

No. 70513-0-I

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

EDWARD J. ELEAZER and MAYA E. ELEAZER,
Husband and Wife and Their Marital Community,
Appellants,

v.

BUSH HOUSE, L.L.C., A Washington Limited Liability Company, Its
Successors and Assigns; SNOHOMISH HEALTH DISTRICT, a
Municipal Corporation of the State of Washington; and LOYAL MARY
NORDSTROM, an Individual,
Respondents.

ON REVIEW FROM
SNOHOMISH COUNTY SUPERIOR COURT

APPELLANTS' BRIEF

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INTRODUCTION

This case is about unfair surprise, contract law, and the preservation of the courts as arbiters, not writers, of agreements. In the proceedings below, the trial court entered summary judgment in favor of the seller and the current owner of the Bush House, a small hotel next door to appellants Edward Eleazer and Maya Caldwell Eleazer. (CP 261-66.) Now an easement for a commercial-grade onsite sewage system (OSS) encircles the Eleazers' family home:



(CP 96.) The Eleazers did not voluntarily negotiate the terms of this new easement for an onsite sewage system, and it was not recorded for the first few years that they owned their home, which they bought in May 2007. (CP 149–59, 335–36 ¶¶ 3–7.) Instead, this easement was imposed in June 2013 at the request of respondents Bush House, L.L.C. (BHLLC), the current owner of the Bush House, and Loyal Mary Nordstrom, the former owner of the Bush House and also the seller of the Eleazers’ home. (CP 149–59, 211–48, 261–66, 457–58.)

In support of their request, BHLLC and Nordstrom invoked two documents from 1993 that were not disclosed to the Eleazers at the time of the sale in 2007. (CP 618, 620–21, 673 ¶ 5.) BHLLC and Nordstrom also pointed to a two-sentence addendum to the Eleazers’ offer to buy in February 2007, which contemplated “access for maintenance of OSS to Bush House B&B ... in the form of a recorded easement agreeable to both parties.” (CP 679.) The statutory warranty deed executed by Nordstrom in May 2007, however, did not reference the 1993 documents, and it warranted that there were no encumbrances or easements affecting the property’s marketability. (CP 492.) Further, the addendum had said nothing about the timeline for agreeing on the form of easement and recording it,

about the location of the easement, about the definition of “access” and “maintenance,” about the Bush House’s right of use, about whether the Eleazers would be responsible for repairs, or about indemnification and liability for damages. (CP 679.) Nordstrom first presented a form of easement addressing these issues in October 2010, over three and a half years after closing. (CP 336 ¶ 7, 339–46.) The final form of easement, as involuntarily recorded under court order in 2013, changed still further, with the location of the easement growing beyond what Nordstrom suggested three years earlier. (*Compare* CP 346, *with* CP 159.)

Reversal is the proper outcome on appeal. The two-sentence addendum was an unenforceable “agreement to agree” that was vague and lacked essential and material terms. The trial court ordered further negotiations on the form of an easement, even though the Supreme Court has squarely held that the parties to an “agreement to agree” have no duty to continue negotiating until a deal is finalized. Even if the “agreement to agree” were enforceable before closing, it merged into the statutory deed and is now a nullity. Further, the respondents lacked the right to specific performance, because Nordstrom had since sold the property and BHLLC was not a party to the original agreement. The trial court improperly dismissed the Eleazers’ claim that Nordstrom breached the statutory warran-

ty deed, as the property *was* encumbered. The trial court improperly gave force to a declaration of restrictive covenants, even though the respondents conceded that it did not create a private encumbrance on the Eleazers' property. And the trial court improperly failed to dismiss the respondents' counterclaims. While the errors were many, they all flowed from the same basic mistake: the trial court choosing to become a contracts draftsman, writing in specific and missing terms several years later.

ASSIGNMENTS OF ERROR

1. The trial court erred in denying the motion of the Eleazers for partial summary judgment, which sought a judgment quieting title in their property against BHLLC, a declaratory judgment invalidating the declaration of restrictive covenants and a 1993 letter from the Snohomish Health District (SHD) from 1993, and dismissal of the respondents' counterclaims. (CP 266 ¶ 6.A, 682–83, 687.)

2. The trial court erred in granting the motion of BHLLC and Nordstrom for partial summary judgment. (CP 266 ¶ 6.B.)

A. The trial court erred in dismissing the Eleazers' claim to quiet title in their property against BHLLC. (CP 266 § 6.C, 441–42 ¶¶ 33–35.)

B. The trial court erred in dismissing the Eleazers' claim for a declaratory judgment invalidating the declaration of restrictive covenants and

the SHD letter from 1993. (CP 266 § 6.C, 442 ¶¶ 36–39.)

C. The trial court erred in dismissing the Eleazers’ claim against Nordstrom for breach of the statutory warranty deed. (CP 266 § 6.C, 443 ¶¶ 40–44.)

D. The trial court erred in specifying under CR 56(d) that the “Eleazers contractually promised to grant an OSS easement, which was the direct purpose of the SHD letter and Covenants,” and, “Eleazers are in breach of the Form 34 promise to grant an OSS easement to the Bush House property.” (CP 265 §§ 5.D, 5.H.)

E. The trial court erred in specifying under CR 56(d) that “Nordstrom has not breached any warranty she made to Eleazers when she executed and delivered a Statutory Warranty Deed conveying the Eleazer property to Plaintiffs.” (CP 265 § 5.G.)

F. The trial court erred in specifying under CR 56(d) the other facts set forth in its order of May 23, 2013. (CP 265 §§ 5.A–5.C.)

3. The trial court erred in enjoining the Eleazers “to grant and record an OSS easement in a form acceptable to SHD,” with a condition that a special master would be appointed under CR 70 upon motion to approve easement language, if an easement agreement could not be reached by July 1, 2013. (CP 266 § 6.D.)

4. The trial court erred in ordering, “Claims for attorneys’ fees and cost (sic) are reserved for later court action.” (CP 266 § 6.E.)

ISSUES

1. Whether a preliminary agreement to create an easement for a on-site sewage system is an enforceable contract when the agreement says only that the easement will involve “access for maintenance,” with remaining details unresolved, and with the parties still left to negotiate a form of easement “agreeable to both parties.”

2. Whether an addendum to a real-estate purchase-and-sale agreement pledging to grant an easement merges into the deed at closing, with the terms of the deed thus superseding the terms of the addendum.

3. Whether the original promisee of a preliminary agreement to grant an easement has a right to an equitable remedy for a breach of that agreement after selling the putative dominant estate, and whether the subsequent purchaser of that estate was a third-party beneficiary.

4. Whether a declaration of restrictive covenants which was recorded unilaterally by the prior owner and not mentioned in a deed of transfer is enforceable against the buyers, particularly when the declaration’s only restriction was to bind the property to other lots under a single owner.

5. Whether a seller's failure to mention a recorded declaration of restrictive covenants or a claimed right to an easement constitutes a breach of a statutory warranty deed.

6. Whether a failure of sufficient proof should have compelled the trial court to dismiss the counterclaims under CR 11, RCW 4.84.185, RCW 4.24.350, and the common law regarding intentional interference with a business expectancy.

STATEMENT OF THE CASE

I. FACTUAL HISTORY

A. The dilapidated Bush House hotel was not operational commercially for six years by the time Nordstrom decided to sell it and the single-family home on the adjoining parcels

Loyal Nordstrom once owned adjoining properties in Index, Washington, including a single-family home and the land where stood the old Bush House—a small hotel and restaurant. (CP 432.) Nordstrom recalls “many things that needed work” on the Bush House. (*Id.* ¶ 3.) In 2001 or 2002, Nordstrom shut the hotel down “because of some bigger damages to it,” and due to her “financial problems.” (*Id.*) On May 31, 2002, Nordstrom’s holding company for the Bush House dissolved. (CP 645 ¶ 7, 663.) By 2004, she “decided ... I probably needed to sell the Bush House.” (CP 433 ¶ 3.)

When early 2007 rolled around, however, the Bush House remained unsold and nonoperational, despite the real-estate boom being at its height. (CP 334 ¶ 2, 568, 672–73 ¶ 2, 677.) The Eleazers came across a flyer from Nordstrom’s listing agent marketing the Bush House and the single-family home also sitting on the nine lots. (CP 11 ¶ 3, 105.) They noticed the flyer stated, “Seller may consider selling separately.” (CP 105.)

B. A two-sentence pledge regarding an easement was added to the Eleazers’ offer to buy the single-family home, but by closing time they were reassured that it had become a moot point

In February 2007, the Eleazers’ real-estate agent, using NWMLS Form 21, wrote an offer to Nordstrom to buy only the single-family home. (CP 570 ¶¶ 5–6.) At the insistence of Nordstrom’s listing agent, a Form 34 addendum was added: “Buyer agrees to grant access for maintenance of OSS to Bush House B&B. Access to be granted in the form of a recorded easement agreeable to both parties.” (CP 570 ¶ 6, 673 ¶ 4, 679.) These two sentences were the only provisions included in the addendum for an easement. (CP 673 ¶ 4, 679.) Nordstrom’s listing agent does not assert that the offer price was lowered to account for the possibility of an easement. (CP 570 ¶ 6.) The Eleazers knew that the on-site sewage system (OSS) for the Bush House included a drainfield in the front yard of the property they hoped to buy. (CP 335 ¶ 3.) But they signed the Form 34 “agreement to

agree” with the belief that “we retained the opportunity to discuss the details of the easement that Nordstrom wanted and terminate the sale if we could not agree on the terms.” (*Id.*)

By closing on May 10, 2007, however, Nordstrom and her representatives failed to follow up on the suggested easement, never presenting the Eleazers with a proposed form of easement, or even mentioning the topic at all. (CP 335 ¶¶ 4–6, 673 ¶¶ 5–7.) Nordstrom conveyed title to the home by statutory warranty deed to the Eleazers. (CP 646 ¶ 8, 665–68, 673 ¶ 5.) The deed said nothing about an easement, neither reserving one nor referencing any recorded declaration describing one to be created. (CP 665–68.) Before accepting the deed, the Eleazers “asked the escrow agent about” the issue, but the escrow agent said he “knew nothing about an easement agreement.” (CP 335 ¶ 4.) As the Eleazers recall, “because Nordstrom had already executed the Statutory Warranty deed, [the escrow agent] had us proceed with the closing.” (*Id.*) Based on Nordstrom’s silence on the topic, and having received the escrow agent’s assurances that it was then a moot point, the Eleazers accepted the deed. (*Id.* ¶¶ 3–4.)

C. After three years of peace, the Eleazers discovered they had walked unwittingly into a quagmire

Although the Eleazers knew the nonoperational, dilapidated hotel was hooked up to a septic drainfield in their front yard, they did not know at closing that the SHD had issued a recorded letter on March 26, 1993 requiring that the “components of onsite sewage facility on separate tax lots from the Bush House Restaurant must be tied to Bushhouse (sic) via recorded easements.” (CP 476 ¶ 2, 656–57, 673 ¶ 5.) The Eleazers did not know at closing that on May 12, 1993, Nordstrom had executed a Declaration of Restrictive Covenants providing that Nordstrom’s adjoining properties, including the property purchased later by the Eleazers, “are to be considered as one total building lot,” and providing for cancellation of “this easement at such time as Snohomish Health District will approve cancellation of the same.” (CP 476 ¶ 2, 659, 673 ¶ 5.) Nordstrom did not disclose these documents or the substance of their contents, and the recorded documents did not appear on the Commitment for Title Insurance from the Eleazers’ title company. (CP 476 ¶ 2, 480–490, 656–57, 665–68, 673 ¶ 5.)

Following closing, the Bush House property remained unsold, and the Eleazers heard nothing from Nordstrom or her associates about an easement for three years. After peaceably owning their home for three years,

they were approached first by Blair Corson, the current owner of BHLLC, who “demanded, in a hostile and belligerent fashion, that we grant Bush House an easement.” (CP 335–36 ¶¶6–7, 673 ¶ 7.) For the first time since the May 2007 closing, Nordstrom contacted the Eleazers in October 2010 with a letter demanding an easement, proposing a form of easement, and suggesting that the Eleazers obtain an attorney. (CP 336 ¶ 7, 338–346.) The parties could not reach agreement.

A court-appointed receiver for Nordstrom conveyed the Bush House to BHLLC by special warranty deed on December 28, 2011. (CP 646 ¶ 9, 649–652.)

On February 3, 2012, the SHD disapproved an application from the Eleazers to repair their failing septic system by hooking up to the front-yard drainfield. (CP 646 ¶ 10, 670–71.) The SHD’s disapproval letter explained that the Declaration of Restrictive Covenants “may just be some sort of cloud on the title of [the Eleazers’ lots],” or “it may also be a legal instrument granting dominate (sic) control of the existing OSS pressure bed and portions of [the Eleazers’ lots] to the property owner of [the Bush House lots].” (CP 670.) Until such legal uncertainty was resolved, the SHD declared that it could not approve a septic-repair permit. (*Id.*) This development presented an expensive dilemma: if the Eleazers had a right

of use permitting them to hook up to the front-yard drainfield, they could have arranged for a repair costing roughly \$2,500. (CP 336 ¶¶ 9–10, 350–51.) Without such a right, however, the Eleazers were limited to a septic-repair design costing nearly \$20,000. (*Id.*)

On March 12, 2012, the Town of Index published a notice that BHLLC had submitted a land-use application to repair and remodel the Bush House. (CP 674 ¶ 8.)

II. PROCEDURAL HISTORY

On April 2, 2012, the Eleazers filed a quiet-title action, and Nordstrom intervened. (CP 699–701, 708–14.) The Eleazers’ amended complaint requested (1) an order quieting title to their home in their favor and against any claim for an easement; (2) a declaration that the Declaration of Restrictive Covenants could no longer be enforced to create an easement; and (3) a judgment for damages against Nordstrom for breach of the statutory warranty deed. (CP 436–46.) BHLLC counterclaimed for (1) CR 11 sanctions for the Eleazers’ complaint not affirmatively alleging that (a) the Eleazers knew about the front-yard drainfield and (b) Nordstrom and her agents attempted “negotiations” for an easement in 2010; (2) a frivolous-lawsuit claim under RCW 4.84.185; (3) malicious prosecution under RCW 4.24.350; and (4) tortious interference with a business expectancy. (CP

392–408.) BHLLC requested damages and reasonable attorney fees. (CP 408.) For a year after the suit commenced, however, BHLLC did not file a motion seeking dismissal, sanctions, or relief of any kind, until it filed a motion for partial summary judgment on April 25, 2013. (CP 457–75.) Nordstrom, for her part, counterclaimed for (1) an order requiring an easement as specific enforcement of Form 34, (2) damages against the Eleazers for breach of contract, and (3) reasonable attorney fees. (CP 376–81, 598–601.)

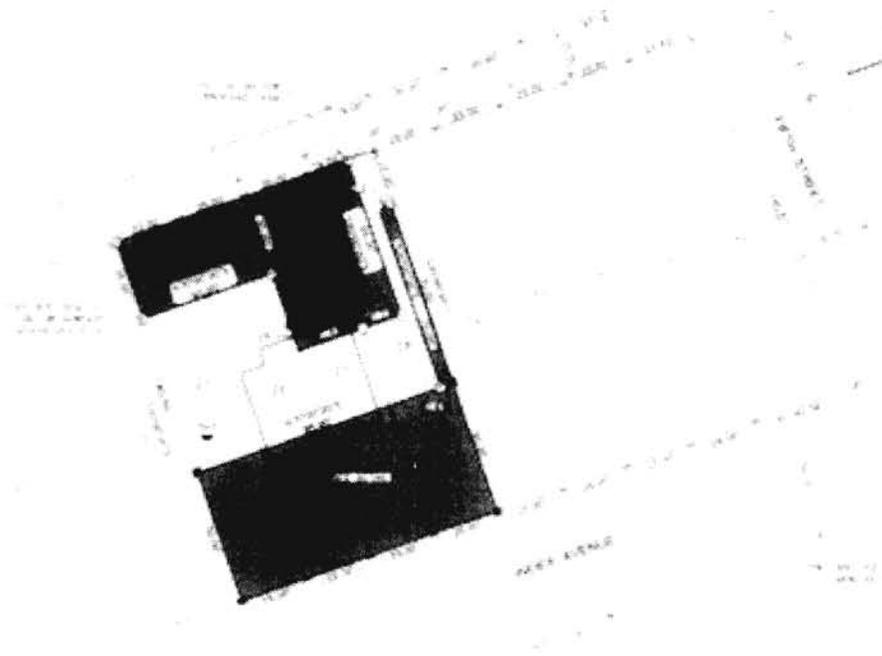
On May 23, 2013, on cross-motions for partial summary judgment, the trial court dismissed the Eleazers’ claims, rejected their request for dismissal of the counterclaims of BHLLC and Nordstrom, and entered a finding that the “Eleazers are in breach of the Form 34 promise to grant an OSS easement to the Bush House.” (CP 261–67.) The partial-summary-judgment order required the Eleazers to grant and record an easement by July 1. (CP 266.) The order stated that “[c]laims for attorneys fees and costs are reserved for later court action.” (*Id.*)

The parties did not reach agreement on a form of easement, and BHLLC moved that the trial court compel an easement under authority of a special master. (CP 211–248.) In support of its motion, BHLLC submitted a declaration claiming to have a legal description of the easement that

was “surveyed” and based on “field work.” (CP 164–65 ¶¶ 6–8, 166.) That legal description included an area that did not appear in the form of easement proposed by Nordstrom with her October 2010 letter, namely 30 to 40 feet of the Eleazers’ backyard for “reserve drainfield.” (*Compare* CP 159, 166, *with* CP 346.) On June 27, the court adopted the BHLLC’s form of easement to be recorded against the Eleazers’ wishes, with Form 34 ballooning from a two-sentence preliminary agreement to a recorded document of eight pages, covering topics never mentioned in Form 34, such as access for the SHD, upgrades and replacements of the septic system, attorney fees, and the location of the easement. (CP 149–161.)

On July 3, the SHD sent a letter to the Eleazers citing the newly recorded easement and denying their application for a permit to repair their failing septic system. (CP 100 ¶ 5, 116.) Because the denial letter said the location of the easement needed to be depicted on the septic-repair design, Cascade Survey & Engineering told the Eleazers that they had to have a survey done. (CP 89 ¶ 5, 100 ¶ 6.) For the first time, then, in July 2013 a survey was done of this description of the purported easement, costing the Eleazers \$1,200. (CP 89 ¶ 5, 95–96, 100 ¶ 6.) When the Eleazers received the survey, they were “stunned, totally taken by surprise,” because, “[u]ntil that day, we had no idea that an easement for the Bush House’s

commercial septic system could be that huge.” (CP 100-01 ¶ 6.) As Maya Caldwell Eleazer notes, “It even goes under our house.” (*Id.*)



(CP 96.)

Since then, moreover, the surveyor who stamped the legal description presented by BHLLC has come forward to say that this particular legal description had *never* been surveyed before, there had never been a survey of *any* easement for the septic system, adding the backyard was Corson’s idea, no soils testing has ever been done to confirm the backyard is actually usable as reserve area, and “the information that Cascade has strongly indicates that the soils are *not* suitable for a drainfield.” (CP 89 ¶¶ 5-6.)

The Eleazers filed a notice of appeal, with the trial court’s May 23 order attached. (CP 201-10.) The Court treated the notice as a notice for discretionary review under RAP 5.1(c). After the trial court certified its May 23 order for discretionary review under RAP 2.3(b)(4) (CP 1-4), this Court granted discretionary review of the order under RAP 2.3(b)(2) (“The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act.”).

ARGUMENT

The trial court should be reversed. The form of easement approved by the trial court demonstrates why vague and incomplete preliminary agreements—mere agreements to agree—are not enforceable contracts. Courts are not in a position to supply the terms of a contract for the parties, especially when, as here, the terms may hinge on technical information and a complex set of considerations. One downside of courts writing the deal for the parties is that terms may be included that were never assented to, resulting in unfair surprise. And that is precisely what happened here. The trial court lost sight of core principles of contract law, and all of its other rulings flowed from the fundamental error of enforcing Form 34.

I. THE “AGREEMENT TO AGREE” ON AN EASEMENT WAS NOT AN ENFORCEABLE CONTRACT

A burden falls on every person who seeks relief under contract law: demonstrate that there is a valid contract in the first place. *See, e.g., Johnson v. Nasi*, 50 Wn.2d 87, 91, 309 P.2d 380 (1957) (“The burden of proving a contract ... is on the party asserting it, and he must prove each essential fact”); *Bogle & Gates, P.L.L.C. v. Zapel*, 121 Wn. App. 444, 448, 90 P.3d 703 (2004) (same); *Cahn v. Foster & Marshall, Inc.*, 33 Wn. App. 838, 840, 658 P.2d 42 (1983) (same). Accordingly, BHLLC and Nordstrom must establish that an agreement to create an easement for a commercial-grade sewage system is an enforceable contract despite providing only for “access for maintenance” and leaving the rest for negotiations on a form of easement “agreeable to both parties.” (CP 679.) Under the law of contracts, however, the respondents cannot meet this burden: “‘Agreements to agree are unenforceable in Washington.’” *P.E. Sys., LLC v. CPI Corp.*, 176 Wn.2d 198, 208, 289 P.3d 638 (2012) (quoting *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 176, 94 P.3d 945 (2004)).

An “agreement to agree” is defined as “an agreement to do something which requires a further meeting of the minds of the parties and without which it would not be complete.” *Sandeman v. Sayres*, 50 Wn.2d 539, 541–542, 314 P.2d 428 (1957)). As the definition suggests, the prohibition

against enforcing such a preliminary agreement is based on core principles of Washington contract law:

- Under “the objective manifestation test for contracts,” a contract forms only if the parties mutually and objectively show their intent to be bound to the terms of an agreement. *Keystone*, 152 Wn.2d at 177, 179.
- The terms of the agreement “must be sufficiently definite.” *Keystone*, 152 Wn.2d at 179 (citing *Sandeman*, 50 Wn.2d at 541).
- The agreement must be complete in all of the material and essential terms concerning the subject matter, without any future meeting of the minds required. *E.g.*, *Keys v. Klitten*, 21 Wn.2d 504, 519, 151 P.2d 989 (1944).

Measured by these principles, Form 34 is not enforceable.¹

¹When these principles are applied to determine the validity of an agreement, the standard of proof depends in part on the type of remedy sought. Where the desired remedy is specific performance, as it was for BHLLC and Nordstrom in this case, the proponent of the agreement must produce “‘clear and unequivocal’ evidence that ‘leaves no doubt as to the terms, character, and existence of the contract.’” *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993) (quoting *Powers v. Hastings*, 93 Wn.2d 709, 717, 713, 612 P.2d 371 (1980)). Where the desired relief is legal damages, the bar is not as high, but the proponent still must demonstrate that the agreement is certain enough to be a valid contract. *Hedges v. Hurd*, 47 Wn.2d 683, 688, 289 P.2d 706 (1955). When called upon to decide whether a writing is an unenforceable agreement to agree, a reviewing court uses its own judgment independently from the trial court’s findings. *See P.E. Systems, LLC v. CPI Corp.*, 176 Wn.2d at 207–210 (reversing without deference to the trial court’s decision on the enforceability of the contract).

A. The preliminary agreement for an easement did not objectively indicate a mutual, present intent to be bound to its terms

The unenforceability of agreements to agree stems from a black-letter rule: “It is essential to the formation of a contract that the parties manifest to each other their mutual assent to the same bargain at the same time.” *Pac. Cascade Corp. v. Nimmer*, 25 Wn. App. 552, 555–56, 608 P.2d 266 (1980). This manifestation must be a present intent to be bound; the intent to do something in the future, such as hammer out an agreement, “is evidence of a future contractual intent.” *16th Street Investors, LLC v. Morrison*, 153 Wn. App. 44, 54, 223 P.3d 513 (2009) (quotations and citations omitted).

The problem of the easement location alone shows that Nordstrom and the Eleazers did not have mutual assent. Form 34 said nothing about the location of the easement on the Eleazers’ property. (CP 679.) Descriptions of the location did not appear until three years later, in 2010, and even then the location was unclear. Corson, from BHLLC, claims that he presented a legal description to the Eleazers at that time. (CP 164–65 ¶ 7, 166.) But it differed from the location described in the form of easement proposed by Nordstrom in her letter of October 2010. (CP 336 ¶ 7, 339–46.) The final form of easement recorded by court order adopted Corson’s proposed location. (CP 159, 164–65 ¶ 7, 166.) That settled the matter, but

not because Eleazer and Nordstrom mutually assented to it when Form 34 was executed in February 2007. It was nothing more than an agreement to agree.

B. The terms of the preliminary agreement were not specific enough to avoid surprise and to allow a determination of the parties' rights and responsibilities

The rule against enforcing agreements to agree stems from another important principle: “The terms of a contract must be sufficiently definite.” *16th Street Investors, LLC v. Morrison*, 153 Wn. App. 44, 55, 223 P.3d 513 (2009). Courts require the terms of a contract to be specific in order ‘avoid trapping parties in surprise contractual obligations.’” *Keystone Land & Development Co. v. Xerox Corp.*, 152 Wn.2d 171, 178, 94 P.3d 945 (2004) (quoting *Teachers Ins. & Annuity Ass’n v. Tribune Co.*, 670 F. Supp. 491, 497 (S.D.N.Y. 1987)). This is a “primary concern.” *Id.* Additionally, “preliminary agreements must be definite enough on material terms to allow enforcement without the court supplying those terms.” *Setterlund v. Firestone*, 104 Wn.2d 24, 25, 700 P.2d 745 (1985). The role of the courts is not to write the contract for the parties. In short, “if a term is so ‘indefinite that a court cannot decide just what it means, and fix exactly the legal liability of the parties,’ there cannot be an enforceable agreement.” *Key-*

stone, 152 Wn.2d at 178 (quoting *Sandeman v. Sayres*, 50 Wn.2d 539, 541, 314 P.2d 428 (1957)).

Form 34 was not specific enough. The only substantive property right contemplated in Form 34 was a right of the Bush House owner to “access for maintenance.” (CP 679.) What did “access” mean? At what hours could the property be entered? How often? By whom? How many people at one time? What about machinery? Would the right of access preclude construction of a fence around the property? And what did “maintenance” mean? Monitoring the system? Repairing it? Would the Eleazers be partially responsible for maintenance?

Given the sparse and vague two sentences of Form 34, the trial court was required to enter the fray and write the contract for the parties. (CP 266, 149–61.) It should not have done so.

C. The preliminary agreement was not complete, as it lacked the essential and material terms required to make it enforceable

Only when negotiations resolve all the material and essential terms does an agreement mature into an enforceable contract. Otherwise, a preliminary understanding is nothing more than an agreement to agree—helpful in negotiations, perhaps, but unenforceable. *See Johnson v. Star Iron & Steel Co.*, 9 Wn. App. 202, 206, 511 P.2d 1370 (1973) (“An agreement to negotiate a contract in the future is nothing more than negotia-

tions.”). These principles have been laid in the bedrock of Washington contract law for a century. *See, e.g., Plumbing Shop, Inc. v. Pitts*, 67 Wn.2d 514, 521, 408 P.2d 382 (1965) (“[I]f the preliminary agreement is incomplete, it being apparent that the determination of certain details is deferred until the writing is made out ... the preliminary negotiations and agreements do not constitute a contract.” (quoting Restatement of Contracts § 26 cmt. a (1932))); *Sandeman v. Sayres*, 50 Wn.2d 539, 541-42, 314 P.2d 428 (1957) (“An agreement for an agreement, or, in other words, an agreement to do something which requires a further meeting of the minds of the parties and without which it would not be complete is unenforceable.”); *Keys v. Klitten*, 21 Wn.2d 504, 519, 151 P.2d 989 (1944) (“A contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as the result of future negotiations.”); *Weldon v. Degan*, 86 Wash. 442, 447, 150 P. 1184 (1915) (“So, to be enforceable, a contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as the result of future negotiations.” (quotation omitted)).

Form 34 was silent on many material terms. The fundamental purpose of an easement is to create “a privilege to use another’s land in a certain manner.” *State ex rel. Shorett v. Blue Ridge Club*, 22 Wn.2d 487, 494, 156

P.2d 667 (1945); *see also* 1 John W. Weaver, *Easements and Licenses*, Washington Real Property Deskbook § 7.2(1), at 7-3 (4th ed. 2009). Yet Form 34 says nothing about “use.” Would the use of the septic system be limited in any manner, such as barring the Bush House owner from adding hotel rooms or building a bakery? And would the owner of the Bush House property have an *exclusive* right to use the septic system, to the exclusion of Edward and Maya Eleazer, even if their own septic system would fail? The unrefuted testimony from Edward and Maya Eleazer was that this last point was never discussed or resolved. (CP 335 ¶ 3.) If the Eleazers had a right of use permitting them to share the front-yard drainfield with the Bush House owner, they could have arranged for a repair costing roughly \$2,500. (CP 336 ¶¶ 9–10, 350–52.) Instead, because the Eleazers have no right of use under the easement recorded by court order, they were forced to pursue a repair design costing nearly \$20,000. (CP 101 ¶ 7, 336 ¶¶ 9–10, 350–52.)

Other material terms for a real-estate contract were missing. Such material terms include “allocation of risk with respect to damage or destruction” and “indemnification provisions.” *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993). Would the Bush House owner indemnify the Eleazers if this large commercial-grade septic system on their property

failed and exposed the Eleazers to claims by a third party? Would the Eleazers themselves be liable? Would they be entitled to compensation in event of a failure causing damage, and if so, how would the compensation be calculated? The time for performance is another material term in real-estate and many other types of contracts. *See, e.g., id.* at 722 (noting that the “time ... for transferring title” is a material term in a real-estate contract); *Plumbing Shop*, 67 Wn.2d at 520 (holding that “work progress completion dates” was an essential term to a construction contract); *FDIC v. Uribe, Inc.*, 171 Wn. App. 683, 689, 287 P.3d 694 (2012) (striking down a financing contract as unenforceable because “it lacks definite material terms,” including time for performance). Form 34 also said nothing about whether the Eleazers would be jointly responsible for maintenance or whether the Bush House would be authorized to expand the system. *See Kruse*, 121 Wn.2d at 722 (noting that “responsibility for ... repairs” is a material term in a real-estate contract); *id.* (noting that “restrictions, if any, on ... capital improvements” is also a material term).

A particularly essential missing term was the location of the easement. According to the Eleazers, “we never discussed an easement in our backyard with Nordstrom, and as far as we know Nordstrom never installed a drainfield in our backyard.” (CP 335 ¶ 5.) Further, according to

the company that itself designed the Bush House septic system, the legal description proposed by BHLLC is not based on a professional survey, encompasses the backyard for reserve area without any soils testing to determine its fitness for that purpose, and “the information that Cascade has today strongly indicates that the soils are *not* suitable for a drainfield.” (CP 89 ¶ 6.) With so much uncertainty surrounding the location of the easement, Form 34’s silence on the topic makes it unenforceable.

Apparently there was even a term that was essential to Nordstrom but remained hidden from the Eleazers: the Eleazers were required to agree to a form of an easement that would be agreeable not just to Nordstrom, but also to the SHD, and the Eleazers were required to present the easement to the SHD for its approval. (*See, e.g.*, CP 460 ¶ 12 (“Since the sale closed, Eleazers have at no time presented a draft OSS easement to Ms. Nordstrom or SHD for approval.”); CP 469:5–:7 (criticizing the Eleazers for not affirmatively “circulat[ing] to SHD for approval ... the stipulated OSS easement”). In fact, according to Nordstrom and BHLLC, “[t]he intent of the Form 34 promise was that an OSS easement form agreeable to Ms. Nordstrom (which meant to SHD) would be presented so the D of RC could be cancelled and severance of the two parcels could legally occur.” (CP 459–60 ¶ 7.) In fact, Nordstrom and BHLLC *concede* that neither the

purchase-and-sale agreement nor the deed mentioned the SHD's letter or the Declaration of Restrictive Covenants. (CP 460 ¶ 11.) Form 34 said *nothing* about the right of a third party, the SHD, to review the form of the easement and to veto it. (CP 679.) Now, however, Nordstrom and BHLLC, insist that “the reason for ‘agreeable’ language was actually to obtain SHD’s agreement.” (CP 468:20–:21.) Whatever the subjective purpose of Nordstrom was at the time, this supposedly integral feature of the final agreement—that the SHD review it and pre-approve it before severance—was not mentioned anywhere in Form 34. Thus, Form 34 was obviously lacking a material term. And the defendants’ broad interpretation of the word “agreeable” underscores the inefficacy of Form 34, as Form 34 would be intolerably vague if “agreeable” could mean so much.

The particulars were left to a future agreement. The parties did not have a meeting of the minds on any of the crucial details. *Keystone*, 152 Wn.2d at 175 (defining an “agreement to agree” as “‘an agreement to do something which requires a further meeting of the minds of the parties and without which it would not be complete’” (quoting *Sandeman v. Sayres*, 50 Wn.2d 539, 541–42, 314 P.2d 428 (1957)); *Nimmer*, 25 Wn. App. at 557–558 (holding that an agreement in principle for a lease, including price and

term, was not enforceable because the final writing resolving landlord-tenant questions was never agreed upon).

In the end, when the “parties contemplate drafting a later agreement, this is ‘strong evidence to show that they do not intend the previous negotiations to amount to any proposal or acceptance.’” *Keystone Land & Dev. Co. v. Xerox Corp.*, 353 F.3d 1070, 1074 (9th Cir. 2003) (quoting *Nimmer*, 25 Wn. App. at 556).

It is no answer for Nordstrom and BHLLC to place the blame on the Eleazers for not taking the initiative to negotiate an easement form before closing, for not immediately agreeing in 2010 when an easement was finally demanded of them three years after they bought their home, and again not reaching an agreement when they were under the gun of the court’s May 23 order to negotiate. This argument was foreclosed by the Supreme Court in *Keystone*, which specifically held that, after an agreement to agree has been formed, the parties do *not* have an affirmative duty to continue negotiations until a contract is finalized. *Keystone*, 152 Wn.2d at 180. By law, an agreement to agree preserves the ability of the parties to walk away. *See Keys*, 21 Wn.2d at 519 (noting that an agreement to agree allows the parties to later negotiate terms and conditions “to which either of the parties might object if opposed”). This is particularly true in the real-estate con-

text, as a buyer is free until closing to reject the deed. *See* William B. Stoe-buck & John W. Weaver, *Delivery and Acceptance*, 17 Washington Practice: Real Property § 7.11 (“[A] deed is not effective until it is ‘accepted’ by the grantee ... to allow the grantee to disclaim a conveyance he does not want.”) And the courts, even when asked to, must not intercede; it is not their role to write the contract for the parties. *See, e.g., Keys*, 21 Wn.2d at 519 (“This, a court of equity will not do.”); *Weldon*, 86 Wash. at 445 (upholding dismissal of a claim for damages for an alleged breach of an agree-ment to agree). These precedents also further confirm the flaw in the trial court’s partial-summary-judgment order. It imposed a duty on the Eleazers that no appellate court has previously required of a party to an agreement to agree.

As in *Settlerlund*, “[t]his case is a perfect illustration of the danger of trying to enforce a nonspecific preliminary agreement.” *Settlerlund v. Firestone*, 104 Wn.2d 24, 26, 700 P.2d 745 (1985). The dangers of surprise be-came reality. The easement as recorded is unfathomably large, encircling the Eleazers’ home and even going under it. There is no space left for re-serve area for the Eleazers’ planned repair to their own septic system. Consequently, as Maya Caldwell Eleazer says, “if this repair fails at any point in the future, we appear to be out of luck.” (CP 101 ¶ 8.) Form 34

grew from a two-sentence preliminary agreement to a recorded document of eight pages, covering topics never mentioned in Form 34. This court, in writing the form of the easement for the parties, relied on the statements of a party, BHLLC, that proved inaccurate and potentially misleading. Blair Corson, the owner of BHLLC, offered a legal description for the easement and claimed he “ordered the field and drafting work for the surveyed legal description.” (CP 164 ¶ 6.) He claimed it represented “the drainfield, the pipe coming from the Bush House to the drainfield, and the Bush House reserve drainfield area.” (CP 164–65 ¶ 7.) However, the surveyor who stamped the legal description says that this particular legal description had never been surveyed before, that there had never been a survey of *any* easement for the septic system, that adding the backyard was Corson’s idea, that no soils testing has ever been done to confirm the backyard is actually usable as reserve area, and that “the information that Cascade has strongly indicates that the soils are *not* suitable for a drainfield.” (CP 89 ¶ 6.) Septic systems are designed and maintained by relying on technical experts, and they are regulated by an expansive and detailed set of statutes, administrative rules, and sanitary codes. The easement approved in this case shows that it would be unwise, and inconceivable, for parties to a septic-drainfield easement to rush through the process without

careful deliberations and expert guidance. It is untenable for courts to enforce incomplete preliminary agreements for such easements.

II. THE PRELIMINARY AGREEMENT MERGED INTO THE DEED

A. With few exceptions, the merger-by-deed doctrine holds that the terms of the deed supplant the terms of the earlier purchase-and-sale agreement

The merger-by-deed doctrine holds that “the provisions of a real estate purchase and sale agreement merge into the deed upon execution of the deed.” *Ross v. Kirner*, 162 Wn.2d 493, 498, 172 P.3d 701 (2007) (citations omitted)). It does not matter whether the terms of the deed vary from the terms of the purchase-and-sale agreement; by definition, the conflicting terms of the purchase-and-sale agreement are disregarded, and the deed controls. *See id.* (“Execution and acceptance of a deed varying from the terms of the underlying purchase and sale agreement amends the contract so that the provisions of the deed generally fixes the parties’ rights.” (citation omitted)). Some exceptions apply to this general rule. One is for “collateral contract requirements that are not contained in or performed by the execution and delivery of the deed, are not inconsistent with the deed, and are independent of the obligation to convey.” *Barber v. Peringer*, 75 Wn. App. 248, 252, 877 P.2d 223 (1994) (citation omitted). An-

other exception is for “actions based on fraud or mistake.” *Brown v. Johnson*, 109 Wn. App. 56, 60, 34 P.3d 1233 (2001).

B. The preliminary agreement concerning an easement merged into the deed because it was central to the agreement to convey and its terms conflicted with the deed

The Court of Appeals has already held that “an alleged agreement to convey an easement” is “central, not collateral, to the agreement to convey.” *Barnhart v. Gold Run, Inc.*, 68 Wn. App. 417, 424, 843 P.2d 545 (1993). That should be the end of the issue: Form 34 merged. But, for the sake of argument, there is another reason Form 34 merged into the deed: to the extent that Form 34 means that an easement was *required* to attach to the Eleazers’ property, as claimed by Nordstrom and BHLLC, it was inconsistent with the deed. As a statutory warranty deed, it warranted that the property was “from all encumbrances.” RCW 64.04.030(2). The deed also contained enhanced language promising that title was “marketable,” with the exception of some “easements and encroachments,” but only those “not materially affecting the value of or unduly interfering with grantee’s reasonable use of the property.” (CP 665.) In other words, the deed warranted that the property was free from the very type of invasive and limiting easement that Form 34 purportedly meant to create. Given this clash, the deed controls. Form 34 melts away.

Nordstrom and BHLLC’s arguments lack merit. They assert the doctrine of merger is inapplicable because the deed did not mention Form 34 and “effectively conveyed title to Eleazers’ property.” (CP 466:11–:13.) But that argument only confirms that Form 34 merged, because “an alleged agreement to convey an easement” is “central, not collateral, to the agreement to convey.” *Barnhart*, 68 Wn. App. at 424. Nordstrom and BHLLC argued also that the deed “did not fully execute the contract of sale of land.” (CP 466:14–:15.) But that argument would swallow the merger doctrine; the argument assumes that merger occurs only when all of the terms in the purchase-and-sale agreement are included in the deed. If that were so, merger would not mean anything at all. Merger does not mean that the terms of the purchase-and-sale agreement must be reprinted in the deed. Rather, it preserves the parties’ contractual freedom to change and omit the terms of their agreement. *See* 18 William B. Stoebuck & John W. Weaver, *Deed Covenants—General Principles*, Washington Practice: Real Estate § 14.2 (2d ed. & Westlaw Supp. May 2013) (“Washington has long said this doctrine exists, for the theoretically sound reason that parties are free to modify their former agreement.”). In reality, then, unexecuted terms do not preclude merger, because “[e]xecution and acceptance of a deed varying from the terms of the underlying purchase and sale agree-

ment amends the contract so that the provisions of the deed generally fixes the parties' rights." *Ross*, 162 Wn.2d at 498.

Nordstrom and BHLLC also claimed that merger did not occur because an easement could not be created until after closing. Not true. Easements are created *all the time* at closing. *See, e.g.*, 17 William B. Stoeck, *Creation of Easements and Profits by Express Act*, Washington Practice: Real Estate § 2.3 (2d ed. & Westlaw Supp. May 2013) ("We have spoken so far of the 'grant' of easements and profits. They may also be retained upon land by a person who conveys an estate in that land to another."); 1 John W. Weaver, *Easements and Licenses*, Washington Real Property Deskbook § 7.3, at 7-6 (4th ed. 2009) ("A reservation ... conveys some land and reserves a right-of-way or other easement for use (or benefit) of a dominant estate." (citations omitted)). What Nordstrom could have done in 1993 or 2007 was to obtain the approval of the Eleazer and SHD for a form of an easement, then to record it as a "declaration of easement," and finally to note on the deed that the conveyance was "subject to" this recorded declaration of easement. *See, e.g., Beebe v. Swerda*, 58 Wn. App. 375, 377, 382, 793 P.2d 442 (1990) (giving force to this type of declaration of easement that was expressly noted on the deed upon conveyance). Thus, contrary to the position of Nordstrom and BHLLC, Nordstrom *could* have

recorded a declaration of easement that would have matured into an enforceable easement upon executing a deed referencing the declaration. And this is really what Nordstrom *should* have done. She had superior knowledge, she controlled access to the property as its owner, she had the prior dealings with SHD, and she is the one who hired the technical experts who worked on the 1993 septic design. She knew that the SHD required her to create an easement; the Eleazers did not. Her agent is the one who insisted on an easement in the first place. Given these circumstances, the Eleazers reasonably waited on Nordstrom before closing.

C. The “mistake” exception does not apply

A case involving reformation shows why the “mistake” exception does not apply. In *Key Design, Inc. v. Moser*, 138 Wn.2d 875, 983 P.2d 653 (1999), a buyer and seller entered a real-estate purchase-and-sale agreement where the property was not described, but instead a clause was included saying, “full and complete legal description must be inserted prior to execution by parties.” *Id.* at 878. The court refused to “reform” the purchase-and-sale agreement under the mistake doctrine and the applicable “clear and convincing” burden of proof for the doctrine to apply. *Id.* at 889. Similar to here, the burden of proof could not be met because a party testified that “they did not believe the agreement was meant to be bind-

ing” and was only “a step in the negotiation for the sale of the property.”

Id. at 889.

III. IT WAS ERROR TO GRANT AN EQUITABLE REMEDY TO NORDSTROM AND TO BHLLC, A STRANGER TO THE AGREEMENT

Nordstrom and BHLLC raised this question below: “Do both SHD and Nordstrom have direct rights of enforcement, and does Bush House have third-party beneficiary rights of enforcement, for granting and recording of an OSS easement by Eleazers ...?” (CP 462:15–:19.) The trial court plainly believed the answer was yes. Review is *de novo*. *See Lakewood Racquet Club, Inc. v. Jensen*, 156 Wn. App. 215, 222, 232 P.3d 1147 (2010) (“A trial court’s determination about a party’s standing to enforce a restrictive covenant is a conclusion of law that we review *de novo*.”).

Nordstrom, having sold the Eleazer parcels in 2007 and the Bush House parcels in 2011, had no direct right to specifically enforce the Declaration of Restrictive Covenants or Form 34. *See, e.g., Lakewood Racquet Club*, 156 Wn. App. at 224 (holding that “covenantees may only enforce restrictive covenants if they have a justiciable interest in enforcement, generally an ownership interest in the benefited property”). If Nordstrom is entitled a remedy, it is only for damages at law for the purported breach of Form 34.

Of course, even if she had a right to the equitable remedy of specific performance, her right is defeated by equitable defenses. Even though the Declaration of Restrictive Covenants prohibited Nordstrom from splitting the property and selling off some of the parcels without obtaining prior SHD approval, she flouted this prohibition, failed to disclose the Declaration of Restrictive Covenants to the Eleazers, failed to propose or reserve an easement before closing, and then did nothing for three years after closing. Such conduct supports a conclusion that Nordstrom should be denied the equitable remedy of specific performance.² *See Mountain Park Homeowners Ass'n, Inc. v. Tydings*, 125 Wn.2d 337, 341–342, 883 P.2d 1383 (1994) (“A number of equitable defenses are available to preclude enforcement of a covenant: merger, release, unclean hands, acquiescence, abandonment, laches, estoppel, and changed neighborhood conditions.” (citations omitted)).

The trial court likewise committed error in concluding that BHLLC had the right to specific performance of Form 34. “The creation of a third

²The sufficiency of the evidence supporting an equitable defense may be a question of fact, “[b]ut if reasonable minds could reach only one conclusion from the admissible facts in evidence, summary judgment is proper.” *Suquamish Indian Tribe v. Kitsap County*, 92 Wn. App. 816, 827, 965 P.2d 636 (1998). Further, this Court has previously suggested that when a party seeks equitable relief, as Nordstrom and BHLLC have here, the appropriateness of equitable relief is a question of law reviewed de novo. *See Norcon Builders, LLC v. GMP Homes VG, LLC*, 161 Wn. App. 474, 483, 254 P.3d 835 (2011).

party beneficiary agreement requires that the parties intend, *at the time they enter into the agreement*, that the promisor assume a *direct* obligation to the beneficiary.” *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229, 255, 215 P.3d 990 (2009) (citation omitted) (emphasis added). Nothing in Form 34 suggests that the parties intended the performance to create a direct obligation an entity that had not even been created yet. If BHLLC believes its status as a downstream purchaser of a putative dominant estate makes it a third-party beneficiary of Form 34, it advances an argument rejected in *Deep Water*. See 152 Wn. App. at 241, 256. And, if BHLLC believes equity entitles it to step into the shoes of Nordstrom—an argument never developed on summary judgment—then it is barred by the same equitable defenses as against Nordstrom. See William B. Stoebuck & John W. Weaver, *Form and Interpretation of Real Covenants*, Washington Practice: Real Estate § 3.2 (2d ed. & Westlaw Supp. May 2013) (“[F]or the covenantee’s successor to be able to enforce the covenant, the covenantee must have been able to enforce it.”). It would also be subjected to an equitable claim of unjust enrichment. See generally *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008) (discussing unjust enrichment). Nordstrom has claimed that she “reduce[d] the sales price of the Bush House by \$75,000.00” when selling to BHLLC due to the absence of an

easement. (CP 434 ¶ 8.) If that is so, the specific enforcement of Form 34 unjustly enriched BHLLC; it has obtained an easement supposedly worth \$75,000.00 but has not paid for this windfall.

The trial court should not have ordered specific performance of Form 34, because neither BHLLC nor Nordstrom had a right to that remedy, regardless of the agreement's legal effect.

IV. THE DECLARATION OF RESTRICTIVE COVENANTS IS NOT ENFORCEABLE

Nordstrom and BHLLC conceded that “there was never a valid private restrictive covenant encumbering the Eleazer property.” (CP 470:12–:22.) So it was odd for them to later cite the Declaration of Restrictive Covenants as a proper vehicle for the trial court to order an easement. (*See* CP 469:14–:15 (arguing that SHD and BHLLC “are entitled to have the ... covenant enforced by specific performance of the Form 34 promise”). To the extent the trial court agreed with them, it was error. This is a question decided de novo on appeal. *See Bauman v. Turpen*, 139 Wn. App. 78, 89, 160 P.3d 1050 (2007) (discussing principles for interpreting a covenant); *Meadow Valley*, 137 Wn. App. at 816, 156 P.3d 240 (2007) (“Where the relevant facts are undisputed and the parties dispute only the legal effect of those facts, the standard of review is also de novo.”).

There is some authority for the proposition that a previously recorded declaration of covenant will ripen into an enforceable restrictive covenant running with the land only when a portion of the property is later conveyed by deed, regardless of whether the deed references the declaration of covenant. *Thorstad v. Fed. Way Water & Sewer Dist.*, 73 Wn. App. 638, 642-43, 870 P.2d 1046 (1994). Professor Stoebuck agrees with *Thorstad* that a restrictive covenant can arise when a property subject to a recorded declaration of restrictive covenants is severed by conveying a portion to a new owner, but he explains this can occur only if the declaration is specifically referenced in the deed. See 17 William B. Stoebuck & John W. Weaver, *Form and Interpretation of Real Covenants*, Washington Practice: Real Estate § 3.2 n.1 (2d ed. & Westlaw Supp. May 2013) § 3.2 n.1 (“The decision is correct in stating that a landowner’s solitary recording of a declaration of covenants did not at that time impose land use restrictions ... but because the deed in *Thorstad* made no specific reference to the declaration of covenants, application of the principle to the facts is dubious.”). This latter view is better rule. Thus, the Declaration of Restrictive Covenants did *not* operate to create a restrictive covenant running with the Eleazers’ property, because Nordstrom and BHLLC admitted that Nordstrom did not reference the Declaration of Restrictive Covenants in the deed conveying the

parcels to the Eleazers. (CP 470:22-:23.) In any event, they conceded that there was no private encumbrance.

The terms of the Declaration of Restrictive Covenants also show why a severance in the property nullified any legal effect of the document as against the Eleazers. The only operative term of the Declaration is a requirement “[t]hat all parcels of property as described above are to be considered as one total building lot.” (CP 659.) Once some, but not all, of the parcels were conveyed to the Eleazers, the Declaration became meaningless. From then on, it was impossible for the Eleazers (or Nordstrom or her successors) to treat “*all* parcels of property ... as one total building lot” (CP 659), because they did not own all parcels.

Even if the Declaration of Restrictive Covenants did create an enforceable covenant requiring that an easement be created, the same equitable defenses against enforcement of Form 34 weigh in favor of invalidating the declaration.

The trial court should have entered a declaratory judgment invalidating the declaration of restrictive covenants.

V. NORDSTROM BREACHED THE STATUTORY WARRANTY DEED

The trial court ruled, “Nordstrom has not breached any warranty she made to Eleazers when she executed and delivered a Statutory Warranty

Deed conveying the Eleazer property to Plaintiffs.” (CP 265.) This was error, and as an order entered under CR 56 it is reviewed de novo. *See, e.g., Keystone Masonry v. Garco Constr.*, 135 Wn. App. 927, 932, 147 P.3d 610 (2006) (“Absent disputed facts, the legal effect of a contract is a question of law that we review de novo.”).

By operation of law, a statutory warranty deed includes several warranties, regardless of whether they are expressly stated or not. *See* RCW 64.04.030. One warranty is that the property is free “from all encumbrances.” RCW 64.04.030(2). Here, the deed also contained enhanced language promising that title was “marketable,” with the exception of some “easements and encroachments,” but only those “not materially affecting the value of or unduly interfering with grantee’s reasonable use of the property.” (CP 665.) Because “any easement is an encumbrance” and also “render[s] title unmarketable,” 2 Friedman on Contracts & Conveyances of Real Property § 5.1, at 5-2 (7th ed. 2007), Nordstrom breached the warranty deed to the extent that she and BHLLC assert that Form 34 was sufficient to create an easement. (And Nordstrom’s warranty against encumbrances also undercuts the argument that she and BHLLC could still have a legally enforceable expectation to an easement encumbering the Eleazers’ property.)

The same goes for the Declaration of Restrictive Covenants. It is either enforceable against the Eleazers, in which case Nordstrom breached the statutory warranty deed by failing to disclose it, or it is not enforceable against the Eleazers, as suggested by Nordstrom and BHLLC, but still created a cloud on the title. (*See* CP 670 (2012 SHD letter to the Eleazers stating that the Declaration of Restrictive Covenants “may just be some sort of cloud on the title of [the Eleazers’ lots].”) And Nordstrom and BHLLC argued that an easement was required *to enforce the Declaration of Restrictive Covenants*. (*See* CP 469:14–:15 (arguing that SHD and BHLLC “are entitled to have the ... covenant enforced by specific performance of the Form 34 promise”). Nordstrom cannot have it both ways. She cannot simultaneously argue both that Form 34 and the Declaration of Restrictive Covenants are an enforceable basis for creating an encumbrance on the Eleazers’ property, and that she did not breach the deed’s warranties against encumbrances and unmarketable title.

The dismissal of the Eleazers’ claim against Nordstrom for breach of the statutory warranty deed should be reversed, with remand for trial.

VI. THE COUNTERCLAIMS RELIED ON A NOVEL THEORY AND WERE UNSUPPORTED BY EVIDENCE

BHLLC brought a set of counterclaims under CR 11, RCW 4.84.185 (the frivolous-lawsuit statute), RCW 4.24.350 (the malicious-prosecution statute), and the common law of intentional interference with a business expectancy, all of which were rooted in the same basic allegation: the Eleazers pursued this action in bad faith and without a sufficient basis in law or fact. (CP 403–06.) The trial court, instead of putting these baseless counterclaims out of their misery, allowed them to live on. That was error, and this Court should reverse with instructions to dismiss.

CR 11 requires the attorney signing a complaint to certify that “(1) it is well grounded in fact,” “(2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law,” and “(3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” CR 11(a). Upon a showing that a complaint violates this certification, the defendant may move the trial court for “the amount of the reasonable expenses incurred because of the filing of the pleading ..., including a reasonable attorney fee.” *Id.* The trial court is empowered with the discretion to grant or deny a request for sanctions. *Tiger Oil Corp. v. Dep’t of Licensing*, 88 Wn. App. 925, 937–38, 946 P.2d 1235 (1997).

“CR 11 sanctions have a potential chilling effect,” *Skimming v. Boxer*, 119 Wn. App. 748, 755, 82 P.3d 707 (2004), with the specter of liability for the other side’s legal bills deterring plaintiffs who are otherwise “seeking to advance meritorious claims,” *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 219, 829 P.2d 1099 (1992). These dangers of overly zealous requests for sanctions are evident here.

Ironically, given CR 11’s prohibition against legally unsupported claims, it was BHLLC that failed to cite any legal authority for its novel theory that CR 11 is violated by a complaint’s omission of a fact supporting a potential counterclaim by a defendant. (CP 404–05, 594.) There is a reason for BHLLC’s omission: Washington is a notice pleading state. A complaint is required only to set forth “a short and plain statement of the claim showing that the pleader is entitled to relief.” CR 8(a)(1). And in order to satisfy that requirement, the complaint need only show that “it is *possible* that facts could be established to support the allegations in the complaint.” *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 101, 233 P.3d 861 (2010) (emphasis in original). BHLLC’s novel theory, however, is that a plaintiff also has an affirmative duty to plead the facts that might support a potential defense or counterclaim. Such a novel theory is fantastical in light of the holding in *Putman v. Wenatchee Valley Medical Center*,

P.S., 166 Wn.2d 974, 983, 216 P.3d 374 (2009) that CR 11 does not permit an affirmative duty on the plaintiff to produce evidence supporting *his own* claims. If the plaintiff does not have an affirmative duty to plead all the then-known evidence regarding his own claims, how can he have such a duty with respect to potential counterclaims?

The procedural posture of BHLLC's CR 11 counterclaim is also unusual. By the terms of the rule, CR 11 does not create a freestanding legal claim. Rather, it states that the trial court may order "an appropriate sanction" when called to "upon motion or upon its own initiative." CR 11(a). BHLLC's request for sanctions was presented as a "counterclaim" in its answer and its amended answer. (CP 404-05.) BHLLC never actually filed a motion for sanctions (*see* CP 1-721), and it did not seek dismissal of the Eleazers' complaint until over a year after it was filed. (CP 457-75.) What is more, BHLLC's defense against dismissal of its CR 11 "counterclaim" is arguing that "there are substantial disputes of fact" and that its allegations, "[i]f proven at trial," would support an order of sanctions (CP 594)—an unusual argument, given that CR 11 sanctions are predicated on the total *absence* of disputed facts. These circumstances are the canary in the coal mine: something is amiss. BHLLC has never seriously acted on its CR 11 request, instead leaving it to hang in the air ominously over the case.

While BHLLC prevailed below, “CR 11 is not meant to act as a fee shifting mechanism.” *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994). The rule is designed to deter baseless claims and the abuse of the judicial process, not to reward one party or attorney for having a better argument. *See id.* (“[T]he imposition of sanctions is not a judgment on the merits of an action.”). In any event, the Eleazers believe it is they who have not only reasonable case, but the better of the facts and the argument. The Commissioner appeared to agree, and that certification of the case under RAP 2.4(b)(2) should decide the CR 11 issue as a matter of law.

The trial court also should have dismissed BHLLC’s counterclaims under RCW 4.84.185, RCW 4.24.350, and the common law of intentional interference. For a counterclaim to succeed under RCW 4.84.185, the action “must be frivolous in its entirety; if *any* of the asserted claims are not frivolous, the action is not frivolous.” *Skimming v. Boxer*, 119 Wn. App. 748, 756, 82 P.3d 707 (2009) (citations omitted) (emphasis added). BHLLC cannot show that there is no rational argument in law or on the facts for any of the Eleazers’ claims. For this reason, the counterclaims under RCW 4.84.185 and the malicious-prosecution statute should be dismissed. *See* RCW 4.24.350(1) (requiring proof that the lawsuit was “without probable cause”).

The counterclaims of malicious prosecution and tortious interference share a similar allegation: the Eleazers wrongfully and intentionally brought this action, not to attempt to vindicate their rights in good faith, but to purposefully wound BHLLC. (CP 392–408.) In opposing summary judgment, however, BHLLC produced no evidence to support those allegations and create a genuine issue of material fact. *See* RCW 4.24.350(1) (requiring proof of “maliciousness”); *Pleas v. City of Seattle*, 112 Wn.2d 794, 803-04, 774 P.2d 1158 (1989) (requiring proof of an “improper purpose” or “improper means” for an intentional-interference claim). These counterclaims should have been dismissed. *See Heath v. Uraga*, 106 Wn. App. 506, 513, 24 P.3d 413 (2001) (“[T]he nonmoving party must set out specific facts sufficiently rebutting the moving party’s contentions and disclosing the existence of a material issue of fact.”).

CONCLUSION

The Eleazers should not be bullied into a final contract with terms and conditions which they never negotiated and never agreed upon. The trial court committed error when it dismissed the Eleazers’ claims, allowed the other parties’ counterclaims to go forward, and forced the recording of an onerous easement on the Eleazers’ property.

DATE: November 20, 2013

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Gary W. Manca', written over a horizontal line.

Gary W. Manca, WSBA No. 42798
Manca Law, PLLC

Attorney for Appellants

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

EDWARD J. ELEAZER and
MAYA E. ELEAZER, husband
and wife and their marital
community,

Appellants,

v.

BUSH HOUSE, L.L.C., a
Washington limited liability
company, its successors and
assigns; and SNOHOMISH
HEALTH DISTRICT, a
municipal corporation of the State
of Washington; and LOYAL
MARY NORDSTROM, an
individual,

Respondents.

Case No. 70513-0-I

CERTIFICATE OF
SERVICE

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 DIVISION I
 SEATTLE, WA

I certify that today I caused a copy of *Appellants' Brief* to be served on the following people in the manner indicated below:

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DATE: November 20, 2013



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