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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MALCOM DOUGLAS CLOSE and LAURA MORRIS CLOSE, husband and wife, and their marital community,

Appellants/
Cross-Respondents,

v.

YARROW HILL HOMEOWNERS ASSOCIATION, a Washington corporation; CWD GROUP, INC., a Washington corporation; and DOE DEFENDANTS 1-10,

Respondents/
Cross-Appellants.

No. 80882-6-I

DIVISION ONE

UNPUBLISHED OPINION

SMITH, J. — Malcom and Laura Morris Close (collectively Closes) own a townhome in Kirkland, Washington. Yarrow Hill Homeowners Association (Association) managed the development in which the property was located. When Malcom first purchased the property, the Association was in the middle of rebuilding the townhome's lower deck. Years later, the deck was rotting and unsafe, and the Closes requested that the Association repair the deck pursuant to the Association's governing documents. The Association discovered that the deck was significantly larger than allowed and gave the Closes two options: (1) take over maintenance of the deck or (2) have the Association remove and rebuild the deck to the appropriate specifications. The Closes declined each

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option and brought suit, alleging breach of contract, adverse possession, and prescriptive easement, among other claims. Following the Association and its property manager CWD Group Inc.'s motion for summary judgment, the trial court dismissed the Closes' adverse possession claim. In addition, following a bench trial, the court found in favor of the Association and CWD on the Closes' remaining claims. However, it did not award the Association and CWD their attorney fees and costs as requested.

Because the Growth Management Act (GMA), chapter 36.70A RCW, bars adverse possession claims against bona fide homeowners' associations' open spaces, we affirm the trial court's order granting the Association and CWD's motion for summary judgment regarding the claim. Similarly, because the record supports the trial court's conclusion that the Closes' use of the encroaching deck was not adverse to the Association and CWD, we affirm the court's finding that the Closes' prescriptive easement claim fails. Finally, the trial court erred when it denied the Association and CWD their reasonable fees and costs. Therefore, we affirm the trial court's orders but remand to the trial court for a determination of the Association and CWD's attorney fees.

BACKGROUND

The Yarrow Hill development is a planned development that has landscaped and natural common areas and 66 residential townhomes across 25 buildings. Each townhome shares a wall with either another townhome or another townhome's garage. Each homeowner owns the platted parcel of real property under the footprint of their individual townhome.

The Association is the designated representative entity for the development. In 1979, the Association filed articles of incorporation to form a Washington nonprofit corporation. Its stated purpose is "[t]o own, maintain, repair and upkeep those certain 'Common Areas' described in the Declaration and to perform and carry out whatever other duties and responsibilities as may be necessary to effectuate said purposes." Pursuant to the articles of incorporation, every owner of a lot is a member of the Association. In 1986, the Association filed a "Declaration of Covenants, Conditions & Restrictions" (declaration) for the development. The declaration specifies that the Association governs the development according to the declaration's "easements, restrictions, covenants, and conditions," and the Association's bylaws. The articles and declaration define "common area" as "all real property owned by the Association for the common use and enjoyment of the owners" and "lot" as "any plot of land shown upon any recorded subdivision map of the properties with the exception of the Common Areas." To this end, the declaration asserts that there is "an easement for the non-exclusive use and enjoyment of all the Common Area" "for the benefit of and conveyed to each Owner and to the Association."

The Association's governing documents assign to the Association the responsibilities of "[p]ainting, maintenance, repair, and replacement of the Common Area and such . . . improvements of and in the Common Area as the [Board] shall determine are necessary and proper, all landscaping of the Common Area," and "exterior maintenance, repair, rebuilding, and restoration upon the dwelling structures and garages on every Lot as follows: paint, repair,

replace and care for roofs, gutters, downspouts, exterior building surfaces, trees, shrubs, grass, walks, drainage swales, V-ditches, and all other exterior improvements."

In the first amendment to the declaration, the Association created the Architectural Control Committee (ACC). Its duties include approving buildings, structures, and modifications thereto. Specifically, the first amendment states:

> No building or structure of any kind shall be constructed, erected, placed or altered on any lot, whether or not the structure is attached to an existing dwelling unit, or in or upon any portion of the Common Area, before construction plans and specifications showing the size, shape, height, location, materials and colors have been submitted to and approved in writing by the ACC.

CWD manages the development pursuant to a contract with the Association. As a part of its management, CWD collects monthly dues and assessments from homeowners and manages maintenance and improvement projects. With regard to the common areas, "[d]ue to the overall character of the community and budget constraints, the Association [and CWD] . . . elect to maintain many areas in the community in a natural state and . . . prioritize maintaining Common Areas that are visible from the main road over areas that are behind lots," like the common area behind the property.

FACTS[1]

In 2004, Malcolm[2] purchased a townhome at 4509 102nd Lane NE, Kirkland, Washington from the prior owner, Carolyn Bender. The property is

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[1] The majority of facts are taken from the trial court's undisputed findings of fact following the bench trial.

[2] We refer to the Closes by their first names for clarity.

located in the development and legally described as “Lot 43, Yarrow Hill Division 2, according to the plat thereof recorded in Volume 118 of Plats.”

At the time that Malcom purchased lot 43, CWD, with the Association’s permission, was building a large lower deck, as well as an upper deck at the townhome. The deck abuts a common area that CWD maintains in “primarily a natural state consistent with the landscaping standards the Association’s Board . . . has put in place.” CWD’s manager assured Malcom that the decks would be rebuilt by the time Malcom’s purchase of the property closed. Malcom purchased the property “due to its location and especially because of its decks, on which he can relax and enjoy the surrounding view of the lake.” Included in his purchase documents, Malcom received a resale certificate from CWD. The resale certificate stated, “RCW 64.34.425 requires every condominium association, within ten days after a request . . . to furnish a certificate.” It provided that there were no “alterations to the home or the limited common elements assigned to the home which violate any provision of the governing documents, rules or bylaws of the” Association.

In December 2004, the Association announced a new policy regarding exterior decks within the development. Specifically, “[t]he Association held that the decks were within the common area maintenance obligation of the Association and . . . that . . . the maintenance and repairing of the exterior decks would be the Association’s responsibility.” Despite CWD’s assurance, the deck was not completed until March 2005, nearly five months after Malcom purchased the property.

After Malcom purchased the property, he married Laura, and she began to use the lower deck as a place for gardening.

In 2014, the Association commissioned an investigation into the various lots and the lots' outdoor decks. The investigation revealed that "many of the decks were not built according to the original building plans and had exceeded their permitted size." The Closes' lower deck was a deck not built according to the permitted size, having been expanded in the past and having 266 square feet encroaching on the common area. After the Association's investigation, they provided each owner of a deck that constituted a "significant encroachment" into the common area (50 or more feet) two options: (1) have the association remove and rebuild the deck at the Association's expense or (2) agree to take over maintenance of the deck. The Closes declined both options.

In 2015, the lower and upper decks began to have problems, including developing soft spots and rot. These issues created safety concerns for the Closes. The Closes requested that the Association repair their decks, "which the association has performed or scheduled to perform."

Between August 2015 and the summer of 2016, CWD's workers dug a hole to investigate standing water issues on the northwest corner of lot 43. The hole affected the Closes' "enjoyment of their Lot and the Common Area." Eventfully, following numerous requests amid the Closes' concerns for their grandchildren's safety around the hole, CWD fixed the problem in the summer of 2016.

In 2017, the Closes sued the Association alleging, among other claims,

breach of contract, adverse possession, and prescriptive easement, and sought declaratory relief. In February 2019, both parties moved for summary judgment. The court granted defendants' motion for summary judgment and dismissed the Closes' claims of adverse possession and breach of fiduciary duty, among other claims. With regard to the Closes' adverse possession claim, the court dismissed the claim based on Washington's GMA, which bars adverse possession claims against bona fide homeowners' associations. The court denied the Association and CWD's motion for summary judgment with regard to the Closes' breach of contract and prescriptive easement claims, and reserved the defendants' request for attorney fees "pending final disposition of [the] matter." The court denied the Closes' motion for summary judgment.

On September 27, 2019, the court held a bench trial. After the trial, the court found in favor of the Association and CWD. However, it concluded that the Association and CWD were not the prevailing party and denied their request for attorney fees.

The Closes appeal the order granting the Association and CWD's motion for summary judgment with regard to their claim of adverse possession and the trial court's findings of fact and conclusions of law following the bench trial. The Association and CWD appeal the trial court's denial of their request for attorney fees.

ANALYSIS

Applicability of Chapter 64.32 RCW

The Closes assert that the trial court erred when it concluded that the

homeowners' association act (HOAA), chapter 64.38 RCW, exclusively governs the Association. Because the Association is not subject to the Horizontal Property Regimes Act (HPRA), chapter 64.32 RCW, or the Washington Condominium Act (WCA), chapter 64.34 RCW, we agree with the trial court.

"'[T]he determination of whether a particular statute applies to a factual situation is a conclusion of law.'" Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 74, 170 P.3d 10 (2007) (alteration in original) (quoting Leingang v. Pierce County Med. Bureau, Inc., 131 Wn.2d 133, 150, 930 P.2d 288 (1997)). In interpreting a statute and applying it, our main "'objective is to ascertain and carry out the Legislature's intent.'" Seattle Hous. Auth. v. City of Seattle, 3 Wn. App. 2d 532, 538, 416 P.3d 1280 (2018) (quoting Citizens All. for Prop. Rights Legal Fund v. San Juan County, 184 Wn.2d 428, 435, 359 P.3d 753 (2015)). "'[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.'" Seattle Hous. Auth., 3 Wn. App. 2d at 538 (alteration in original) (quoting Citizens All., 184 Wn.2d at 435). Statutory analysis "begins with the text and, for most purposes, should end there as well." Malyon v. Pierce County, 131 Wn.2d 779, 799, 935 P.2d 1272 (1997).

"The HPRA governs condominiums in Washington established between 1963 and July 1, 1990." Lake v. Woodcreek Homeowners Ass'n, 169 Wn.2d 516, 521, 243 P.3d 1283 (2010). "The HPRA permits a condominium to comprise three kinds of property—private apartments, common areas, and limited common areas—with a condominium owner holding different kinds of

property rights in each." Lake, 169 Wn.2d at 521-22. An apartment's boundaries "are the interior surfaces of the perimeter walls, floors, ceilings, windows and doors thereof, and the apartment includes both the portions of the building so described and the air space so encompassed." RCW 64.32.010(1). For common areas of condominiums governed by HPRA, "[e]ach apartment owner shall be entitled to an undivided interest in the common areas and facilities in the percentage expressed in the declaration." RCW 64.32.050.

The WCA applies "only to property, the sole owner or all of the owners, lessees or possessors of which submit the same to the provisions hereof by duly executing and recording a declaration as hereinafter provided." RCW 64.32.020. "Simultaneously with the record of the declaration" required by RCW 64.32.020, the owners must submit "a survey map of the land submitted to the provisions of this chapter showing the location or proposed location of the building or buildings thereon." RCW 64.32.100.

The HOAA governs homeowners' associations created by the owners of lots. RCW 64.38.005. A "lot" is "a physical portion of the real property located within an association's jurisdiction designated for separate ownership," and an "owner" is "the owner of a lot." RCW 64.38.010(12), (13). The HOAA provides:

> "Homeowners' association" or "association" means a corporation, unincorporated association, or other legal entity, each member of which is an owner of residential real property located within the association's jurisdiction, as described in the governing documents, and by virtue of membership or ownership of property is obligated to pay real property taxes, insurance premiums, maintenance costs, or for improvement of real property other than that which is owned by the member.

RCW 64.38.010(11). And "'[h]omeowners' association' does not mean an association created under chapter 64.32 or 64.34 RCW." RCW 64.38.010(11). Under the HOAA, "property owned, or otherwise maintained, repaired or administered by the association" constitutes common areas. RCW 64.38.010(4).

Here, under the plain language of the statutes, the Association is not governed by the HPRA or the WCA for three reasons. First, the development includes lots, not apartments or units as designated under the HPRA. Where apartment owners own the interior perimeter of the walls, a lot owner, like the Closes, owns the plot of land under the structure. Second, the Association did not provide a survey map of the land pursuant to RCW 64.32.100. Finally, contrary to the Closes' assertion that "the homeowners of the . . . development collectively own the common area[s]," the Association—and not homeowners—owns the common areas pursuant to the declaration. Specifically, the governing documents define "common area" as "all real property *owned* by the Association for the common use and enjoyment of the owners." For these reasons, as a matter of law, the Association is governed by the HOAA and not the HPRA or the WCA.[3]

[3] To the extent that the Closes challenge the trial court's finding of fact that the HOAA applies to the Association, the finding is more properly understood as a conclusion of law, and the trial court did not err. With regard to the Closes' challenge to the trial court's finding that the common areas are owned by the Association, substantial evidence, including the declarations and the articles, supports the court's determination. Finally, the Closes challenge the court's finding that "[m]any of the lots have common walls with one or two other lots." This issue is not material to our analysis, but we agree with the Closes that *all* lots have a common wall with one or two other lots.

The Closes ask us to look beyond the plain language of the statutes to each statute's individual "timing, intent, and language" and the Association's governing documents. Specifically, the Closes allege that because the Association was created prior to the enactment of the HOAA, the HOAA cannot apply. However, the Closes fail to provide any basis for this assertion beyond a generalized statement that "most statutes operate prospectively." And "'[w]here no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.'" City of Seattle v. Levesque, 12 Wn. App. 2d 687, 697, 460 P.3d 205 (2020) (quoting DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)). Moreover, our objective when interpreting a statute is to apply the statute's plain language if the statute is unambiguous. Here, as discussed, it is clear from the statutes' plain language that the Association is not governed by the HPRA or the WCA. Therefore, we are bound by the plain language and conclude that the Association is governed by the HOAA.

Adverse Possession

The Closes claim that the trial court erred when it dismissed their adverse possession claim. We disagree and apply the GMA's prohibition on an individual's ability to adversely possession an HOAs' open space.

Under CR 56(c), "summary judgment is appropriate where there is 'no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" Elcon Constr., Inc. v. E. Wash. Univ., 174 Wn.2d 157, 164, 273 P.3d 965 (2012) (alteration in original). "We review rulings on

summary judgment and issues of statutory interpretation de novo." Am. Legion Post No. 149 v. Dep't of Health, 164 Wn.2d 570, 584, 192 P.3d 306 (2008). As previously mentioned, our main "'objective is to ascertain and carry out the Legislature's intent.'" Seattle Hous. Auth., 3 Wn. App. 2d at 538 (quoting Citizens, 184 Wn.2d at 435). To this end, we apply the same principles of statutory interpretation that we set out in the previous section.

Under RCW 36.70A.165, an individual cannot "acquire by adverse possession property that is designated as a plat greenbelt or open space area or that is dedicated as an open space to a public agency or to a bona fide homeowner's association." As the basis for this prohibition, the statute declares that "[t]he legislature recognizes that the preservation of urban greenbelts is an integral part of comprehensive growth management in Washington" and "certain greenbelts are subject to adverse possession action which, if carried out, threaten the comprehensive nature of this chapter." RCW 36.70A.165.

The plain language clearly applies to the common areas in the development, including the common area into which the Closes' deck encroaches. The GMA does not define greenbelt or open space, and when a statute does not define a term, we utilize the dictionary definition to inform the statute's plain meaning. See Lyft, Inc. v. City of Seattle, 190 Wn.2d 769, 781, 418 P.3d 102 (2018) (defining a term by "its usual and ordinary dictionary definition" where the statute provided no definition). The dictionary definition of "greenbelt" is "a belt of parkways, parks, or farmlands that encircles a town or community." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 996 (2002). And

the dictionary defines “park” as “a tract of land maintained by a city or town as a place of beauty or of public recreation” or an area “maintained in its natural state for public use.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1642 (2002). Either definition aptly applies to the common areas behind the Closes’ lot. Specifically, the common area is described as “consist[ing] of a grassy area that steeply slopes down to the Western Boundary of the Association” and being “largely left in a natural wooded state, including large trees, blackberry bushes, ivy, and other natural invasive plants.” This urban greenbelt or open space area is held by the Association for the use and enjoyment of the Association’s members, and it includes the space into which the deck encroaches. In addition, the Association is clearly a bona fide homeowners’ association, subject to the immunity provided for by the GMA.

The Closes disagree and contend that the GMA “does not purport to regulate or otherwise preserve [HOAs’] property.” Rather, they believe that the GMA is limited to regulating cities and counties. There are multiple reasons this contention is without merit. Among the most persuasive is the fact that the explicit language of the at-issue statutory provision says otherwise, as it applies to homeowners’ associations. Therefore, the Closes are incorrect.

The Closes rely on Timberlane Homeowners Association, Inc. v. Brame[4] to support their position that they may seek adverse possession over common areas. Timberlane was decided in 1995, two years before the legislature enacted the GMA. The Closes’ reliance on Nickell v. Southview Homeowners

[4] 79 Wn. App. 303, 901 P.2d 1074 (1995).

Ass'n[5] also is misplaced. There, the time period required for the plaintiff to adversely possess the property had been completed two years before the GMA was enacted. Nickell, 167 Wn. App. at 53. But here, Malcom purchased the property after the legislature enacted the GMA. Therefore, Timberlane and Nickell do not control our analysis or prevent the application of the GMA in this case. And the Closes' adverse possession claim fails as a matter of law.

Prescriptive Easement

The Closes assert that the trial court erred when it concluded that, under their prescriptive easement claim, they failed to satisfy the adverse element as a matter of law. We disagree.

"'Prescriptive rights . . . are not favored in the law, since they necessarily work corresponding losses or forfeitures of the rights of other persons.'" Tiller v. Lackey, 6 Wn. App. 2d 470, 483, 431 P.3d 524 (2018) (alteration in original) (internal quotation marks omitted) (quoting Gamboa v. Clark, 183 Wn.2d 38, 43, 348 P.3d 1214 (2015)). "To establish a prescriptive easement, the person claiming the easement must use another person's land for a period of 10 years in a manner that was (1) 'open' and 'notorious,' (2) 'continuous' or 'uninterrupted,' (3) over 'a uniform route,' (4) 'adverse' to the landowner, and (5) 'with the knowledge of such owner at a time when he was able in law to assert and enforce his rights.'" Tiller, 6 Wn. App. 2d at 484 (internal quotation marks omitted) (quoting Gamboa, 182 Wn.2d at 43). "Whether a claimant has established a prescriptive easement is a mixed question of law and fact." Tiller, 6

[5] 167 Wn. App. 42, 271 P.3d 973 (2012).

Wn. App. 2d at 484. "We review the trial court's findings of fact following a bench trial to determine whether they are supported by substantial evidence, and we then review whether those findings support the trial court's conclusions of law." Tiller, 6 Wn. App. 2d at 484.

To support their contention, the Closes challenge the court's finding of fact that they "gardened on the extended lower deck and [were] allowed to use it as if it were their own." Specifically, they contend that they were not allowed to use, or adversely used, the garden. And the Association and CWD do not challenge the other elements of prescriptive easement. Thus, the success of the Closes' turns on whether their use was permissive or adverse.

"'Adverse use' generally means that the claimant's use was not permissive." Tiller, 6 Wn. App. 2d at 484 (quoting Gamboa, 183 Wn.2d at 44). "Whether use is adverse 'is to be measured by an objective standard; that is, by the objectively observable acts of the user and the rightful owner.'" Tiller, 6 Wn. App. 2d at 484 (quoting Dunbar v. Heinrich, 95 Wn.2d 20, 27, 622 P.2d 812 (1980)). "[A] presumption of permissive use applies in certain factual scenarios, including cases involving vacant and unenclosed land, and developed land cases when there is 'a reasonable inference of neighborly sufferance or acquiescence.'" Tiller, 6 Wn. App. 2d at 484-85 (quoting Gamboa, 183 Wn.2d at 44, 50-51). Specifically, the presumption applies where "the record support[s] a reasonable inference of permissive use." Tiller, 6 Wn. App. 2d at 486.

Here, the presumption applies based on the record, including the facts that CWD built the deck to its current, encroaching specifications and that the

Association allowed the Closes' use of the deck without argument for nearly a decade. To this end, the Closes acknowledged throughout the proceedings that the Association "approved," "entirely facilitated," and "allowed" the Closes' use of the deck. Similarly, in their complaint, the Closes' argued, "[T]he fact that Defendants caused the decks to be re-built in their current configuration and size waives any suggestion that the decks were re-built without authorization." Accordingly, the Closes asserted that their use of the common area was permissive. Pursuant to the presumption and the record, substantial evidence supports the court's finding that the use was not adverse. Therefore, the trial court did not err when it concluded that the Closes failed to meet all of the elements required to obtain a prescriptive easement.

Equitable Estoppel

The Closes allege, for the first time on appeal, that the Association is equitably estopped from asserting title and waived any claim to ownership of the real property located beneath their lower deck. Because the Closes did not present this claim in their complaint at the trial court, we decline to address it.

In their complaint, the Closes claimed that "the fact that Defendants caused the decks to be re-built in their current configuration and size waives any suggestion that the decks were re-built without authorization, *estoppes the [Association] from demanding remediation from the Plaintiffs*. The [Association] remains completely responsible for proper maintenance of the decks, pursuant to the governing documents." This claim fell under the Closes' section for declaratory relief and did not allege that the Association was estopped from

asserting title over the property. Rather, the Closes claimed that the Association was estopped from requiring the Closes to repair and replace the deck. And "[i]ssues and contentions neither raised by the parties nor considered by the trial court . . . may not be considered for the first time on appeal." See Cano-Garcia v. King County, 168 Wn. App. 223, 248, 277 P.3d 34 (2012) (refusing to address a theory of negligence that the plaintiff raised in his complaint but failed to raise in opposition to summary judgment and that the trial court therefore did not address). Therefore, we do not consider this claim.[6]

Maintenance Responsibility

The Closes contend that the Association "should be enjoined from arbitrarily enforcing the provisions of the Declarations against" them and requiring them to maintain their home's decks. Because the record supports a finding that the Association's enforcement was not arbitrary, we disagree.

"[C]ovenants must be reasonable and reasonably exercised to be valid." Riss v. Angel, 131 Wn.2d 612, 624, 934 P.2d 669 (1997). And a "covenant cannot operate to place restrictions on a lot which are more burdensome than those imposed by the specific covenants." Riss, 131 Wn.2d at 625.

Here, the Association reasonably exercised the covenant and did not create a more burdensome restriction on the Closes compared to other homeowners. The Association commissioned an investigation into all homeowners' decks. When it discovered that many of the decks encroached into

[6] Similarly, we do not consider the Closes' assertion that, because the Association failed to enforce the covenant and therefore abandoned it, we cannot enforce it.

common areas and outside their permitted areas, the Association sought counsel to address the issue. It then adopted a policy that it would not disturb decks that encroached less than 50 square feet into the common areas. With regard to the decks that intruded more than 50 square feet into the common area, the Association adopted a policy to provide the homeowners with two options: (1) maintain the deck at its larger size at their own expense or (2) have the Association remove and rebuild the encroaching deck at the Association's expense. By definition, this enforcement method is not arbitrary. Indeed, the Association adopted and applied a reasoned policy, and 10 other homeowners agreed to have CWD remove and rebuild their encroaching decks. Therefore, the Closes' assertion is without merit.

The Closes rely on Riss to support their assertion that the Association is arbitrarily enforcing the declarations. In Riss, William and Carolyn Riss purchased a lot in a subdivision subject to restrictive covenants and construction approval by the Mercia Heights homeowners' association. 131 Wn.2d at 615-16. The Risses submitted a plan to demolish the existing building on their lot and build a one-story home. Riss, 131 Wn.2d at 617. The homeowners' association denied Risses proposal based on "a misleading photo montage about the impact of Plaintiffs' plans" and inaccurately described height and size accounts. Riss, 131 Wn.2d at 628. In contrast, the Association did not apply its policy based on incorrect information, and it applied the policy to all homes in the development with a deck above a certain size. Therefore, Riss is not analogous.

Breach of Contract

The Closes assert that the trial court erred when it concluded that their breach of contract claim failed because the Closes had not proven damages. Because the Closes provide no evidence in the record to support a damages claim with regard to the Association and CWD's breach of contract, we disagree.

The trial court concluded that, *with regard to the hole that CWD failed to address*, "the Closes' claimed damages were speculative and not reasonable, and therefore that claim ultimately fails as well." But in their briefing, the Closes assert that "[t]estimonial evidence was presented at trial that the value of the townhome would be diminished if the lower deck was removed." Any loss of their home's value due to the removal of the larger deck is inapplicable to the breach of contract claim pertaining to the hole. And the Closes do not challenge the trial court's conclusion that the Association and CWD did not breach the contract by failing to maintain, repair, or replace the deck. Furthermore, the Closes provide no evidence in the record to support their claim for damages with regard to the hole. And "[w]e will not consider arguments that a party fails to brief." See Sprague v. Spokane Valley Fire Dep't, 189 Wn.2d 858, 876, 409 P.3d 160 (2018) (declining to address claims that were not briefed). Therefore, the trial court did not err when it concluded that the Closes' damages were speculative and unreasonable.

Attorney Fees and Costs

In its cross appeal, the Association and CWD allege that the trial court erred when it concluded that neither the Association and CWD nor the Closes

were the prevailing party at trial. They assert that they were entitled to fees below and also are entitled to fees on appeal. Because they were the substantially prevailing party below and here, we agree with the Association and CWD and grant them their fees and costs.

"When reviewing an award of attorney fees, the relevant inquiry is first, whether the prevailing party is entitled to attorney fees." Unifund CCR Partners v. Sunde, 163 Wn. App. 473, 483-84, 260 P.3d 915 (2011). An award of attorney fees must be based in "contract, statute, or recognized ground of equity." Durland v. San Juan County, 182 Wn.2d 55, 76, 340 P.3d 191 (2014). We review de novo whether the trial court had a legal basis for awarding attorney fees. Durland, 182 Wn. App. at 76.

The trial court concluded that (1) "[n]either party is a prevailing party for purposes of awarding attorney fees or costs" and (2) "the attorney provision in the By-laws section 12.6 only concerns assessment recovery actions and is therefore not applicable to this case." First, the prevailing party does not have to prevail on every claim. Rather, the *substantially* prevailing party is entitled to fees if a contractual, statutory, or equitable right to fees exists. See, e.g., Piepkorn v. Adams, 102 Wn. App. 673, 687, 10 P.3d 428 (2000) (awarding fees and costs to the plaintiff when he was the "substantially prevailing party in [an] action to enforce . . . restrictive covenants," despite dismissal of his claim for damages). Here, although the Closes prevailed on one of their breach of contract claims, the Association and CWD prevailed on the majority of the remaining claims. Specifically, the trial court found in favor of the Association

and CWD on the Closes' remaining six claims. Similarly, we conclude that the Closes' appeal is without merit. Therefore, at the trial court and on appeal, the Association and CWD are the substantially prevailing party.

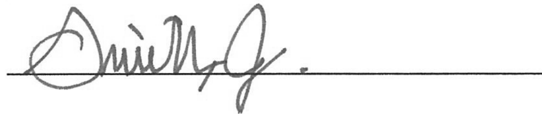
In addition, at trial, the court failed to address the applicability of Declaration article XI, section 16(d) as a basis for the prevailing party's fees. And the parties asserted a contractual basis for attorney fees under section 16(d), as well as bylaws section 12.6. Section 16(d) provides:

> The Board and each Owner shall have full power and authority to enforce the covenants in this Declaration in any proceedings at law or in equity, against the person or persons violating or attempting to violate said covenants, and to recover damages sustained by reason of such violation. If the Board or any Owner employs counsel to enforce any of the covenants in this Declaration of Covenants, Conditions and Restrictions, all expenses incurred in such legal process, including a reasonable attorney's fee, shall be paid in full by the Owner violating the covenants.

Pursuant to section 16(d), the Association and CWD are entitled to fees and costs if the suit resulted in the enforcement of a covenant. Because the Association and CWD sought to enforce the covenant providing for the collective right to use and enjoy the common areas, they are entitled to reasonable attorney fees and costs, and the trial court erred in concluding otherwise. On this same basis, they are entitled to reasonable fees and costs on appeal subject to their compliance with RAP 18.1(d). See Viking Bank v. Firgrove Commons 3, LLC, 183 Wn. App. 706, 717-18, 334 P.3d 116 (2014) ("When a contract provides for an attorney fee award in the trial court, the party prevailing before this court may seek reasonable attorney fees incurred on appeal.").

CONCLUSION

We affirm the trial court's orders (1) granting summary judgment in favor of CWD and the Association regarding the Closes' adverse possession claim, (2) finding that the Closes failed to satisfy the adverse element of their prescriptive easement claim, and (3) finding that the Closes failed to show damages from the Association and CWD's breach of contract. However, we reverse the trial court's order denying the Association and CWD's request for attorney fees. Therefore, we remand to the trial court to determine fees and costs.



WE CONCUR: