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NO. 75001-1-1

COURT OF APPEALS  
DIVISION I  
OF THE STATE OF WASHINGTON

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

Appellants/Plaintiffs

and

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

Plaintiffs pursuant to RCW 7.24.110

v.

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

Respondent/Defendant

FILED  
STATE OF WASHINGTON  
2016 APR 02 AM 10:00

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AMENDED BRIEF OF APPELLANTS

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## I. INTRODUCTION

Pondilla Estates is a waterfront community on Whidbey Island comprised of 31 residential lots; Tract A (the "Community Beach"); and a private road ("Pebble Beach Drive"). It is governed by a homeowners' association, respondent Pondilla Estates Community Association ("HOA").

In 1991, the lot owners in Pondilla Estates were facing an emergency. The sea threatened to collapse both the steep bank on the Community Beach and Pebble Beach Drive, which is the only access road to the Community Beach and the seven lots that abut to it. The Community Beach and Pebble Beach Drive are both jointly and equally owned by all 31 lot owners in Pondilla Estates, and they were granted an easement to use them by the developer. Nevertheless, the HOA refused to have a bulkhead built to save the bank and Pebble Beach Drive from the sea unless the owners of the seven lots along Pebble Beach Drive ("Pebble Beach Drive lot owners") signed an agreement prepared by the HOA's attorney ("1991 Agreement"). It shifted the burden of maintaining the bulkhead and Pebble Beach Drive solely onto the Pebble Beach Drive lot owners indefinitely. Facing irreparable loss of access to their homes and properties, they signed it under duress in 1991. Appellants Solin and Golphenee each own a home along Pebble Beach Drive, and are negatively impacted by the 1991 Agreement.

The 1991 Agreement (a deed granting an easement and

establishing a covenant running with the land) was fatally flawed in several ways at its creation in August, 1991. First, it lacked new consideration to any of the past or present Pebble Beach Drive lot owners in exchange for the many new burdens it imposed upon them. Consideration is an essential element; a contract in Washington that lacks consideration is unenforceable as a matter of law. Second, it violated Washington's statute of frauds (RCW 64.04) in three ways: 1) it omitted many required legal descriptions; 2) it omitted several necessary parties and their notarized signatures; and 3) it lacked many essential terms necessary to implement it. Our statute of frauds renders any agreement that offends it null and void by operation of law.

Golphenee and Solin brought an action seeking declaratory judgment as to the 1991 Agreement's enforceability. The trial court erred when it dismissed this case as untimely by applying the 6-year statute of limitations by analogy. The issue of timeliness is moot because the 1991 Agreement was rendered null and void by operation of law at its inception in 1991. The Uniform Declaratory Judgment Act (RCW 7.24) does not contain a statute of limitations. The Court is not time-barred from interpreting the 1991 Agreement and declaring it unenforceable. Golphenee and Solin ask this Court to reverse and order entry of declaratory judgment that the 1991 Agreement is unenforceable as a matter of law.

## II. ASSIGNMENTS OF ERROR AND ISSUES

1. The trial court erred by not converting the motion to dismiss under CR 12(b)(6) to one for summary judgment and deciding it under CR 56.

Issue #1: The HOA submitted a large volume of evidence outside the pleadings in its motion to dismiss under CR 12(b)(6). Should the trial court have converted the motion to dismiss to one for summary judgment pursuant to CR 56?

2. The trial court erred when it applied the statute of limitations by analogy and dismissed the case as untimely, denying Golphenee' and Solin's motion for reconsideration. CL 2A (CP 9); CP 13.

Issue #2: Was the 1991 Agreement rendered void and unenforceable by operation of law at its creation in 1991 because it lacks consideration, or because it violates Washington's statute of frauds, making application of the statute of limitations moot?

Issue #3: Should the statute of limitations be applied to time-bar the Court's interpretation under the Uniform Declaratory Judgment Act (RCW 7.24) of an ongoing agreement that requires continuing performance indefinitely, pursuant to which the last performance has not yet occurred?

3. The trial court erred by treating the unauthorized alteration and re-recording of the 1991 Agreement by the HOA's attorney as proper, concluding that the 1991 Agreement contains

all of the legal descriptions necessary to satisfy Washington's statute of frauds (RCW 64.04). FF 10 (CP 5); CL 2B (CP 10-11).

Issue #4: Was it proper for the HOA's attorney to add missing legal descriptions to the executed and recorded 1991 Agreement (a deed), and to re-record the altered deed without express authority and the consent of the Pebble Beach Drive lot owners? Does the 1991 Agreement now contain all legal descriptions required by Washington's statute of frauds?

4. The trial court erred by holding the 1991 Agreement was binding on the original parties, and is binding on the current parties. CL 2B (CP 11).

Issue #5: Was the 1991 Agreement binding on the original parties, so as to be binding on its successors?

5. The trial court erred by considering irrelevant hearsay statements that it found to be multiple, differing legal opinions obtained by the HOA that provided no clear answer as to who was responsible to maintain the private road, Pebble Beach Drive, and in ruling that the 1991 Agreement settled a dispute regarding this. FF 6 (CP 5); CL 2A (CP 9).

Issue #6: Should the trial court have considered irrelevant, hearsay statements offered by the HOA as multiple legal opinions about who was responsible to maintain Pebble Beach Drive? Were they really legal opinions, and did they create a dispute that was settled by the 1991 Agreement?

### III. STATEMENT OF THE CASE

When a boat ramp was removed from the County Park next door to Pondilla Estates shortly before 1991, wave and tidal action began to rapidly erode the base of the steep slope on Pondilla Estates' Community Beach. CP 219. This steep slope supports the private beach access road, Pebble Beach Drive. Unless a bulkhead was constructed quickly to protect the slope, it would collapse and take Pebble Beach Drive with it. FF 5 (CP 4). In the Declarations Section on the face of the recorded plat map for Pondilla Estates, the developer dedicated the Community Beach to all 31 lot owners in the plat. FF 1 (CP 3), CP 187. Pebble Beach Drive is the sole access road to the Community Beach as well as to the seven lots that abut to it. FF 2 (CP3), CP 187. The HOA has utilities buried in its right-of-way, which can only be accessed for repair and maintenance via Pebble Beach Drive. CP 187. Moreover, all 31 lot owners in Pondilla Estates enjoy enhanced property values for their individual lots based upon their deeded beach rights and their private access to their Community Beach. CP 121. This was all placed in jeopardy by erosion of the bank supporting Pebble Beach Drive.

The HOA hired engineering consultants to advise it on how best to deal with this emergency. They advised some form of protective structure like a bulkhead was required. CP 219. But as the HOA began to acquire estimates of cost to build it, the lot

owners who did not rely on Pebble Beach Drive to access their individual properties began to oppose paying for it. CP 203, 204 & 220.

So the HOA hired an attorney, Kenneth Pickard, to research the law and determine whether or not all 31 lot owners in Pondilla Estates must share equally in the cost of maintaining Pebble Beach Drive, and to render a formal written opinion. Mr. Pickard did so, and he concluded that yes, all 31 lot owners in Pondilla Estates would have to share equally in the cost of maintaining Pebble Beach Drive. CP 215-217. The trial court also held that all 31 lot owners in Pondilla Estates jointly and equally own the Community Beach, as well as Pebble Beach Drive to the centerline of the road where the Community Beach abuts to it, as a matter of law. CL 1B (CP 7-8).

Nevertheless, the HOA instructed its attorney, James Kotschwar, to draft the 1991 Agreement so as to disregard this joint and equal responsibility for cost sharing and shift the entire burden onto the seven Pebble Beach Drive lot owners instead. CP 134, para 5. They would now be required to pay 50 percent of the \$31,500 cost to construct the bulkhead on the Community Beach. This is more than twice their pro rata share, which is only 23 percent (7 lots divided by total of 31 lots). So they paid \$15,500 instead of their pro rata share of \$7,130. This reduced proportionately the share paid by the other 24 joint owners of this

property to just 50 percent -- their pro rata share is 77 percent (24 lots divided by total of 31 lots) -- so they only paid \$15,500 instead of their pro rata share of \$23,870. The Pebble Beach Drive lot owners also became responsible to pay 100 percent of all future costs to repair and maintain both the bulkhead on the Community Beach and Pebble Beach Drive. In contrast, the share to be paid by the other 24 joint owners of these properties for all future repair and maintenance of their bulkhead and private road was thus reduced from 77 percent to zero. CP 143-144.

The 1991 Agreement also called for the Pebble Beach Drive lot owners to grant an appurtenant beach access easement over Pebble Beach Drive to the owners of certain lots outside of Pondilla Estates in Gov't Lot 3, who would pay a portion of the cost to construct the bulkhead on the Community Beach in exchange. However, their payments did not reduce the amount to be paid by the Pebble Beach Drive lot owners -- only the obligation of the other 24 joint owners of the Community Beach. CP 143, para 1) & 4).

It is undisputed the HOA told the Pebble Beach Drive lot owners that if they did not sign this agreement, no bulkhead would be built. (CP 134-135, para 5). In fact, this has been confirmed by the HOA in an answer to an interrogatory promulgated to it by Golphenee. CP 111-112 (underscore added).

"Interrogatory No. 29: How much time had elapsed between the date you first learned a bulkhead or other protective structure needed to be built to protect the Bank or Pebble

Beach Drive, and the time the Bulkhead was actually constructed?

Did you require the Maintenance Agreement to be signed, acknowledged, and recorded in Island County before you would act to have a bulkhead constructed on Tract A?

Answer: See first supplemental response to interrogatory two and previously provided minutes and bulkhead information.

Defendant Association had no obligation to contribute to the construction of a bulkhead and would not have contributed money for that purpose if the 1991 Agreement had not been entered."

This was also confirmed by Bud Hansen and Pete Cosmos, two current officers of the HOA, in their identical declarations.

"I believe it safe to say that had the 1991 Agreement not been posed, the membership would not have voted to fund building any form of bulkhead..." CP 203 & 204 (para 4).

If the steep slope on the Community Beach was allowed to collapse taking Pebble Beach Drive with it, the Pebble Beach Drive lot owners would irretrievably lose access to their homes and properties. In the face of this existing emergency, there was no time to resort to the courts. Left with no viable alternative, they signed the 1991 Agreement. CP 134-135 (para 5).

The HOA's attorney, Mr. Kotschwar, recorded the signed and notarized 1991 Agreement in September, 1991. About six months later, he realized he had omitted certain legal descriptions from the deed that are required by the statute of frauds. He obtained the original 1991 Agreement, altered it to add some (but

not all) of the missing legal descriptions, and then re-recorded it in March, 1992 -- all without authority, the Pebble Beach Drive lot owners' knowledge, or their consent. CP 123-126, para 8-10.

Also missing from the 1991 Agreement are 24 of the 31 joint-owners of Pebble Beach Drive as Grantors of the deed of easement across their jointly-owned road, as well as the legal descriptions of their servient lots and their notarized signatures. CP 143-144.

The 1991 Agreement also omits the legal description of the bulkhead the Pebble Beach Drive lot owners are to maintain, which is actually only a *small portion* of a much larger bulkhead that stretches 565' with no gaps. It was all built by the same contractor, Jesse Allen Construction, in the same log-pile style of construction. CP 129, para 4. It does not specify precisely what part of this extended bulkhead the Pebble Beach Drive lot owners are responsible for, referring to it only by its intended purpose, and not its location. CP 144, para 5).

The 1991 Agreement further omits many other essential terms necessary to effectively implement it. CP 130-131 (para 8-10). Even the HOA's attorney, Mr. Kotschwar, stated this in his declaration. CP 125, para 12.

In May, 2015 Golphenee and Solin filed this action seeking the court's declaration as to whether or not the 1991 Agreement is enforceable. CP 292, para 36. The HOA filed a motion to dismiss,

arguing that it is too late for Golphenee and Solin to challenge the enforceability of the 1991 Agreement. CP 175-276. In this motion, the HOA offered two documents (CP 212; CP 220, para 3) in addition to Mr. Pickard's (CP 215-217) that it portrayed as "differing legal opinions regarding plat lot owners' legal obligations to repair and maintain the private road/bulkhead." CP 177, line 12-13. Golphenee and Solin objected to these two documents as being inadmissible because they are not legal opinions at all, and are irrelevant and hearsay. CP 89, para 3; CP 59, para 11; CP 35, line 25 - CP 36, line 17.

In response to the HOA's motion to dismiss, Golphenee and Solin argued 1) that their action for declaratory judgment seeking the trial court's declaration of the rights and responsibilities of the parties and challenging the validity and enforceability of the 1991 Agreement is not an "action on a contract", and is not untimely; 2) the 1991 Agreement was fatally flawed when it was executed because it violates RCW 64.04, Washington's statute of frauds for real property, and was rendered null and void by the statute by operation of law, making the issue of timeliness moot; 3) the 1991 Agreement lacks the essential element of consideration so it is unenforceable as a matter of law; 4) that because the 1991 Agreement was not enforceable against the original contracting parties, it is not enforceable against their successors; 5) that in other similar cases, Washington courts had not been barred by the

statute of limitations from looking back over 20 years to determine whether or not a deed satisfied our statute of frauds; 6) that the trial court should have converted the motion to dismiss to one for summary judgment and disposed of it under CR 56 because the moving party submitted evidence far beyond that which is contained in the pleadings; and 7) that the 6-year statute of limitations has no application here, by analogy or otherwise, because the 1991 Agreement is a continuous, on-going contract with no definite termination date, and the last performance under the agreement has not yet occurred. CP 16-18; 30-33; 49-56; 86-90; 101-103.

The trial court decided to apply the statute of limitations by analogy, dismissing the action on that basis in a Letter Opinion dated December 23, 2015. CP 69-75. The trial court denied Golphenee' and Solin's motion for reconsideration filed on December 31, 2015 (CP 13-14), and entered findings of fact, conclusions of law, and an order dismissing the action on March 7, 2016. CP 1-12. Golphenee and Solin appealed to this Court on March 29, 2016.

#### IV. ARGUMENT

##### A. Standard For Review. (Issue #1)

The trial court dismissed Golphenee' and Solin's case pursuant to the HOA's motion to dismiss under CR 12(b)(6). Therefore, the correct standard for review is *de novo*.

"A trial court's ruling on a CR 12(b)(6) motion presents a question of law that we review de novo. *Kinney v. Cook*, 159 Wash.2d 837, 842, 154 P.3d 206 (2007) (citing *Tenore v. AT & T Wireless Servs.*, 136 Wash.2d 322, 329–30, 962 P.2d 104 (1998))."

*Citizens for Rational Shoreline Planning v. Whatcom Cty.*, 172 Wn.2d 384, 389, 258 P.3d 36, 39 (2011)

In a motion brought under CR 12(b)(6), all plaintiffs' allegations are presumed to be true.

"...for purposes of the analysis under CR 12(b)(6), a plaintiff's allegations are presumed to be true and the court may consider hypothetical facts not included in the record. See, *Hipple v. McFadden*, 161 Wash. App. 550, 557, 255 P.3d 730 (Div. 2 2011), review denied, 172 Wash. 2d 1009, 259 P.3d 1108 (2011)."

9 Wash. Prac., Civil Procedure Forms § 12.47 (3d ed.)

Defendant's motion to dismiss should have been converted to a motion for summary judgment and decided under the provisions of CR 56, because defendant's motion considered many arguments and exhibits outside the pleadings. CP 186-276.

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

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

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

Therefore, the correct standard for review of the trial court's decision to dismiss the case is *de novo* under CR 56. All facts should be construed in the light most favorable to Golphenee and Solin.

"All facts and reasonable inferences are considered in a light most favorable to the nonmoving party, and all questions of law are reviewed *de novo*."

*Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 698, 952 P.2d 590, 594 (1998)

B. The Pebble Beach Drive Lot Owners Received No New Consideration To Support Their Promises In The 1991 Agreement. (Issue #2)

The Pebble Beach Drive lot owners received no new consideration in exchange for the vastly increased burden imposed upon them by the 1991 Agreement. In fact, they received far less than they were already entitled to. Consideration is essential to a contract. Without it, no contract is legally formed. It is well settled in Washington that any contract lacking consideration is unenforceable. *McKasson v. Johnson*, 178 Wash. App. 422, 315 P.3d 1138 (2013); *King v. Riveland*, 125 Wn2d 500, 886 P.2d 160 (1994).

Both Washington courts and the 9th Circuit Court of Appeals interpreting Washington law have so held:

"A contract requires an offer, acceptance, and consideration. A contract must be supported by consideration to be enforceable."

*FDIC v. Uribe, Inc.*, 171 Wn. App. 683, 688, 287 P.3d 694 (2012 as Amended Jan, 2013)

“Consideration is an essential element of a contract in Washington. The contract must be supported by consideration to be enforceable.”

*BOFI Fed. Bank v. Advance Funding LLC*, 105 F. Supp. 3d 1215, 1219

It is also settled law that consideration to support a contract must be new. *Multicare Med. Ctr. v. State, Dep't of Soc. & Health Servs.*, 114 Wash. 2d 572, 584-85, 790 P.2d 124, 131-32 (1990). In other words, if a party to a contract is already obliged to do something, either by law or by earlier contract, what he is already obligated to do cannot serve as consideration to support a new agreement. In *Harris v. Morgensen*, 31 Wn.2d 228, 240, 241-242, 196 P.2d 317 (1948) the court said:

"A promise to do what the promisor is already bound to do cannot be a consideration, for if a person gets nothing in return for his promise but that to which he is already legally entitled, the consideration is unreal." *Harris* at pg 240.

"In 12 Am.Jur. 582, Contracts, § 88, appears the following text: 'The performance or promise of performance of a legal duty imposed by law or arising from a contract with the other party is insufficient consideration for a promise.'" *Harris* at pg 241.

"Where a legal obligation exists, a cumulative promise to perform it, unless upon a new consideration, is a nullity. A promise cannot be conditioned on a promise to do a thing to which a party is already legally bound." *Harris* at pg 242.

Before the 1991 Agreement, all 31 lot owners in Pondilla

Estates already had an obligation to share equally in the cost to construct the required bulkhead on their Community Beach, as well as to repair and maintain both the bulkhead and Pebble Beach Drive in the future, based upon their joint and equal ownership of these properties, their easement to use them granted by the plat developer, and their enhanced lot values because of them.

In the Declarations Section on the face of the recorded plat map, the developer dedicated Tract A (Community Beach and Playground) to the use of all 31 lot owners in Pondilla Estates. CP 187. This granted them an exclusive easement to use Tract A.

"Tract A is hereby dedicated to the use of all owners of this plat & any future additions thereto for recreational purposes and community activities."

This necessarily included an implied easement to use the private road (Pebble Beach Drive) because it is the only road that provides access to Tract A.

"An implied grant of easement is based upon the principle of construction that where a man grants a definite thing, the thing granted is, by implication, accompanied by everything necessary to its reasonable enjoyment, or at least by those things which the common owner, during the time it was in his possession, used for its benefit, and which are appurtenant thereto."

*Bushy v. Weldon*, 30 Wn.2d 266, 269, 191 P.2d 302, 304 (1948)

These easements are appurtenant to the lots in Pondilla Estates, because they were dedicated to the use of all owners in

the plat, and not to any individually named parties. *Green v. Lupo*, 32 Wash.App. 318, 323, 647 P.2d 51 (1982). The easements are therefore passed to successors in interest. *M.K.K.I., Inc. v. Krueger*, 135 Wash. App. 647, 655, 145 P.3d 411, 416 (2006); *Kemery v. Mylroie*, 8 Wn. App. 344, 346, 506 P.2d 319, 320 (1973).

The developer's dedication of Tract A (Community Beach) was converted to a quitclaim deed granting appurtenant ownership to them by operation of law. *M.K.K.I., Inc. v. Krueger, Supra*, 135 Wash. App. at 653.

RCW 58.17.165 states:

"Any dedication, donation or grant as shown on the face of the plat shall be considered to all intents and purposes, as a quitclaim deed to the said donee or donees, grantee or grantees for his, her or their use for the purpose intended by the donors or grantors as aforesaid."

Because the Community Beach abuts Pebble Beach Drive along the entire western boundary of the road, this joint ownership of the Community Beach carries title to the centerline of Pebble Beach Drive where they adjoin, as a matter of law.

"We join the majority of jurisdictions in holding the better rule is that if there is nothing in the deed or surrounding circumstances to show a contrary intention, a conveyance of land bounded by a private road carries title to the center of the road. *Accord In re Buchanan*, 6 Ill.App.3d 694, 286 N.E.2d 580 (1972); *State Roads Comm'n v. Teets*, 210 Md. 213, 123 A.2d 309 (1956); *Brassard v. Flynn*, 352 Mass. 185, 224 N.E.2d 221 (1967); *Sawtelle v. Tatone*, 105 N.H. 398, 201 A.2d 111 (1964); *Walker v. Tanner*, 38 Tenn.App. 437, 275 S.W.2d 958 (1954); *MacCorkle v. Charleston*, 105

W.Va. 395, 142 S.E. 841, 58 A.L.R. 231 (1928); 6 G. Thompson, *Real Property* § 3068, at 673–74 (1962); 11 C.J.S. *Boundaries* § 43, at 593 (1938)."

*McConiga v. Riches*, 40 Wash. App. 532, 538-39, 700 P.2d 331, 336-37 (1985).

Therefore, the trial court correctly held that joint and equal ownership of Tract A (Community Beach), as well as joint ownership of Pebble Beach Drive, is appurtenant to all 31 lots in Pondilla Estates, as a matter of law. CL 1B (CP 7, line 21 - CP 8, line 8) . This joint and equal ownership naturally includes the obligation to share equally in the cost of improvements constructed on their jointly-owned properties, and to repair and maintain them.

This obligation to maintain their joint properties also results from the appurtenant easements granted to all 31 lot owners in Pondilla Estates by the developer. *Restatement (Third) of Property, Servitudes* § 4.13(3), pp. 631–32 and § 4.13(4) (2000).

"Generally, responsibility for the maintenance and repair of an easement to keep it in proper condition lies with the owner of the easement—the dominant estate. 1 Wash. State Bar Ass'n, *Washington Real Property Deskbook* § 10.4(2)(c) (3d ed.1997)."

*Donner v. Blue*, 187 Wn. App. 51, 56, 347 P.3d 881, 884 (2015)

It makes no difference whether the easement is express or implied. *Bushy v. Weldon*, 30 Wn.2d 266, 272, 191 P.2d 302, 305 (1948). Even without a maintenance agreement, all those who use a property are obliged to share in the cost of maintaining it.

"Absent an agreement, joint users of a common roadway are obligated to contribute to the costs reasonably incurred for repair and maintenance of the roadway. "

*Buck Mountain Owner's Ass'n v. Prestwich*, 174 Wn. App. 702, 707, 308 P.3d 644, 648 (2013)

All 31 lot owners had an equal right to use the Community Beach and Pebble Beach Drive, regardless of how often they exercised this right. The value of each owner's individual lot was increased because of his deeded beach rights and private beach access road. With these benefits comes the obligation to maintain these properties.

"Hunt acquired property that carried with it the right to enjoy certain common facilities. Even if Hunt elected not to exercise that right, Hunt was benefited because its property was worth more as a result. Hunt would be unjustly enriched if it could retain that benefit without paying for it,"...

*Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.*, 120 Wn. App. 246, 261, 84 P.3d 295, 303 (2004)

So prior to the 1991 Agreement, all 31 lot owners in Pondilla Estates were already obligated to pay their pro rata share of expenses to repair and maintain their jointly-owned property. This meant that the seven Pebble Beach Drive lot owners were aggregately responsible for 23 percent of such expenses, and the 24 other lot owners were responsible for 77 percent.

However, the 1991 Agreement ignored this prior obligation,

shifting this burden solely onto the Pebble Beach Drive lot owners instead. They received no new consideration in exchange for this. The 1991 Agreement required the Pebble Beach Drive lot owners to pay more than twice their pro rata share to construct the bulkhead on the Community Beach, and bear all future costs to repair and maintain both the bulkhead and Pebble Beach Drive indefinitely. So not only did the seven Pebble Beach Drive lot owners not receive any *new* consideration under the 1991 Agreement, they received *far less* than they were already entitled to before it was entered. Correspondingly, the other 24 joint owners of the Community Beach and Pebble Beach Drive now pay *far less* than they were obliged to pay before the 1991 Agreement was executed -- including *absolutely nothing* for repair and maintenance of their jointly-owned properties indefinitely. If there is such a thing as "negative consideration", this would be it.

C. The 1991 Agreement Violates Washington's Statute of Frauds.  
(Issues #2 & #4)

The 1991 Agreement is an indivisible contract that provides for construction of a bulkhead on the Community Beach, the grant of a beach access easement over Pebble Beach Drive to certain parties outside Pondilla Estates in exchange for their paying toward the construction cost of this bulkhead, and a covenant running with the land regarding repair and maintenance of the bulkhead and

Pebble Beach Drive. The 1991 Agreement constitutes a "conveyance of real estate" and an "interest in land" within the meaning of RCW 64.04, which governs conveyances of real property. Therefore, the 1991 Agreement must be in the form of a deed and meet all the requirements of our statute of frauds. *Berg v. Ting*, 125 Wn.2d 544, 551, 886 P.2d 564 (1995). Although it is an incorporeal right, an easement is an interest in land. See *Perrin v. Derbyshire Scenic Acres Water Corp.*, 63 Wash.2d 716, 388 P.2d 949 (1964).

"RCW 64.04.010 provides that 'Every conveyance of real estate, or any interest therein, shall be by deed.' An easement is certainly an interest in land."

*Ormiston v. Boast*, 68 Wn.2d 548, 550, 413 P.2d 969

RCW 64.04.020 states every deed "shall be in writing, signed by the party bound thereby, and acknowledged"...

The 1991 Agreement, which is required to be in the form of a deed, violates Washington's statute of frauds in at least four distinct ways: 1) it omits the legal descriptions of at least two Grantees of the easement over Pebble Beach Drive; 2) It omits 24 of the 31 joint owners of Pebble Beach Drive as parties to the deed, each of whom must consent as Grantors of any deed of easement granted over their jointly-owned private road, as well as the legal descriptions of each of their servient lots, and their notarized

signatures; 3) it omits the legal description of the section of the bulkhead for which the Pebble Beach Drive lot owners are responsible to repair and maintain, so it cannot be located without resorting to parol evidence (if then); and 4) it omits many other essential terms necessary to effectively implement the 1991 Agreement. Washington's statute of frauds renders any agreement that offends its requirements null and void by operation of law.

"The statute of frauds is not a doctrine in equity, it is a positive statutory mandate which renders void and unenforceable those undertakings which offend it. Forland v. Boyum, 53 Wash. 421, 102 P. 34 (1909); Farrell v. Mentzer, 102 Wash. 629, 174 P. 482 (1918); Sposari v. Matt Malaspina & Co., 63 Wash.2d 679, 388 P.2d970(1964).

*Smith v. Twohy*, 70 Wash. 2d 721, 725, 425 P.2d 12, 15 (1967)

Each of these four ways in which the 1991 Agreement violates the statute of frauds is discussed in detail below:

1) The 1991 Agreement purports to grant an appurtenant easement over Pebble Beach Drive for access to the Community Beach to the owners of an unspecified number of lots outside Pondilla Estates, located in Government Lot 3, Section 25, Township 32 North, Range 1, West of Willamette Meridian, whose properties were to be legally described in Exhibit A, which was incorporated by reference. CP 143, para 1). Under the terms of the agreement, they were to pay a share of the cost to construct

the bulkhead in exchange for the easement. However, the 1991 Agreement left out the legal descriptions of at least two of these intended Grantees. They were impermissibly added six months later by the HOA's attorney, Mr. Kotschwar, without authorization, and without the consent or knowledge of the Pebble Beach Drive lot owners. CP 125, para 9-10.

Washington courts have consistently ruled that the authority to add a legal description after an agreement was signed must have been clearly stated in writing in the agreement. If such authority is absent, the writing violates the statute of frauds. *Edwards v. Meader*, 34 Wash. 2d 921, 924, 210 P.2d 1019, 1020-21 (1949). This is well-settled law.

"Here, the instrument itself contained no authorization to any person to attach a legal description thereto. Nor can we imply such authority from the fact of the real-estate brokers' possession of the earnest-money agreement signed by both parties. *Barth v. Barth*, 1943, 19 Wash.2d 543, 143 P.2d 542. Since the contract is in violation of the statute of frauds, it is void..."

*Schweiter v. Halsey*, 57 Wash. 2d 707, 714, 359 P.2d 821, 825 (1961)

The HOA's attorney did not have authorization to add any of the missing legal descriptions to the 1991 Agreement and re-record it. His attempt to do so is legally ineffective, resulting in violation of the statute of frauds.

2) The 1991 Agreement omits 24 of the 31 joint owners of Pebble Beach Drive, who were not made parties to the deed as

Grantors of the easement over their jointly-owned private road, as well as the legal descriptions of their individual servient lots and their notarized signatures.

The 1991 Agreement identifies the Grantors of the easement over Pebble Beach Drive as only "The undersigned owners of the referenced lots which abut and adjoin the Private Road". In other words, this easement was to be granted by the owners of only seven lots (Lots 1-5, Block 1 and Lots 1&2, Block 2). CP 143. Paragraph 4) states:

"The undersigned owners of the referenced lots which abut and adjoin the Private Road hereby grant and confirm that the owners of all lots within Blocks 1, 2, and 3, Pondilla Estates, Division No. 1, and the owners of the above-referenced parcels which are described in EXHIBIT "A", and the guests and invitees thereof, may use and have an easement over and across the Private Road for ingress and egress to Tract "A", the "Community Beach and Playground".

This is grossly inadequate under the statute of frauds (RCW 64.04.020), because all owners must consent to the grant of an easement over their jointly-owned property as evidenced by their notarized signatures on the deed. Simply put, only 7 joint owners cannot grant a deed of easement over property owned by 31 joint owners. Moreover, both spouses must consent for each of the 31 lots owned as community property, including both of their acknowledged signatures on the deed. RCWA § 26.16.030 states:

"Neither person shall sell, convey, or encumber the community real property without the other spouse or other domestic partner joining in the execution of the deed or other

instrument by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument must be acknowledged by both spouses or both domestic partners."

Each person holding an ownership interest in Pebble Beach Drive must be a named Grantor of the easement over their private road.

"The agreement to the easement by the owner of the servient estate is a vital element in the creation of an easement. *Beebe v. Swerda*, 58 Wash.App. 375, 382, 793 P.2d 442 (1990)."

*Zunino v. Rajewski*, 140 Wn. App. 215, 222, 165 P.3d 57, 60 (2007)

Because ownership of Pebble Beach Drive is appurtenant to all 31 lots in Pondilla Estates, each lot is a servient estate that must be legally described in the deed granting the easement. However, the legal descriptions of 24 of these servient lots are missing. CP 143-148.

"A grant of easement must describe a specific servient estate; that is an absolute."

*Berg v. Ting* (1995) 125 Wash.2d 544, 551, 886 P.2d 564, reconsideration denied.

In *Key Design Inc. v. Vince Moser et al*, 138 Wash. 2d 875, 881, 983 P.2d 653 (1999), quoting *Martin v. Seigel*, 35 Wash.2d at 228, 212 P.2d 107 (1949, as corrected in 1950), the Court held:

"In the interests of continuity and clarity of the law of this state with respect to legal descriptions, we hereby hold that every contract or agreement involving a sale or conveyance of platted real property must contain, in addition to the other requirements of the statute of frauds, the description of such property by the correct lot number(s), block number,

addition, city, county, and state. *Martin*, 35 Wash.2d at 229, 212 P.2d 107."

Our statute of frauds is the strictest in the entire nation, a fact for which our Supreme Court makes no apology.

"Washington's rule is "the strictest in the nation.... In most states an incomplete description or a street address is sufficient, and parol evidence may be received to locate the land. Not so in Washington." William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate: Transactions* § 16.3, at 225 (2d ed. 2004).

"We do not apologize for the rule. We feel that it is fair and just to require people dealing with real estate to properly and adequately describe it, so that courts may not be compelled to resort to extrinsic evidence in order to find out what was in the minds of the contracting parties. *Martin*, 35 Wash.2d at 228, 212 P.2d 107."

*Home Realty Lynnwood, Inc. v. Walsh, Supra*, 146 Wash. App. at pg 237 (Emphasis added)

3) The 1991 Agreement omits the legal description of the bulkhead the Pebble Beach Drive lot owners are to maintain. This "bulkhead" is really only a section of a much larger bulkhead that runs continuously without gaps across three separate properties owned by different parties. It was all built by the same contractor, Jesse Allen Construction, in the same log-pile style of construction. CP 129, para 3-4. The 1991 Agreement omits a legal description of the section of the bulkhead that the Pebble Beach Drive lot owners must maintain, only identifying it as "any log pile bulkhead, or other protective structure, which is or may be constructed to prevent damage to the Private Road". CP 130, line 11-13 & line 19-20; CP

144, para 5.

This description of the bulkhead that is to be maintained by the Pebble Beach Drive lot owners does not refer to any specific property, much less exactly *where* on that property it is located. In fact, the 1991 Agreement makes no attempt at all to locate it, describing it only by its intended purpose, not its location. There is simply no way to determine by looking within the 1991 Agreement precisely what part of this extended bulkhead was constructed for that stated purpose, as opposed to some other purpose, such as to stabilize a portion of the bank that does *not* support Pebble Beach Drive; to stabilize adjacent property; to protect a building site; to protect a structure; to prevent loss of trees and shrubs on or near the bank; to provide safety to passersby on the beach below from falling debris; etc. The Court may not look outside the deed to determine this. *Cushing v. Monarch Timber Co.*, 75 Wash. 678, 684-85, 135 P. 660, 663 (1913).

Furthermore, it is well settled that a description of land that is a portion of a larger tract that does not identify the particular part in question does not meet the requirements of the statute of frauds. *Ecolite Mfg. Co. v. R.A. Hanson Co.*, 43 Wash. App. 267, 270, 716 P.2d 937, 939 (1986); *Herrmann v. Hodin*, 58 Wn.2d 441, 364 P.2d 21 (1961) (“sufficient land to clear the barn”); *Garrett v. Shriners Hospitals for Crippled Children*, 13 Wn. App. 77, 533 P.2d 144 (1975) (undesignated portion of larger parcel).

General descriptions and imprecise locations do not satisfy the statute of frauds.

"Here, the phrase "the land immediately to the west" is not sufficient to identify the burdened property without looking to other sources. See, e.g., *Howell*, 28 Wash.App. at 495, 624 P.2d 739. There is no way to ascertain from the description in the Andrews' deed how much land the grantor (Kellogg) intended to burden. Further, it is unclear whether both lots 1 and 119 were meant to be burdened. In order to determine exactly what was encumbered, the court would have had to erroneously rely on oral testimony. *Howell*, 28 Wash.App. at 495, 624 P.2d 739 (quoting *Bigelow*, 56 Wash.2d at 341, 353 P.2d 429). The statute of frauds was not met in the 1984 Kellogg–Andrews deed, thereby rendering the restriction void. See, e.g., *Howell*, 28 Wash.App. at 495, 624 P.2d 739."

*Dickson v. Kates*, 132 Wash. App. 724, 734, 133 P.3d 498, 503-04 (2006), as amended (Dec. 12, 2006)

4) The 1991 Agreement also lacks many important terms necessary to implement it. Mr. Goodman explained this throughout his declaration @ CP 128-131, especially paragraphs 7 - 10:

"7. Some of the other Pebble Beach Drive lot owners supported me taking the lead and making decisions for the group, while others did not. Some expressed approval of the scope and cost of the repairs and upgrades; others objected. Some thought the bulkhead damage occurred in an area for which they were responsible under the Agreement, but some thought the damage occurred outside the area of their responsibility. This made it very difficult for me to collect reimbursement from some, resulting in litigation among three of the current six Pebble Beach Drive lot owners. Ultimately, these lawsuits became too expensive to maintain, and were settled. This experience created a

chilling effect on our willingness to take the lead for repairs or maintenance in the future.

8. The Agreement provides very little in the way of terms and conditions. It does not even locate the portion of the bulkhead that is covered by the Agreement. It does not explain what repairs and maintenance procedures are to be performed, when, how, or by whom; who monitors and inspects the bulkhead for areas requiring repair or maintenance; who decides when and if repairs and maintenance are necessary; who determines whether work will be competitively bid, and if so, who the bidders will be; who compares bids, selects, and negotiates with contractors, and on what basis; who oversees, approves, or rejects their work; who (if anyone) makes decisions for the group about such matters; who is responsible to apply for and obtain required permits; how meetings between the Pebble Beach Drive lot owners are called and scheduled; how many constitute a forum to conduct business and make decisions; what happens if multiple options exist, but none enjoy majority support; etc.

9. Once the need for work is determined, how are funds to pay for it collected? The Pebble Beach Drive lot owners do not have the authority to assess anyone, and responsibility for repairs and maintenance under the Agreement is joint, not several. What happens if one or more parties cannot, or will not, pay their share? Who is responsible to make up such shortfalls when there is no several liability under the Agreement? Damage to the bulkhead is always going to occur in extreme weather and create an emergency situation, so there is no time to resort to the courts or other collection activities to obtain necessary funds. Contractors will not schedule work without a significant payment up front, and the balance immediately upon completion.

10. Many of these questions became issues in the aforementioned litigation. I do not see how this will ever change as long as the Agreement remains in force, so I anticipate more litigation each time a major repair to the road or bulkhead becomes necessary."

Even Mr. Kotschwar, the HOA's attorney who drafted the 1991 Agreement, agreed with this, as he stated in his declaration.

CP 125, lines 24 & 26-31:

"[When John and Sharon Solin came to my office in August, 1991] I recall pointing out that the Agreement addressed only who was responsible for maintenance and did not address any of the items normally addressed in a road maintenance agreement between responsible parties. I suggested that they and the other owners of lots adjoining the private road should retain an attorney to draft a true maintenance agreement." (Emphasis added)

It is undisputed that the 1991 Agreement lacks many essential terms required to effectively implement it. To satisfy the statute of frauds, the deed must contain all the essential terms of the undertaking; parol evidence is not admissible to supply missing terms or explain the parties' intent.

"The memorandum or memoranda in writing, to satisfy the requirements of the statute must not only be signed by the party to be charged but it must also be so complete in itself as to make recourse to parol evidence unnecessary to establish any material element of the undertaking. Liability cannot be imposed if it is necessary to look for elements of the agreement outside the writing."

*Smith v. Twohy, Supra, 70 Wash. 2d at 725*

"By an unbroken line of decisions we have held that, to meet this statute, the writing evidencing the agreement must be so complete in itself as to make a resort to parol evidence to establish any material element of the agreement unnecessary. "

*Cushing v. Monarch Timber Co., Supra, 75 Wash. at 684-85*

When reviewing a covenant to determine whether it is void

and unenforceable because it violates the statute of frauds, the Court may not look outside the deed to consider parol evidence.

*Dickson v. Kates, Supra*, 132 Wash. App. at 734.

While real covenants must satisfy the statute of frauds, they must also comply with contract law. *Dickson v. Kates, Supra*, 132 Wn. App. at 733. This requires the terms of the agreement to be definite. A supposed promise may be illusory because it is so indefinite that it cannot be enforced. *Sandeman v. Sayres*, 50 Wash.2d 539, 541, 314 P.2d 428 (1957).

"Washington follows the objective manifestation test for contracts. *Wilson Court Ltd. P' ship v. Tony Maroni's, Inc.*, 134 Wash.2d 692, 699, 952 P.2d 590 (1998). Accordingly, for a contract to form, the parties must objectively manifest their mutual assent. *Yakima County Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wash.2d 371, 388, 858 P.2d 245 (1993). Moreover, the terms assented to must be sufficiently definite."

*Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 177-78, 94 P.3d 945, 949 (2004)

"If an offer is so indefinite that a court cannot decide just what it means, and fix exactly the legal liability of the parties, its acceptance cannot result in an enforceable agreement. *Schuehle v. Schuehle*, 21 Wash.2d 609, 152 P.2d 608."

*Sandeman v. Sayres, Supra*, 50 Wash.2d at 541

In the case at bar, the terms of the covenant running with the land contained in the 1991 Agreement are far from definite. It is even missing such fundamental terms as the location of the portion of the bulkhead the Pebble Beach Drive lot owners are responsible

to maintain, as well as many essential terms necessary to accomplish the undertaking. Under *Sandeman* and *Keystone*, this results in an unenforceable agreement.

Moreover, any mistakes or ambiguities in the 1991 Agreement must be charged to the HOA as the drafter of the document. *Pierce County v. State*, 144 Wash. App. 783, 813, 185 P.3d 594 (2008); *Emter v. Columbia Health Servs.*, 63 Wash.App. 378, 384, 819 P.2d 390 (1991); *Cont'l Ins. Co. v. PACCAR, Inc.*, 96 Wash.2d 160, 167, 634 P.2d 291 (1981). Mr. Kotschwar states in his declaration that he took all of his instructions from his client, the HOA. Mr. Kotschwar did not meet with the Pebble Beach Drive lot owners before or during the preparation of the 1991 Agreement, and that they were not represented by counsel at that time. CP 124, para 4; CP 135, line 4-5.

D. The 1991 Agreement Is An Ongoing Agreement Requiring Continuing Performance Indefinitely, Pursuant To Which Performance Is Not Yet Completed. (Issue #3)

By its terms, the 1991 Agreement is a covenant running with the land. It is a continuing contract. It was intended to go on indefinitely, with no specific termination date. On a continuing, on-going basis, it requires the Pebble Beach Drive lot owners to inspect the road and bulkhead to determine the need for repairs and maintenance; select and hire consultants to advise them or to satisfy permit requirements, as necessary; obtain proposals and bids; negotiate and contract for any needed work; apply for and

obtain any necessary permits; review and accept (or reject) the contractor's performance; collect necessary funds and pay the contractor; and monitor the results. CP 135-136 (para 9-10). This is undisputed, as confirmed in the following discovery response promulgated to the HOA by Golphenee @ CP 101, line 17-21:

"INTERROGATORY NO. 35: Pursuant to the Agreement, who is currently responsible to: a) determine the need for, and scope of, repairs and maintenance of the Bulkhead and Pebble Beach Drive? b) select and negotiate with a contractor for any such work? c) review, accept, or reject the contractor's work? d) collect the necessary funds, and to pay, the contractor?"

ANSWER: Owners of lots that abut Pebble Beach Drive."

Continuing agreements requiring ongoing performance without a specified termination date are not subject to the statute of limitations until performance under the agreement is completed. *Richards v. Pac. Nat. Bank of Washington*, 10 Wash. App. 542, 549, 519 P.2d 272, 277 (1974); *Sibley v. Stetson & Post Lumber Co.*, 110 Wash. 204, 206, 188 P. 389, 390 (1920). This is even true in the case of implied contracts not in writing. *Culligan v. Old Nat. Bank of Wash.*, 1 Wash. App. 892, 896, 465 P.2d 190, 193 (1970).

Moreover, if an action can be brought at any time to enforce it (CP 144, para 7), why should an action challenging its enforceability be time-barred by analogy?

In *Austin v. Wright*, 156 Wash. 2d, 29, 286 P. 48, 50 (1930), the court held that the statute of limitations had not yet run on a continuing contract even after 20 years had lapsed:

"Next, it is urged that the action is barred by the statute of limitations, but this is a continuing contract to be effective until the preferred stock should be redeemed by the corporation which issued it..."

The HOA has the burden of proving every element of its affirmative defenses. *Young Soo Kim v. Choong-Hyun Lee*, 174 Wash. App. 319, 300 P.3d 431 (2013). The statute of limitations is an affirmative defense on which the defendant [HOA] bears the burden of proof. *Haslund v. City of Seattle*, 86 Wash.2d 607, 620–21, 547 P.2d 1221 (1976). If the HOA fails to meet this burden, its affirmative defenses must fail. No authority was cited supporting application of the statute of limitations by analogy to Golphenee' and Solin's action seeking declaratory judgment so as to prevent the Court from determining whether or not the 1991 Agreement is enforceable.

E. Action For Declaratory Judgment To Interpret A Deed Is Not Time-Barred By Statute Of Limitations. (Issues #3 and #5)

To be enforceable against successors, the 1991 Agreement must have been enforceable against the original contracting parties. *Limerick Country Club v. Hunt Mfg. Homes, Inc., Supra*, 120 Wash. App. at pg 254. But in order to be enforceable between the original parties, a covenant must satisfy

the statute of frauds. *Dickson v. Kates, Supra*, 132 Wn. App. at 733, quoting *Lake Limerick* at 254-55. If courts are somehow time-barred by the statute of limitations from reviewing the 1991 Agreement more than 6 years after it was created, how could the courts determine this element? The Uniform Declaratory Judgment Act (RCW 7.24) does not contain a statute of limitations. The trial court should not have applied the 6-year statute of limitations to the 1991 Agreement by analogy so as to prevent the court from determining its enforceability.

Washington courts have routinely reviewed deeds and covenants running with the land many years, even decades, after they were created to determine whether or not they were in compliance with the statute of frauds at their inception. In one case, the court reviewed a covenant for enforceability more than 40 years after its creation. *Saunders v. Meyers*, 175 Wn. App. 427, 435-37, 306 P.3d 978, 983 (2013).

In a situation similar to the one at bar, this Court reversed the trial court's decision and remanded for entry of a declaratory judgment based upon its finding that Washington's statute of frauds rendered a covenant running with the land void and unenforceable because it violated the statute of frauds. *Dickson v. Kates, Supra*, 132 Wn. App. at 734, 737. In *Dickson*, the court reviewed (and

declared invalid) this covenant some 22 years after it was created. This Court is not precluded by the statute of limitations from reviewing the 1991 Agreement to determine whether or not it complied with Washington's statute of frauds at its creation, even after 24 years.

As in *Dickson*, the 1991 Agreement was rendered a legal nullity by operation of law at the time of its creation pursuant to the statute of frauds. Recording it would do nothing to resuscitate it. Because it could not be enforced against the original contracting parties, the 1991 Agreement cannot be enforced against successors to it, either.

F. The Trial Court Erred When It Considered Inadmissible Evidence. (Issue #6)

The owners of the 24 lots that opposed paying their share to construct the required bulkhead on their jointly and equally owned Community Beach to preserve their jointly owned private road, Pebble Beach Drive, obviously were not happy with the written legal opinion rendered by the HOA's attorney, Kenneth Pickard. Mr. Pickard concluded that all 31 lot owners in Pondilla Estates were jointly and equally responsible to pay for maintaining Pebble Beach Drive. CP 215-217. In an attempt to dilute this formal written opinion and to try to create controversy over whether all 31

lot owners in Pondilla Estates were legally responsible to maintain Pebble Beach Drive, the HOA claimed that it obtained two other legal opinions that differed from Mr. Pickard's. CP 177, para 2. This is not true. These other "legal opinions" are not legal opinions at all, but are irrelevant hearsay statements that are inadmissible under the Rules of Evidence.

One of the claimed legal opinions is in a document entitled "position paper". CP 220, last para. It contains several hearsay statements claiming an unidentified caller spoke to an unidentified attorney by telephone on an unspecified date in an undisclosed place. The unnamed attorney is purported to have revealed that he or she did not know the answer to the HOA's question about who is responsible to maintain Pebble Beach Drive, and did not know how to find the answer -- in fact, didn't believe there was an answer -- so it would be a waste of the HOA's money to pay this attorney to research the matter and render a legal opinion. This is not a second legal opinion; if anything, it is an agreement *not* to render an opinion. In any event, it is hearsay. Rule 801 defines *hearsay* in accordance with the classic view that hearsay is testimony or written evidence of a statement made out of court, being offered in court to prove the truth of the matter asserted, and thus relying for its value upon the credibility of the out-of-court declarant. ER 802 specifies hearsay statements are generally inadmissible. These

statements are also irrelevant under ER 402, as no legal opinion was actually rendered. The trial court should not have considered this "legal opinion".

The claimed third legal opinion is actually an affidavit by Howard Patrick expressing what he remembers about the developer's intent when declaring the plat in 1965, which is irrelevant, and is *not* an exposition of Washington law as to who was responsible to maintain Pebble Beach Drive. CP 212-213. Golphenee and Solin moved to strike it under ER 402 and 802 because it is hearsay, irrelevant, and Mr. Patrick was never subject to cross-examination. CP 89, para 3. Rule 401 defines *relevant evidence* broadly as "evidence having *any tendency* to make the existence of any fact ... more probable or less probable." Irrelevant evidence lacks such tendency. There is nothing in Mr. Patrick's affidavit that makes the existence of any material fact in this case more or less probable. Rule 402 specifies irrelevant evidence is inadmissible. Golphenee and Solin reminded the trial court that the HOA's counsel, Douglas Kelly, stipulated to striking Mr. Patrick's affidavit in open court on November 6, 2015. CP 59, para 11. The trial court did not rule on this motion to strike.

Golphenee and Solin also asked the trial court to take judicial notice that the public records maintained by the WSBA clearly show Mr. Patrick's license to practice law in Washington was inactivated on January 1, 1989 and was never reinstated. This was

over a year-and-a-half before he swore out this affidavit in July, 1990, so it is not legally possible for Mr. Patrick's affidavit to have been a legal opinion under any circumstances. CP 19, line 17-22.

Nevertheless, the trial court still took these inadmissible statements into consideration, and found that these "legal opinions" differed from Mr. Pickard's, leaving the homeowners with no clear answer as to who was responsible to maintain Pebble Beach Drive, thereby creating a dispute over this issue. FF 6 (CP 5). It erred in doing so. *SentinelC3, Inc. v. Hunt*, 181 Wash. 2d 127, 331 P.3d 40, 46 (2014). Clearly, the HOA obtained only one legal opinion, Mr. Pickard's. The only "dispute" was that the 24 opposing joint-owners did not want to pay their share to maintain their property.

G. This Court Can (And Should) Grant Summary Judgment To Golphenee And Solin, Even Though They Are The Non-Moving Party.

Here, no question of material fact exists regarding Golphenee' and Solin's claim that the 1991 Agreement violates the statute of frauds and lacks (new) consideration to them or their predecessors. The HOA agrees there are no disputed material facts before the Court. CP 26, para 2.

Where there are no disputed material facts, and the matter before the Court can be decided as a matter of law, summary judgment is proper. *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 70, 170 P.3d 10, 15 (2007).

The courts have long held that summary judgment may be granted in favor of the non-moving party if it becomes clear that he or she is entitled thereto. *Rubenser v. Felice*, 58 Wash. 2d 862, 365 P.2d 320 (1961); *Impecoven v. Department of Revenue*, 120 Wash. 2d 357, 841 P.2d 752 (1992) (summary judgment for non-moving party entered by appellate court).

The 1991 Agreement speaks for itself; it is in writing, signed, notarized, and publicly recorded so that its terms are not (and cannot be) disputed. It is an indivisible contract consisting of an exchange of correlated promises containing no "severability clause" or "savings clause", and is therefore to be taken as a whole. *Traiman v. Rappaport*, 3 Cir., 41 F.2d 336, 338; 71 A.L.R. 475, 479; 1 Restatement, Contracts, 382, § 266(2); *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 298, 62 S.Ct. 581, 587, 86 L.Ed. 855; *Saletic v. Stamnes*, 51 Wn.2d 696, 699, 321 P.2d 547, 550 (1958). Because the 1991 Agreement is a deed, and must therefore satisfy the statute of frauds, the Court may not go outside the four corners of the deed to interpret it or to supply terms missing from it. *Smith v. Twohy*, *Supra*, 70 Wash. 2d at pg 725; *Cushing v. Monarch Timber Co.*, *Supra*, 75 Wash. at pg 684-85. These claims must be decided based upon what is (and what

is not) contained in the 1991 Agreement.

Golphenee and Solin argue that applying the law to the undisputed facts can only result in one answer: that the 1991 Agreement is a continuous, on-going agreement that violates the statute of frauds, and lacks consideration to any past or present Pebble Beach Drive lot owner. It is therefore void and unenforceable by operation of law.

In ruling for the *non-moving party* in the 1992 case of *Impecoven v. Department of Revenue*, 120 Wash. 2d 357, 841 P.2d 752 (1992), the Supreme Court held:

“Because the facts are not in dispute, we order entry of summary judgment in favor of DOR, the non-moving party.”

The purpose of the summary judgment procedure is to avoid unnecessary time and expense for the parties as well as the courts. If there are no disputed material facts and reasonable minds can reach but one conclusion, then the action can (and should) be decided as a matter of law.

"The purpose of the summary judgment procedure is to avoid an unnecessary trial when there is no genuine issue of material fact."

*Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152, 1155 (1977)

This Court has, in appropriate cases, ordered reversal of a summary judgment in favor of one party, and granted summary judgment to the other party instead, without ordering any additional

proceedings. *Spratt v. Crusader Ins. Co.*, 109 Wn. App. 944, 951-52, 37 P.3d 1269, 1273-74 (2002).

## V. CONCLUSION

The 1991 Agreement was created with several fatal flaws. It lacks new consideration to any of the former or current Pebble Beach Drive lot owners in exchange for their promises. Consideration is an essential element of a contract in Washington. It also violates Washington's statute of frauds in several ways. It is missing many indispensable parties to the deed, required legal descriptions and notarized signatures, and essential terms necessary to the undertaking. Consequently, it was rendered void and unenforceable by operation of law at its creation in 1991.

If this Court agrees that reasonable minds could not reach any other conclusion, then Golphenee and Solin are entitled to summary judgment in their favor. They respectfully request this Court to reverse and order entry of declaratory judgment that the 1991 Agreement is unenforceable as a matter of law, without additional proceedings.

Dated this 18<sup>TH</sup> day of JUNE, 2016.



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