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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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DEPUTY

No. 37472-2-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

MICHAEL B. McGRAW and CONNIE McGRAW, AL DOUD and  
PATRICIA DOUD,

Appellants,

v.

JOSEPH M. BLACKWELL and CYNTHIA BLACKWELL, GREGG R.  
BIEBER and LYNNE M. BIEBER,

Respondents.

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RESPONDENTS' OPENING BRIEF

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*Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 343 P.2d 183 (1959)

*Wilhelm v. Beyersdorf*, 100 Wn.App. 836, 999 P.2d 54 (2000)

STATUTES: N/A

**I. Assignment of Errors**

- A. The trial court's findings of fact and conclusions of law are supported by substantial evidence as pertains to 1) the paving claim, 2) the composting claim, and 3) the fence height counterclaim, and are therefore the trial court is NOT in error.
- B. The trial court's findings of fact and conclusions of law are not supported by substantial evidence as pertains to the fence composition counterclaim, and therefore the trial court IS in error.

**II. Standard(s) of review on Assignment of Errors**

Findings of fact are reviewed under the substantial evidence rule of *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 343 P.2d 183 (1959). Conclusions of law are subject to de novo review by the appellate court. *State v. Williams*, 96 Wn.2d 215, 220, 634 P.2d 868 (1981); *see Dumas v. Gagner*, 137 Wn.2d 268, 280, 971 P.2d 17 (1999).

The meaning of a contract has been held to be an issue of law. *Chem. Bank v. Wash. Pub. Power Supply Sys.*, 102 Wn.2d 874, 894, 691 P.2d 524 (1984), *cert. denied sub nom. Haberman v. Chem. Bank*, 471 U.S. 1065, *and sub nom. Chem. Bank v. PUD No. 1*, 471 U.S. 1075

(1985). When interpreting a restrictive covenant, a court must give clear and unambiguous language its plain and obvious meaning. *Mains Farm v. Worthington*, 64 Wn.App. 171, 824 P.2d 495 (1992). However, if the interpretation of the contract depends on resolving the credibility of extrinsic evidence or inferences to be drawn from extrinsic evidence, however, the meaning of a contract has been held to be a question of fact. *Berg v. Hudesman*, 115 Wn.2d 657, 668, 801 P.2d 222 (1990).

### **III. Statement of the Case**

The parties to this case are neighbors within a four-lot subdivision in the Felida area of Clark County, Washington known as Chestnut II. Chestnut II is governed by a set of covenants, conditions, and restrictions (hereinafter “CC&Rs”) of record (Exh. 1).

Chestnut II was developed in approximately 1990. At the time, the developer was required to comply with conditions set forth by Clark County’s building department, which included standards for a 16’ wide paved road on a 40’ dedicated road easement and cul-de-sac known as NW 35<sup>th</sup> Court. (Exh. 15). The final plat contains said conditions, *inter alia* (Exh. 12). For ease of reference on said plat map, Appellants McGraw own Lot 2, Respondents Blackwell own Lot 3, and Respondents Bieber

own Lot 1. As can be seen from the plat, McGraws' access to their lot depends upon an easement for ingress/egress over and across the Blackwell lot.

The McGraws bought their lot/home in 1992 (RP 248). The Blackwells bought their home in 1996 or 1997, and constructed a landscaped "island" near the completion of construction. Said island was placed up to the edge of the paved roadway surface, which at trial was determined to be 4-5' into the 25' paved portion of the 30' easement radius described on the plat (RP 251). During that time, the private roadway apparently served adequately for all needs of the neighborhood, including multiple vehicles owned by the McGraws and also a 34' Airstream Land Yacht recreational vehicle. (RP 252 ). McGraws claim that the private roadway and turning radius became insufficient for their needs starting in 2003 when they constructed a large addition and remodel on their home, as well as acquiring a new 39.5' x 102" motor home (RP 252). The addition includes 2,300 square foot garage/showroom which has the capacity to store eighteen vehicles (RP 254-255). However, undisputed testimony at trial established that even such a large RV was maneuverable by Mr.

McGraw as long as he had the assistance of someone giving guidance outside the vehicle—a so-called “ground person” (RP 255).

Toward the conclusion of their addition/remodel some time in 2004, the McGraws installed a privacy fence on both boundary lines with Blackwells and Biebers. The fence consisted of a base “wall” of poured concrete, with uniform 6' white vinyl on top. The “wall” was faced with decorative brick on the McGraw sides, and also on the top. The “wall” on the Blackwell and Bieber sides was concrete with some black treatment applied—otherwise unfinished. The “wall” portion ranged from approximately 1' to 4' in height, corresponding to the slope of the lot lines as they went from the front of the McGraw lot to the rear. As a result, the combined fence height generally measures 7' to 11' from finished grade (RP 298). Because of prior litigation and neighborhood tension<sup>1</sup>, and in an attempt to keep neighborhood peace, the Blackwells and Biebers did not take issue with the fence while it was being constructed. (RP 294, 302)

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<sup>1</sup> By way of background, the Blackwells and Biebers filed a prior suit against the McGraws on September 15, 2003, under Clark Co. Superior Court Cause NO. 03-2-04757-4. The essence of said suit was to enjoin the McGraws' remodel/addition because of a violation of the 30' boundary line setback requirement in the CC&Rs. Said case was settled and a dismissal with prejudice was entered on April 27, 2004.

Appellants commenced this action on December 12, 2005 seeking relief against Respondents under the provisions of the CC&Rs, to wit:

1) A court order allowing expansion of the paved portion of the shared private roadway to accommodate outside radius maneuvering of their newly acquired 39' recreational vehicle (hereinafter “the paving claim”);

2) An order/judgment declaring Respondents to be in violation of the CC&Rs for their composting activities (hereinafter “the composting claim”)  
(CP 2, 4, 21).

Respondents answered by denying Appellants’ claims and counterclaimed seeking relief against Respondents, including a request for a judgment/order declaring Appellants’ fence to be in violation of the CC&Rs provisions regarding height (hereinafter the “fence height claim”) and composition (hereinafter the “fence composition claim”)  
(CP 6).

After a bench trial held on September 5, November 8, and December 6, 2007, the court entered Findings of Fact and Conclusions of Law and a Judgment and Order on February 22, 2008 (CP 82, 83). The

bench trial included an on-site visit by the trial court judge on December 6, 2007. Curiously, Appellants' brief does not specifically assign error to any particular Findings/Conclusions entered by the trial court.

**IV. Summary of Arguments**

- A. Substantial evidence exists to support the trial court's denial of Plaintiffs' claim to enlarge the paved area within the common easement private road.
- B. Substantial evidence exists to support the trial court's rejection of Plaintiffs' claim regarding Defendants' composting of "debris."
- C. Substantial evidence exists to support the trial court's granting relief on Defendants' counterclaim regarding Plaintiffs' fence height in excess of 6'.
- D. Substantial evidence exists to support the trial court's granting relief on Defendants' counterclaim requiring brick facing on their sides of Plaintiffs' fence.
- E. The trial court erred in rejecting Defendants' counterclaim regarding the composition of Plaintiffs' fence.

**V. Argument**

- A. Substantial evidence exists to support the trial court's denial of Plaintiffs' claim to enlarge the paved area within the common easement private road.

Respondents presented evidence that the paved driveway had been constructed according to the dimension set out in the plat map for Chestnut II in approximately 1990, and that said driveway had served the reasonable residential needs of all lots within the subdivision since that time, including the "island" in its present configuration. (RP 37, 90) The paving claim arose when Mr. McGraw purchased a new 39' recreational vehicle, combined with an installation of a luxurious brick pillared gate into his driveway, which narrowed his access and maneuvering room. He testified that even with the new larger recreational vehicle, he was able to maneuver it in and out of his driveway with the assistance of a ground person giving him guidance and direction (RP 240-241). Gregg Bieber testified that on at least one occasion, a fire truck was able to maneuver in and out of the McGraw driveway without difficulty or incident, and that vehicles were historically able to use private roadway without incident (RP 327, 337-338).

The documentation from the planning department of Clark County, plus the plat map, demonstrate that the 40' road easement was required as a condition of plat approval of the subdivision and private road, which required at least 16' width of paved surface, and 25' paved radius on a 30' easement radius for the cul-de-sac. (Exhs. 12, 15).

Because of the foregoing, Appellants failed to establish a reasonable necessity for expanding the paved surface of the private roadway over and on the Blackwell lot considering the factors in *Butler v. Craft Eng. Constr. Co.*, 67 Wn.App. 684, 843 P.2d 1071 (1992) and *Standing Rock Homeowners Assoc. v. Misich*, 106 Wn.App. 231, 23 P.3d 520 (2001). The trial court enjoys considerable latitude in the exercise of its equitable powers of enforcement, including in fixing reasonable widths for easements depending on their nature. *Mielke v. Yellowstone Pipeline Co.*, 73 Wn.App. 621, 870 P.2d 1005 (1994).

Appellants' reliance upon *Wilhelm v. Beyersdorf*, 100 Wn.App. 836, 999 P.2d 54 (2000), is misplaced. In *Wilhelm*, a written logging road easement in 40 acres of rural land was deemed to be ambiguous and at variance with the actual roadway in use across a servient tenement. There was no survey or plat map. The court was asked to reform the written

easement to conform to the actual established road. In contrast, the owners of Chestnut II had a detailed plat map of record and a visibly open and obvious paved private road of at least 16' in width in a four-home residential subdivision. Information from Clark County indicates that 16' of paved width on a 40' easement is the standard for approval of the short plat's private road (Exh. 15).

- B. Substantial evidence exists to support the trial court's rejection of Plaintiffs' claim regarding Defendants' composting.

The pertinent clause of the CC&Rs prohibits owners from engaging in "noxious or offensive activity..... nor..... which may become an annoyance or nuisance to the neighborhood" or from using their lots "..... as a dumping ground for rubbish. Trash, garbage, or other waste shall not be kept except in sanitary containers, pending collection and removal." (Exh. 1.)

Evidence at trial indicated that both Blackwells and Biebers occasionally composted their yard clippings according to environmentally sound husbandry practices and guidelines of Clark County (RP 55-60, 333) . Interestingly, the McGraws lived the majority of the time in

question away from the home, suggesting that the composting claim was really a spite claim. (RP 256). Injunctive relief maybe granted in covenant cases if the party shows (1) a clear legal or equitable right, and (2) that he or she has a well-grounded fear of immediate invasion of that right. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 974 P.2d 836 (1999).

The court reasonably concluded in Conclusion of Law No. 4 that the occasional composting of yard debris did not constitute trash or rubbish, or a nuisance as contemplated in the CC&Rs. (CP 82) Said findings/conclusions should not be disturbed on appeal.

- C. Substantial evidence exists to support the trial court's granting relief on Defendants' counterclaim regarding Plaintiffs' fence height in excess of 6'.

The pertinent provision of paragraph 13 of the the CC&Rs captioned "FENCES" prohibits fences in excess of 6' (Exh. 1). Evidence at trial was undisputed that the fence substantially exceeds 6' in height along both the Blackwell and Bieber boundary lines, consisting of 6' of privacy white vinyl on top concrete wall of varying height from grade, ranging from 0' to over 4' in places (RP 55). Common sense would dictate that a fence height should be measured from ground level a/k/a finished grade. However, the McGraws attempted to argue that the fence height

should not be measured from grade, but should instead be measured from some hypothetical point away from the finished grade of the parties' property line. (CP 64). Furthermore, Clark County code makes clear that its fence height provisions presume measurement from finished grade (Exh. 52). Even Appellants' own fence "expert" established that fence height is measured from grade. (RP 210-211). The use of any other starting point would make a height requirement meaningless, whether for building code or CC&Rs.

Appellants argue that they built the wall based upon a pretextual assumption that Biebers and/or Blackwells intended to backfill against it. However, such assumption was without any basis or merit. In fact, any such backfilling is/was in response to the new and unattractive wall leaving several feet of unfilled area. (RP 25-26, 55, 259-260).

The court correctly deemed the McGraw fence to be substantially in excess of 6', and required it to be brought into compliance by being brought to 6' from finished grade.

- D. Substantial evidence exists to support the trial court's granting relief on Defendants' counterclaim requiring brick facing on their sides of Plaintiffs' fence.

The pertinent provision of the CC&Rs states that all fences shall be of “wood, brick, or cyclone design.” The evidence at trial indicated that the McGraws installed the 6' of white vinyl on top of the concrete “wall” portion below. Said lower portion of the fence was faced with decorative brick on the top of it, and on the McGraw side, but was left as bare concrete with a black coating on the Blackwell and Bieber sides. (Exhs. 14, 18-50). The trial court presumably found that the lack of facing violates the CC&Rs and is aesthetically consistent with the rest of the fence, and the general appearance of the subdivision.

Respondents infer that the court granted the requirement of brick facing on the Blackwell/Bieber sides of the McGraw fence as a concession to the McGraws, inasmuch as the trial court declined to find that the vinyl fence violated the composition requirement under the CC&Rs. The court’s order is entirely proper to make the Blackwell and Bieber sides of the wall/fence match and comply with the CC&Rs.

E. The trial court erred in rejecting Defendants’ counterclaim regarding the composition of Plaintiffs’ fence.

Paragraph 13 of the CC&Rs contains the controlling language regarding fences: “All fences are to be 6 foot maximum height of a **wood, brick, or cyclone design.....**” (Exh. 1). Undisputed testimony is that the

fence is concrete wall at the base, plus 6' of white vinyl on top. The wall is faced with decorative brick on the McGraw side, but only treated concrete on the Blackwell/Bieber sides.

Trial testimony of Appellants' own fence contractor witness verified that vinyl fences were in existence in the marketplace in or around 1990 when the CC&RS were executed. (RP 202-203). He further testified as to the relative rarity of vinyl fences in that residential area of Clark County (RP 215-218). Gregg Bieber testified that vinyl fences were exceedingly rare in the Felida area of Clark County. (RP 320-323). The McGraws had installed vinyl fence on their south and east property lines, which were not visible to Blackwells and Biebers and did not directly affect them. Because of neighborhood tension, the Blackwells and Biebers left the issue alone until forced to bring a counterclaim in this suit (RP 27)

Appellants' position is that vinyl, formed in a manner which mimics wood, is allowed under the CC&Rs. (RP 208) The court erred in allowing the vinyl fence to remain over the counterclaim, inasmuch as fence composition is clearly spelled out in the CC&Rs and does not include vinyl. When interpreting a restrictive covenant, a court must give

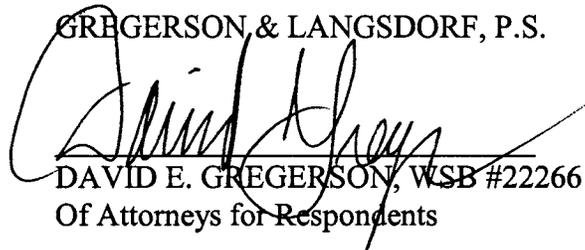
clear and unambiguous language its plain and obvious meaning. *Mains Farm v. Worthington*, 64 Wn.App. 171, 824 P.2d 495 (1992).

**VI. Conclusion**

For the reasons stated above, this Court should affirm the trial court's Judgment and Order with respect to the paving, composting claim, fence height and requirement of brick facing on Respondents' side of the fence, and should reverse the trial court with respect to the counterclaim based upon the fence composition.

Dated this 20 day of October, 2008.

GREGERSON & LANGSDORF, P.S.

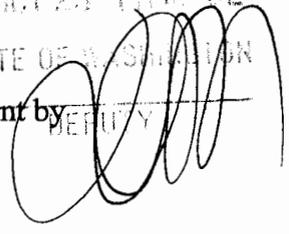


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CERTIFICATE OF SERVICE

On the 21 day of October, 2008, I certify that I served the foregoing Respondents' Brief on the attorney of record for Respondent by sending a copy by first-class mail to:

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



Place: Vancouver, WA