreement, and any appropriate context evidence relating to that agreement. *Newport Yacht*, 168 Wn. App. at 100-

01; *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 334 P.3d 116 (2014) (context evidence may be considered in connection with the contract's execution; interpretation of the contract as to such context evidence is a question of fact).

Here, 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…" That language encompasses claims between the Guests and the Langes and is not just limited to claims by third parties. Moreover, the second clause is even less limiting. Section D also states that "[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. The Court was not entitled, in the guise of interpreting section D of the agreement, to add words to it that the parties did not

negotiate. *Poggi v. Tool Research & Engineering Corp.*, 75 Wn.2d 356, 364, 451 P.2d 296 (1969) (Court would not, in guise of construing contract, make a different contract for the parties).

Additionally, the trial court decided *sua sponte* that the issues in this case did not arise from the *use* 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 related to the Langes' *use* of the alleged easement. Inherent in the trial court's finding that this dispute did not involve the utilization of the easement is a 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 Lot 5. This is an overly restrictive interpretation of Section D, particularly on summary judgment. The Langes' and Guests' claims related to the use of an alleged easement based on invalid documents.

While the Guests do not believe that *City of Tacoma* precludes application of the principle outlined in *Newport Yacht*, even if the decisions were somehow at odds, the Court of Appeals failed to reconcile those lines of authority. This Court should grant review and resolve them. RAP 13.4(b)(1), (2).

(3) The Trial Court Erred in Failing to Instruct the Jury on the Langes' Duty of Good Faith

The trial court's summary judgment decisions left limited issues to be resolved by the jury, one of which was the enforcement of the Langes' undertaking to limit the scope of their new deck. Critical to that issue was their good faith in addressing that undertaking.

There is little question that Washington law has long recognized that a covenant of good faith and fair dealing is an aspect of all Washington contracts. *Badgett v. Security State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). Indeed, a WPI governs as to that implied covenant. WPI 302.11. As noted in 6A *Wash. Practice* at 267: "Use this instruction whenever the jury requires an explanation of the duty of good faith." Moreover, such a covenant is actionable. In *Rekhter v. State, Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 323 P.3d 1036 (2014), this Court reaffirmed the viability of the implied covenant of good faith and held that its violation could be actionable even in the absence of a finding that other contract terms had been violated. *Id.* at 111-12. In particular, that duty is critical in the situation where one party to the contract has discretionary authority regarding contract terms. *Id.* at 112-16.

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. RP (7/15/14):103-04, 122-36. The jury's confusion at the

failure is evident by the jury question asking for a definition. CP 4761; RP (7/16/14):42.

The Court of Appeals concluded that this error was not preserved by the Guests for appellate review. Op. at 19-20. In so concluding it erred. The Guests were entitled to take the trial court at its word that it would instruct the jury on the implied covenant of good faith as it said it would. Moreover, the trial court could have corrected the problem by instructing the jury in the words of WPI 302.11 in responding to the jury's question; it chose not to do so.

The question of the implied covenant of good faith is too important generally in Washington contract law and under the facts of this case in particular not to have the jury instructed on it; this error is especially prejudicial here when it deprived the Guests of the opportunity to argue their key basis for asserting that the Langes breached their undertaking to limit their rebuilt deck. Review is merited. RAP 13.4(b)(1).

F. CONCLUSION

This Court should grant review to address the important issues in this case pertaining to the interpretation of the CC&R's and easements in a subdivision, indemnification, and the covenant of good faith and fair dealing in contracts. RAP 13.4(b). The Court should reverse the

judgment entered in favor of the Langes and order a new trial. This Court should award the Guests their attorney fees and costs on appeal.

DATED this 29th day of September, 2016.

Respectfully submitted,

Philip A. Talmadge, WSBA #6973
Sidney Tribe, WSBA #33160
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661
Attorneys for Petitioners Guest

APPENDIX

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Washington State
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CHRISTOPHER and SUZANNE GUEST, husband and wife, Appellants, v. DAVID and KAREN LANGE, husband and wife, and the marital community comprised thereof, Respondents.	No. 46802-6-II UNPUBLISHED OPINION

MELNICK, J. — Christopher and Suzanne Guest appeal the trial court's summary judgment orders and final judgment in favor of their neighbors, David and Karen Lange. We conclude that the trial court did not abuse its discretion by denying the Guests' motion to amend their complaint; it did not err by granting the Langes' motion for summary judgment dismissing the Guests' claims; it did not err by denying the Guests' motion for partial summary judgment; and, it did not err in instructing the jury. Finally, there was no cumulative error.[1] We affirm.

FACTS

The facts of this case are not in dispute. The Guests and the Langes are neighbors in the Spinnaker Ridge community in Gig Harbor. The Guests reside on Lot 5 and the Langes reside on Lot 4. Nu-Dawn Homes, Inc. developed the community in 1986. As part of the original

[1] The Guests raised many issues in their reply brief for the first time that were not raised in their opening brief. The Guests further raised issues related to the Coe Family Trust, intervenors in the original action, in their reply brief for the first time. Pursuant to RAP 10.3(c), we will not consider them.

development, Nu-Dawn Homes recorded the Spinnaker Ridge declaration of covenants, conditions, restrictions, and reservations (CC&Rs), and a document titled "Patio or Deck Easement" (Easement).[2] Clerk's Papers (CP) at 211. Both documents granted easements for decks. The easement over the Guests' property covered an area of 5 feet by 21 feet for the Langes' deck.

In 2011, the Langes wanted to rebuild their deck because they had concerns with its structural integrity. The original deck's footprint covered the easement over the Guests' property and an additional encroachment area of approximately three feet by five feet. The Langes talked with the Guests about their intent to replace the deck. The Guests told the Langes that they did not have the right to reconstruct their deck on the original deck's footprint which ran along the edge of the Guests' house. The Langes decided to rebuild the deck in a smaller area than the original one.

Later, the Langes' lawyer informed them that they had the legal right to rebuild the deck within the location of the original deck. The Langes asked the Guests for permission to rebuild the deck as it had originally existed. The Guests refused to give their permission. Eventually, the situation deteriorated, and the Langes communicated to the Guests that they were going to rebuild the deck in the same place as the original one. In April, while the Guests were out of town, the Langes rebuilt the deck in the same footprint as the original deck.

[2] The Easement was recorded under Pierce County Auditor Document No. 8704290509 and the CC&Rs were recorded under Pierce County Auditor Document No. 8608080472.

I. PROCEDURAL HISTORY

A. Complaint, Answers, and Counterclaims

In December 2011, the Guests filed a complaint alleging breach of contract and trespass. In May 2012, the Langes filed an answer, affirmative defenses, and counterclaims to quiet title and for trespass. The Guests answered the Langes' counterclaims and asserted affirmative defenses.

B. Amended Complaint

In October, the Guests filed their first amended complaint. It alleged breach of contract, trespass, and breach of the covenant of good faith and fair dealing. It also alleged the Langes had a duty to indemnify the Guests for all claims arising from their actions in connection with the deck and the utilization of the easement.

The Langes filed an answer with affirmative defenses and a counterclaim. They admitted that the deck might encroach on the Guests' property, but the original CC&Rs allowed it, and that the deck covered the same area as the original deck. The Langes alleged that the Guests trespassed. The Langes denied all of the Guests' causes of action. In their counterclaim, the Langes relied on the following language from paragraph 16.4 of the 1986 CC&Rs:

> Encroachments: Each Lot and all Common Areas are hereby declared to have an easement over all adjoining Lots and Common Areas for the purpose of accommodating any encroachment . . . and any encroachment due to building overhang or projection, and any encroachment for a deck, patio and/or parking area or driveway constructed (and assigned for the use of a Lot) by Developer. There shall be valid easements for the maintenance of said encroachments . . . 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. In the event a Lot or Common Areas are partially or totally destroyed, and then repaired or rebuilt, the Owners agree that minor encroachments over adjoining Lots and Common Areas shall be permitted, and that there shall be valid easements for the maintenance of said encroachments so long as they shall exist.

CP at 49.

The Guests answered the Langes' counterclaim and asserted affirmative defenses. They alleged that the indemnity provision contained in paragraph D of the Easement was an insurance contract that obligated the Langes to indemnify and insure the Guests against suits related to the deck. Paragraph D of the Easement 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 all judgments that may result from said claims, actions and/or suits.

CP at 212.

C. Motions to Amend Complaint and for a Continuance

On January 29, 2013, the Guests filed a motion to amend their complaint and to continue the trial. The proposed second amended complaint would have added five new defendants and eleven new causes of action. It was 135 pages long. The Guests claimed that they received late discovery responses and the documents produced gave rise to new causes of action. The case was set for trial on June 4. The Guests requested a six month continuance of all deadlines, including those that had already passed, to join new parties and to adequately prepare for trial.

The Langes opposed the motion because the deadline to add defendants had passed and because they faced significant prejudice if the scope of this litigation expanded and was continued. The trial court denied the motion because it was untimely and because the Langes would be prejudiced.

D. Summary Judgment Motions[3]

1. Guests' Motion for Summary Judgment

On March 8, the Guests filed a motion for summary judgment and dismissal of the Langes' counterclaims of trespass and to quiet title. The Guests claimed they could not trespass on their own property. Even if there was an easement, it would be for the mutual benefit of the parties. The Guests also claimed that paragraph D of the Easement barred any counterclaims by the Langes.

On April 8, the Langes responded to the Guests' motion for summary judgment and agreed that there were no genuine disputes as to the material facts, but because the Guests could not show that they were entitled to judgment on either of the Langes' counterclaims, the motion should be denied.

2. Langes' Motion for Summary Judgment

On March 22, the Langes filed a motion for summary judgment of the Guests' claims, arguing that each claim was legally insufficient. In support of their motion, the Langes included surveys of the Guests' and Langes' lots that showed the deck easement area, the actual deck, and the disputed three feet by five feet area.

On April 9, the Guests responded and claimed the Langes did not have standing because their counterclaims were barred, and that the multiple contracts the Guests entered into with the Langes defeated the motion for summary judgment.

3. Court's Rulings on Summary Judgment Motions

On April 19, the trial court heard arguments on the summary judgment motions. On May 6, the trial court entered a written order granting the Guests' motion for dismissal of the

[3] The facts previously outlined above are those the trial court relied on when deciding the motions for summary judgment.

counterclaim for trespass, but denying the motion to quiet title. The trial court also ruled that the indemnification language in paragraph D of the Easement did not bar the other counterclaims. On that same date, the trial court entered a written order granting the Langes' summary judgment motion in part, dismissing the Guests' claims for trespass with respect to the area described in the Easement, for breach of contract for a violation of the CC&Rs, for breach of contract based on the alleged contract to share the Langes' deck, for breach of indemnity, and for breach of duty of good faith and fair dealing.[4]

After the ruling on both motions for summary judgment, the following claims and counterclaims remained: the Guests' claim for trespass regarding the three feet by five feet encroachment area of the deck; the Guests' claim for breach of contract based on the Langes' alleged promise to not build a deck on the easement area; and the Langes' claim to quiet title.

E. Other Motions

On May 6, the Guests filed CR 56(f) declarations for postponement of entry of the summary judgment orders until the conclusion of discovery, and for denial of the Langes' motion for summary judgment because the grantor in the Easement was not the owner of the development. The Guests' declarations claimed that they acquired newly discovered evidence that proved the Easement was invalid, including that Nu-Dawn Homes Limited Partnership owned and developed the community, not Nu-Dawn Homes Inc., the listed grantor on the Easement.[5] The trial court ruled that the declarations were untimely and declined to consider the Guests' arguments.

[4] The court orally ruled that the Langes had the right to rebuild the deck in the easement area.

[5] The Guests requested the continuance to potentially add the prior owners of Lot 5 as a party to the action.

II. TRIAL

The case proceeded to jury trial with testimony consisting of the same pertinent facts as summarized above. Prior to trial, the Guest's moved in limine that the parties be prevented from presenting any testimony, evidence or argument that there was any easement on the Guests' property that benefitted the Langes' property. The trial court denied the motion, stating that it did not understand the motion and it had already granted summary judgment and ruled that a valid easement existed.

A. Jury Instructions

The Guests argued about three specific jury instructions. The trial court instructed the jury using an instruction the Langes proposed. It read, "If you find that 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." CP at 4646, 4747. The trial court gave the Langes' proposed instruction because it did not understand the Guests' proposed instruction. In ruling, the trial court explained that the instruction would still allow the Guests to argue their theory of the case, i.e. that they justifiably relied on the Langes' promise not to build a new deck on the easement.

The Guests proposed an instruction on the implied duty of good faith and fair dealing. Although the Langes objected, the trial court agreed to give the instruction, but inadvertently failed to give it.

The trial court also instructed the jury regarding the Easement. "The 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 No. 8704290509 [the Easement]." Report of Proceedings (RP) (July 15, 2014) at 132; CP at 4755 (Instr. 17). The trial

court noted that it had determined the validity of the Easement at summary judgment, but the Guests could still argue that there may have been some contract that vacated the Easement.

The trial court asked the parties to check the jury instruction packet to make sure it accurately reflected the court's rulings. Both parties agreed the packet was correct apparently unaware that it did not include the good faith and fair dealing instruction.

B. Verdict

On July 16, 2014, the jury returned a special verdict in the Langes' favor. The jury found the Langes did not breach a contract with the Guests and they did not breach their covenant of good faith and fair dealing with the Guests. The jury also found that the new deck, which was in the same position as the old deck, did not trespass on the Guests' property. On September 19, the trial court entered judgment for the Langes, dismissed all of the Guests' claims with prejudice, awarded judgment to the Langes on their claim to quiet title. It awarded the Langes $565 for attorney fees. The Guests appeal.

ANALYSIS

I. MOTION TO AMEND COMPLAINT

The Guests argue that the trial court abused its discretion by denying their motion to amend their complaint because a motion's timeliness alone is not a proper reason to deny a motion to amend. We disagree in part because the way the Guests frame the issue does not accurately reflect the trial court's ruling. The trial court denied the motion because it was untimely and because it would prejudice the Langes.

A. STANDARD OF REVIEW

We review a trial court's ruling on a motion to amend a complaint for abuse of discretion. *Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters*, 100 Wn.2d 343, 351, 670 P.2d 240

(1983). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). To amend a pleading after the opposing party has responded, the party seeking to amend must obtain the trial court's leave or the opposing party's consent. CR 15(a).

Leave to amend a complaint should be freely granted unless the opposing party would be prejudiced. *Olson v. Roberts & Shaffer Co.*, 25 Wn. App. 225, 227, 607 P.2d 319 (1980), *repudiated on other grounds by State v. Eppens*, 30 Wn. App. 119, 633 P.2d 92 (1981). In determining prejudice, a court may consider undue delay and unfair surprise as well as the futility of amendment. *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 165, 736 P.2d 249 (1987). Undue delay is a proper ground for denying leave to amend. *Elliott v. Barnes*, 32 Wn. App. 88, 92, 645 P.2d 1136 (1982). "In all cases, '"[t]he touchstone for denial of an amendment is the prejudice such amendment would cause the nonmoving party."'" *Herron*, 108 Wn.2d at 166 (quoting *Del Guzzi Constr. Co. v. Global Nw., Ltd.*, 105 Wn.2d 878, 888, 719 P.2d 120 (1986) (quoting *Caruso*, 100 Wn.2d at 350))).

Where the proposed amendment encompasses new concerns and new facts, the likelihood of prejudice to the defendant is greater. "When an amended complaint pertains to the same facts alleged in the original pleading, denying leave to amend may hamper a decision on the merits." *Herron*, 108 Wn.2d at 167. "When the amended complaint raises entirely new concerns, the plaintiff's right to relief based on the facts in the original complaint is unaffected." *Herron*, 108 Wn.2d at 167. "Moreover, the defendant in the latter case is more likely to suffer prejudice because he has not been provided with notice of the circumstances giving rise to the new claim and may have to renew discovery." *Herron*, 180 Wn.2d at 167. "Appellate decisions permitting amendments have emphasized that the moving parties in those cases were merely seeking to assert

a new legal theory based upon the same circumstances set forth in the original pleading." *Herron*, 108 Wn.2d at 166.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION

Here, the Guests moved to file an amended complaint more than seven months after the deadline to add defendants had passed. In addition, their motion came nearly nine months after the Langes filed their answer and three months after the Guests filed their first amended complaint.

The Guests attempted to add five new defendants and eleven new causes of action that were significantly different from the original claims. Many of the new claims were based on conduct that occurred well after the Langes reconstructed the deck, and many of the new claims involved conduct by third parties who were not named as defendants. The trial court concluded that the filing of the second amended complaint would have extended litigation over a long period of time, and would have caused undue delay that would clearly prejudice the Langes. Because these reasons are tenable, the trial court did not abuse its discretion. There is no error.

II. LANGES' MOTION FOR SUMMARY JUDGMENT

The Guests argue the trial court erred by granting the Langes' motion for summary judgment and dismissing the Guests' breach of contract and indemnity claims. They also argue the trial court erred by granting summary judgment on the validity of the Easement because it did not consider new evidence included in their CR 56(f) declarations.[6] We disagree.

[6] The Guests do not argue that the trial court improperly granted summary judgment based on the information it had at the time. Rather, they argue that with the new information contained in the declarations, summary judgment should not have been granted.

A. STANDARD OF REVIEW

We review summary judgment orders de novo, engaging in the same inquiry as the trial court. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). We view the evidence and draw reasonable inferences from it in a light most favorable to the nonmoving party. *Schaaf v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 665 (1995).

A party moving for summary judgment bears the burden of demonstrating that there is no genuine issue of material fact. *Atherton Condo. Apt.-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). "A material fact is one upon which the outcome of the litigation depends in whole or in part." *Atherton*, 115 Wn.2d at 516. If the moving party satisfies its burden, the nonmoving party must present evidence demonstrating that a material fact remains in dispute. *Atherton*, 115 Wn.2d at 516.

The nonmoving party's response, by affidavits or as otherwise provided under CR 56, must set forth specific facts that reveal a genuine issue for trial. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988). "[C]onclusory statements of fact will not suffice." *Grimwood*, 110 Wn.2d at 360. If the nonmoving party fails to do so, and reasonable persons could reach but one conclusion from all the evidence, summary judgment is proper. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

B. DISMISSAL OF GUESTS' BREACH OF CONTRACT CLAIM

The Guests argue that the trial court erred by dismissing their breach of contract claim based on the CC&Rs.[7] In addition, the Guests contend that because the Langes admitted that they were bound by the CC&Rs, the trial court should have vacated the interlocutory summary judgment order dismissing the Guests' claims. We disagree.

A contract is an agreement creating an obligation. *See Ketcham v. King Cty. Med. Serv. Corp.*, 81 Wn.2d 565, 593, 502 P.2d 1197 (1972). To form a contract, the parties must objectively manifest their mutual assent. *Yakima County Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 388, 858 P.2d 245 (1993). Mutual assent is expressed by an offer and acceptance of that offer. *FDIC v. Uribe, Inc.*, 171 Wn. App. 683, 689, 287 P.3d 694 (2012). "A contract requires an offer, acceptance, and consideration." *FDIC*, 171 Wn. App. at 688. The "terms assented to must be sufficiently definite" and "supported by consideration to be enforceable." *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 178, 94 P.3d 945 (2004).

We apply principles of contract interpretation to interpret provisions in CC&Rs and other governing documents relating to real estate developments. *See, e.g., Roats v. Blakely Island Maint. Comm'n, Inc.*, 169 Wn. App. 263, 273-75, 279 P.3d 943 (2012). Contract interpretation is a question of law we review de novo. *Dave Johnson Ins. Inc. v. Wright*, 167 Wn. App. 758, 769, 275 P.3d 339 (2012). "The purpose of contract interpretation is to determine the parties' intent." *Roats*, 169 Wn. App. at 274. Contractual language generally must be given its ordinary, usual, and popular meaning. *Jensen v. Lake Jane Estates*, 165 Wn. App. 100, 105, 267 P.3d 435 (2011).

[7] Because we conclude that the CC&R's did not form a contractual relationship between the parties, we do not decide whether a genuine issue of material fact existed.

Both parties agreed that the 1986 CC&Rs applied. The resolution of this cause of action rests entirely on a legal interpretation of paragraph 16.4 and whether it formed a contractual relationship between the parties. The CC&Rs were developed for the Spinnaker Ridge community long before either the Guests or the Langes purchased a home in the community. It is clear that the plain language of this paragraph is not a contract between the Langes and the Guests. Nothing in the CC&Rs gives one homeowner a contract cause of action against another homeowner. The elements of a contract are missing. The parties did not agree with each other. Because the CC&Rs do not grant any contract rights, the Guests would have no basis to sue the Langes for breach of the CC&Rs.

The Guests rely on *Piepkorn v. Adams*, 102 Wn. App. 673, 10 P.3d 428 (2000), as support for their argument that the CC&Rs provide for a cause of action in contract. This reliance is misplaced. In *Piepkorn*, the court held that an adjoining landowner could get injunctive relief but could not recover damages. 102 Wn. App. at 685-86.

The trial court did not err by dismissing this cause of action because there is no contract between the parties based on the CC&Rs.

C. TRIAL COURT'S DISMISSAL OF GUESTS' CLAIM OF BREACH OF INDEMNITY

The Guests argue that the trial court erred by dismissing their breach of indemnity claims because the trial court's ruling was contrary to the plain language of paragraph D of the Easement. We disagree.

1. Legal Principles

"'Indemnity agreements are essentially agreements for contractual contribution, whereby one tortfeasor, against whom damages in favor of an injured party have been assessed, may look to another for reimbursement.'" *MacLean Townhomes, L.L.C. v. Am. 1st Roofing & Builders Inc.*,

133 Wn. App. 828, 831, 138 P.3d 155 (2006) (quoting *Stocker v. Shell Oil Co.*, 105 Wn.2d 546, 549, 716 P.2d 306 (1986)). "When interpreting an indemnity provision, we apply fundamental rules of contract construction." *Maclean Townhomes*, 133 Wn. App. at 831. The words used in a contract should be given their plain and ordinary meaning. *Maclean Townhomes*, 133 Wn. App. at 831. "Courts may not adopt a contract interpretation that renders a term absurd or meaningless." *Maclean Townhomes*, 133 Wn. App. at 831.

2. The Trial Court Properly Granted Summary Judgment on the Breach of Indemnity Claim

The indemnity provision on which the Guests rely is contained in paragraph D of the Easement. A plain reading of this language shows that it is to bind the indemnitor with respect to claims asserted against the indemnitee by third parties. This interpretation is in accord with *City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584, 269 P.3d 1017 (2012). In *City of Tacoma*, the court interpreted the broad language of an indemnity provision. 173 Wn.2d at 593. It held that while Tacoma agreed to indemnify and defend another city, the proposed "interpretation produces an absurd result . . . : Tacoma would be forced to bear all costs for litigation when any dispute over contractual performance between parties arises. That result simply cannot be obtained from reading the provision as it currently exists." *City of Tacoma*, 173 Wn.2d at 594.

The indemnity clause does not mean, as the Guests propose, that the Langes would be required to indemnify them for all claims related to the Easement in any way. The only reasonable interpretation of the clause is that it only applies to suits related to injury, or where a plaintiff might sue the Guests because of injury caused by or on the Langes' deck. It does not apply to the circumstances of this case.

The trial court did not err by granting the Langes' summary judgment motion on the Guests' claim of breach of indemnity.

D. THE TRIAL COURT DID NOT ERR IN REFUSING TO CONSIDER NEW EVIDENCE OR MODIFY THE PARTIAL SUMMARY JUDGMENT ORDER

The Guests argue that the trial court erred by refusing to hear additional evidence on the partial summary judgment motion or to continue the hearing.[8] We disagree.

1. CR 56(f) Declarations

A trial court may accept affidavits at any time before issuing its final order on summary judgment. *Felsman v. Kessler*, 2 Wn. App. 493, 498, 468 P.2d 691 (1970); *see Jobe v. Weyerhaeuser Co.*, 37 Wn. App. 718, 727, 684 P.2d 719 (1984). Its decision on whether to accept or reject untimely filed affidavits lies within the trial court's discretion. *Felsman*, 2 Wn. App. at 498. A "trial court has discretion to reject an affidavit submitted after the motion has been heard." *Brown v. Peoples Mortg. Co.*, 48 Wn. App. 554, 559, 739 P.2d 1188 (1987). We review the trial court's decision for an abuse of discretion. *Brown*, 48 Wn. App. at 559.

CR 56(f) states:

> Should it appear from the affidavits of a party opposing the motion that, for reasons stated, the party cannot present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

The trial court did not abuse its discretion by declining to consider the declarations the Guests presented. At the presentation of the summary judgment order, the Langes told the trial court they did not receive the declarations until that morning. The trial court declined to consider the Guests' declarations because they were untimely and the Guests were attempting to potentially add other parties.

[8] The Guests also assign error to the trial court's denial of their motion in limine as to the invalidity of the Easement. Their brief does not argue this point or cite to authority or to the record. We do not review it. RAP 10.3(6).

Under CR 59(b), "[a] motion for a new trial or for reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision." If the Guests wanted the trial court to reconsider its decision on the summary judgment motion because of newly discovered evidence the Guests could not have obtained previously with reasonable diligence, they should have filed a motion for reconsideration on that issue. CR 59(a)(4). They failed to do so. If a party fails to timely move for reconsideration, the party is "not entitled to relitigate the facts and issues decided on summary judgment." *Barrett v. Friese*, 119 Wn. App. 823, 851, 82 P.3d 1179 (2003).

In addition, RAP 9.12 provides that:

> On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered. Documents or other evidence called to the attention of the trial court but not designated in the order shall be made a part of the record by supplemental order of the trial court or by stipulation of counsel.

We will not consider this issue further because the Guests did not submit their declarations to the trial court before it considered summary judgment arguments.

III. JURY INSTRUCTIONS

The Guests argue that the trial court erred in instructing the jury because it misstated the definition of consideration, it instructed the jury that the Easement created a valid easement, and it failed to provide an instruction defining the duty of good faith and fair dealing. We disagree.

A. Standard of Review

Generally, we review a trial court's decision on whether to give a jury instruction for an abuse of discretion. *Tuttle v. Allstate Ins. Co.*, 134 Wn. App. 120, 131, 138 P.3d 1107 (2006). But where a trial court's decision to give an instruction is based on a ruling of law, we review the ruling

de novo. *Tuttle*, 134 Wn. App. at 131. If an instruction contains an erroneous statement of the applicable law it is reversible error if it prejudices a party. *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 453, 105 P.3d 378 (2005). Our Supreme Court summarized the standard of review in *Keller v. City of Spokane*, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002): "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. Even if an instruction is misleading, it will not be reversed unless prejudice is shown. A clear misstatement of the law, however, is presumed to be prejudicial." Error is prejudicial if it affects or presumptively affects the outcome of the trial. *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983).

B. Jury Instruction 9—Definition of Consideration

The Guests argue that the trial court erred by instructing the jury on the definition of consideration because it misstated the law. We disagree.

We review this definitional instruction de novo. *Tuttle*, 134 Wn. App. at 131. The trial court's instruction stated "If you find that plaintiffs justifiably relied on defendants' promise not to build a new deck in the area identified in the patio or deck easement, then there was consideration." CP at 4747. This instruction did not misstate the law.[9] "Every contract must be supported by a consideration to be enforceable." *King v. Riveland*, 125 Wn.2d 500, 505, 886 P.2d 160 (1994). "Consideration is any act, forbearance, creation, modification or destruction of a legal relationship, or return promise given in exchange." *King*, 125 Wn.2d at 505. To constitute

[9] It was based on a patterned instruction. 6A WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 301.04, at 178-79 (6th ed. 2009).

consideration, an act or promise "must be bargained for and given in exchange for the promise." *King*, 125 Wn.2d at 505.

The trial court's instruction accurately stated the law and allowed both parties to argue their theories of the case. In fact, during closing argument the Guests argued,

> You have heard evidence that when [the Langes] wrote us by e-mail on March 12th, after we had reached this agreement, after they had made the promise, after we had this contract, that they wrote us and they asked us for permission to extend further . . . and would we allow them to go further forward, which is actually south, but further forward.
>
> That all on its own is an admission to you that, yes, we did have a contract. Yes, we did have an agreement, and that they recognized that what was required at that point was to ask our permission.

RP (July 15, 2014) at 139.

We conclude that the trial court did not err by instructing the jury on the definition of consideration because the instruction properly informed the jury of the applicable law.

C. Jury Instruction 17—Valid Easement

The Guests argue that the trial court erred in instructing the jury that there was a valid easement because they demonstrated at trial that the easement was invalid. We disagree.

Here, the trial court based its decision to give the jury instruction on its previous summary judgment ruling that the Easement created a valid easement. Such ruling has not been appealed. Therefore, we review this instruction de novo. *Tuttle*, 134 Wn. App. at 131.

An express conveyance of an easement by grant or reservation must be made by written deed, signed by the party bound by the deed, and the deed must be acknowledged. RCW 64.04.010; 64.04.020. Accordingly, a deed of easement is required to convey an easement that encumbrances a specific servient estate. *Berg v. Ting*, 125 Wn.2d 544, 551, 886 P.2d 564 (1995). Similarly, a "'deed of easement is not required to establish the actual location of an easement, *but*

is required to convey an easement' which encumbrances a specific servient estate." *Berg*, 125 Wn.2d at 551 (quoting *Smith v. King*, 27 Wn. App. 869, 871, 602 P.2d 542 (1980)). The agreement to the easement by the owner of the servient estate is a vital element in the creation of an easement. *Beebe v. Swerda*, 58 Wn. App. 375, 382, 793 P.2d 442 (1990).

"No particular words are necessary to constitute a grant, and any words which clearly show the intention to give an easement, . . . are sufficient." *Beebe*, 58 Wn. App. at 379. "In general, deeds are construed to give effect to the intentions of the parties, and particular attention is given to the intent of the grantor when discerning the meaning of the entire document." *Zunino v. Rajewski*, 140 Wn. App. 215, 222, 165 P.3d 57 (2007).

Because the Guests have not appealed from the trial court's summary judgment order determining the validity of the easement, it is valid, and the trial court properly instructed the jury.

D. Jury Instruction on Good Faith and Fair Dealing

The Guests contend that the trial court erred by failing to instruct the jury on the duty of good faith and fair dealing, despite agreeing to provide the instruction. They argue that the failure to instruct the jury on this issue prejudiced them. We do not consider the issue because the Guests' waived their right to appeal the issue when they failed to object to the missing instruction.

It is well settled that an "appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). The Guests did not object to the trial court's failure to give the instruction. The trial court asked the parties to check the jury instruction packet and "agree with [the court] that it encompasses the Court's ruling on the instructions." RP (July 15, 2014) at

121. Both parties agreed the packet included the instructions. The trial court read the packet aloud to instruct the jury, and still, the Guests did not object. Finally, when the jury posed a question about the duty of good faith and fair dealing, the Guests still did not realize the mistake or object to the trial court's answer to the question.

Therefore, we do not consider the issue because the Guests failed to preserve this issue on appeal.

IV. CUMULATIVE ERROR—(JUDGMENT AND QUIETING TITLE)

The Guests argue that the cumulative errors in this case denied them a fair trial. We determined that the trial court did not commit any errors below, thus, the Guests' arguments regarding cumulative error are without merit, and we need not consider the issue further.

V. ATTORNEY FEES

The Guests argue that we should award them attorney fees as the prevailing party under RAP 18.1 and paragraph D of the Easement.[10] The Langes argue that the Guests are not entitled to attorney fees because Washington courts follow the American rule, and the Guests failed to cite to any legal authority in their argument for attorney fees. Br. of Resp't at 48.

The Guests did not adequately address the issue of attorney fees in their opening brief because they failed to cite to any legal authority in support of their argument. RAP 18.1(b). Nonetheless, the Guests are not the substantially prevailing party on appeal, and they are not entitled to attorney fees. RAP 14.2; 18.1.

[10] The trial court determined on summary judgment that the Easement did not provide for indemnification in this case, and therefore, this argument has no basis.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Johanson, P.J.

Sutton, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CHRISTOPHER and SUZANNE GUEST, husband and wife, Appellants, v. DAVID and KAREN LANGE, husband and wife, and the marital community comprised thereof, Respondents.	No. 46802-6-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellants, Christopher and Suzanne Guest, filed a motion to reconsider this court's June 14, 2016 unpublished opinion. After review of the record, we deny the motion.

IT IS SO ORDERED.

Panel: Jj. Johanson, Melnick, Sutton

Dated this 30th day of August, 2016.

FOR THE COURT:

Johanson, J.
Presiding Judge

DECLARATION OF SERVICE

On said date set forth below, I e-filed a true and accurate copy of the Petition for Review in Court of Appeals, Div. II, Case No. 46802-6-II with e-service on the following:

Irene Margret Hecht, WSBA #11063 Keller Rohrback LLP 1201 3rd Avenue, Suite 3200 Seattle, WA 98101-3052 *ihecht@kellerrohrback.com*
Timothy J. Farley, WSBA #18737 Farley & Dimmock LLC 2012 34th Street Everett, WA 98201-5014 *tjfarley@farleydimmock.com*
Original e-filed with: Court of Appeals, Division II Clerk's Office 950 Broadway, Suite 300 Tacoma, WA 98402

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: September 29, 2016, at Seattle, Washington.

Matt J. Albers, Paralegal
Talmadge/Fitzpatrick/Tribe

TALMADGE FITZPATRICK LAW

September 29, 2016 - 2:43 PM

Transmittal Letter

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Case Name:

Court of Appeals Case Number: 46802-6

Is this a Personal Restraint Petition? Yes ■ No

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Answer/Reply to Motion: ____

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Statement of Additional Authorities

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Affidavit

Letter

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Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

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■ Petition for Review (PRV)

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Comments:

Petition for Review (Please note: payment of the filing fee will be mailed to the Court). Thank you.

Sender Name: Christine Jones - Email: matt@tal-fitzlaw.com

A copy of this document has been emailed to the following addresses:

ihecht@kellerrohrback.com
tjfarley@farleydimmock.com
phil@tal-fitzlaw.com
sidney@tal-fitzlaw.com
matt@tal-fitzlaw.com