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COURT OF APPEALS
DIVISION II

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No. 37563-0-II STATE OF WASHINGTON
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**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

FOXVIEW HOMEOWNERS ASSOCIATION, Appellant,

and

CYNTHIA A. FENBERG, Respondent.

BRIEF OF RESPONDENT

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ORIGINAL

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Response to Assignments of Error

1. The individual members of Foxview were not necessary parties and did not need to be joined.
2. The trial court properly granted the motion for summary judgment where there were no issues of material fact and where the Second Amendment to the CC&R's did not create an easement as a matter of law.
3. The trial court's award of attorney's fees was proper.

Issues Pertaining to Assignments of Error

1. Was the trial court correct in determining that individual homeowners do not need to be joined to an action where their claimed interest derives solely from their membership in a homeowners' association that is already a party to the suit and is statutorily authorized to litigate on behalf of its members? (Assignment of Error 1)
2. Was the trial court correct in ruling that a reference to "possible and/or potential pedestrian access" is not sufficiently certain to create an enforceable easement? (Assignment of Error 2)
3. Was the trial court correct in awarding attorney's fees to the prevailing party pursuant to the terms of the declaration of covenants? (Assignment of Error 3)

STATEMENT OF FACTS

The material facts are not in dispute. Respondent Cynthia Fenberg is the owner of Lot 8 within the Foxview subdivision in University Place, Washington. CP 153. The plat was recorded in January 2002. CP 46-50. A Declaration of Covenants, Conditions, Restrictions and Reservations (“CC&R’s”) was originally recorded in March 2001, with an amendment recorded in August 2001. CP 52-86. A Second Amendment to the CC&R’s was recorded on January 25, 2002. CP 88-90.

Fenberg’s Lot 8 is on the west of the subdivision, adjacent to a storm water drainage pond designated as Tract A on the plat. CP 46. A railroad right of way extends along the entire western edge of Foxview. Historically, the land that is now Foxview was granted an easement to construct and maintain a railroad crossing opposite the Sunset Beach Hotel. CP 42, 147, 211. The hotel no longer exists, and its exact location cannot be determined, although it may have been on Tract A and/or B. CP 186. There currently is no crossing over the railroad. CP 156.

Appellant Foxview Homeowners Association (“Foxview”) filed suit against Fenberg alleging various violations of the CC&R’s. CP 1. Fenberg filed a counterclaim seeking an injunction to prevent Foxview and its members from trespassing across her lot, primarily to access the beach. CP 6. Foxview filed a motion for summary judgment to dismiss

the counterclaim, which was denied. CP 204-05. Fenberg later filed a motion for summary judgment based on the counterclaim, which was granted. CP 228-30. Foxview appealed the summary judgment in favor of Fenberg. The remaining issues of Foxview's complaint were decided at trial, the outcome of which has not been appealed by the parties.

SUMMARY OF THE ARGUMENT

The trial court's decision must be affirmed. There was no error in entering an injunction against the individual members of the homeowners association because the homeowners' interest was fully represented by Foxview, a non-profit homeowners' association fully authorized by statute to file and defend litigation on behalf of its members. Furthermore, an injunction is binding on parties to the suit and on nonparties whose interest and rights have been represented by named parties.

Summary judgment should also be affirmed because no easement was created as a matter of law. The Second Amendment to the CC&R's does not satisfy the statute of frauds because it does not identify any grantees and it has no language clearly indicating the grantor's intent to convey an interest in land. Regardless of what the grantor intended, the language did not create an easement as a matter of law.

Finally, the award of attorney's fees to Fenberg below must be affirmed, and Fenberg is entitled to her fees on appeal.

ARGUMENT

Summary judgment in this matter must be affirmed because there is no dispute as to the material facts and because no easement was created as a matter of law. A grant of summary judgment is reviewed de novo. *Fredrickson v. Bertolino's Tacoma, Inc.*, 131 Wn. App. 183, 188, 127 P.3d 5 (2005). A summary judgment motion may be granted under CR 56(c) when the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue concerning any material fact, and the moving party is entitled to judgment as a matter of law. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

A. All Necessary Parties Were Joined.

1. Foxview did not preserve the issue for appeal.

Foxview's failure to brief its argument of necessary parties did not preserve the issue for appeal. Because joinder of necessary parties is a jurisdictional requirement for actions under RCW 7.24.110, a defense of failure to join a necessary party raised for the first time in post-trial motions or on appeal is only considered if the action is decided under the declaratory judgment statutes. *Treyz v. Pierce County*, 118 Wn. App. 458, 462, 76 P.3d 292 (2003); *Henry v. Town of Oakville*, 30 Wn. App. 240, 243, 633 P.2d 892 (1981); *see also* RAP 2.5(a).

In contrast, CR 19 issues will not be considered for the first time on appeal. *Draper Mach. Works, Inc. v. Hagberg*, 34 Wn. App. 483, 488, 663 P.2d 141 (1983). The doctrine of necessary parties under CR 19 is equitable, not jurisdictional. *Cathcart-Maltby-Clearview Cmty. Council v. Snohomish County*, 96 Wn.2d 201, 206, 634 P.2d 853 (1981); *see also Wimberly v. Caravello*, 136 Wn. App. 327, 334, 149 P.3d 402 (2006) (“jurisdiction does not turn on the presence or absence of a party”). This Court can only consider the “evidence and issues called to the attention of the trial court.” RAP 9.12.

Fenberg’s counterclaim only sought an injunction, not a declaratory judgment. CP 8-9. Therefore, Foxview needed to raise the issue below in order to preserve the argument for appeal. It failed to: a) file a motion to dismiss the counterclaim, b) mention the issue of necessary parties in its own motion for summary judgment and supplemental briefing, CP 12-20, 182-203, c) raise the issue in response to Fenberg’s motion, CP 209-14, or d) make the argument in its motion for reconsideration, CP 215-19.

Foxview raised the issue orally for the first time when the summary judgment order was presented to the trial court for entry. RP 10-15. At that point, it was well beyond its deadline for filing affidavits and argument in response to the motion for summary judgment. Foxview’s

cursory mention of the issue just before entry of the order on summary judgment was insufficient to preserve the argument for appeal.

2. *The members of Foxview are not necessary parties.*

The individual members of Foxview are not necessary parties because their interest is represented by Foxview. It has the burden to establish that the missing parties are necessary under CR 19. *Matheson v. Gregoire*, 139 Wn. App. 624, 635, 161 P.3d 486 (2007). A party is necessary if:

(1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (A) as a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

CR 19(a). Foxview argues only that the individual lot owners are necessary because they claim an interest relating to the action.¹ Foxview must also establish that resolution of the action without the members as parties would impair their ability to protect their interest.

A non-party whose interest is already represented is not necessary because the ability to protect the interest is not impaired. *See Crosby v.*

¹ No argument can be made that complete relief is impossible between Foxview and Fenberg, as the summary judgment order properly enjoins Foxview from trespassing on Fenberg's property. Foxview has not suggested how multiple or inconsistent obligations could result if the members are not joined.

County of Spokane, 137 Wn.2d 296, 310, 971 P.2d 32 (1999) (on appeal of plat approval, non-party adjacent landowners did not have interest in property, and the public's interest, including neighbors, was represented by the County Board of Commissioners); *Ruston v. Tacoma*, 90 Wn. App. 75, 82, 951 P.2d 805 (1998) (in declaratory judgment action regarding boundary dispute between municipalities, people of municipalities were not necessary parties because "both municipalities represent the interests of their citizens and were already parties").

Foxview is a nonprofit corporation, and each owner of a lot within the plat is a member of the association. CP 1, 231. Homeowners associations are authorized to "institute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more owners on matters affecting the homeowners' association, but not on behalf of owners involved in disputes that are not the responsibility of the association." RCW 64.38.020(4).

Thus, Foxview is authorized by statute to represent the interests of its members in this lawsuit. This dispute is the responsibility of the HOA because if an easement exists, the individual members do not have an independent right to use the easement. Rather, any interest they have exists solely due to their status as members of Foxview, and it is acting as the agent for its members in this action.

In fact, Foxview has requested relief on behalf of the individual members. The original complaint requested an injunction “prohibiting defendant [Fenberg] from obstructing free use of the access easement by the Association *or its members*.” CP 5 (emphasis added). The reply to Fenberg’s counterclaim requested “[a]n injunction prohibiting defendant from impeding use of the easement by the parties entitled thereto.” CP 11. Foxview’s motion for summary judgment sought a declaration “that plaintiff Foxview Homeowners Association *and its members* have the right to use the recorded 15-foot access easement over defendant’s property for pedestrian access to the common areas and the beach.” CP 12 (emphasis added).

The injunction preventing the members and the HOA from trespassing on Fenberg’s lot was properly granted because Foxview represents the interest of its members and has litigated these issues on their behalf. Because the members’ ability to protect their interest is not impaired, they are not necessary parties under CR 19(a).

Moreover, the individual members are not necessary because Fenberg’s counterclaim was an action for an injunction. An injunction is binding on nonparties who are so identified in interest with named parties that it is reasonable to conclude that their rights have been represented. *All Star Gas, Inc., of Wash. v. Bechard*, 100 Wn. App. 732, 737, 998 P.2d

367 (2000). Even though the individual members were not named in the suit, the injunction is binding on them because their interest is fully represented by Foxview. The injunction was proper, and summary judgment must be affirmed.

B. There Is No Easement for Pedestrian Access Across Lot 8.

1. No written instrument created an easement.

No easement for pedestrian access was created across Fenberg's lot. An easement is an interest in land and is therefore subject to the statute of frauds. RCW 64.04.010; *Berg v. Ting*, 125 Wn.2d 544, 551, 886 P.3d 564 (1995). To satisfy the statute of frauds, an express easement must be created by written deed and must satisfy several requirements. *Id.* In addition to being signed by the grantor and acknowledged, RCW 64.04.020, the deed must contain a sufficiently definite description of the servient estate, *Berg*, 125 Wn.2d at 551. A deed must also identify the grantee with specificity. *York v. Stone*, 178 Wash. 280, 284, 34 P.2d 911 (1934).

In addition, a deed must contain words of conveyance. Regarding easements, generally, “[n]o particular words are necessary to constitute a grant and any words which clearly show the intention to give an easement, which is by law grantable, are sufficient to effect that purpose, *providing the language is sufficiently definite and certain in its terms.*” *Beebe v.*

Swerda, 58 Wn. App. 375, 379, 793 P.2d 442 (1990) (emphasis added). Deeds are construed to give effect to the parties' intent. *Zunino v. Rajewski*, 140 Wn. App. 215, 222, 165 P.3d 57 (2007) (citing *Carr v. Burlington N. Inc.*, 23 Wn. App. 380, 390-91, 597 P.2d 409 (1979)). However, the grantor's intent alone is not sufficient to create an easement without words that "demonstrate a present intent to grant or reserve an easement." *Id.* Any doubts about ambiguous language in a deed must be resolved against the grantor. *Kunkel v. Meridian Oil, Inc.*, 114 Wn.2d 896, 901, 792 P.2d 1254 (1990).

The parties in *Zunino* had a common predecessor in interest, who recorded documents entitled "Private Road & Utility Easement" and "Easement and Maintenance Agreement" before subdividing her property into 10-acre lots. 140 Wn. App. at 221-22. The grantor believed she was creating access easements in compliance with a county requirement, and the instruments referred to "the undersigned property owner, who is granting the easement across their property," and "the property involved with this easement." *Id.* at 221-22. Despite this evidence of the grantor's intent, the court held that the "documents failed to convey an easement because the words do not demonstrate a present intent to grant or reserve an easement." *Id.* at 222. The instruments were "not deeds because they [did] not convey an interest in property." *Id.* at 223.

Similarly, *Dickson v. Kates*, 132 Wn. App. 724, 133 P.3d 498 (2006), invalidated a covenant despite the grantor's intent. The parties' predecessors in interest intended to create a restrictive view covenant and recorded a deed containing the covenant. *Id.* at 728. However, the covenant was invalid under the statute of frauds because the description of the burdened land was inadequate, and could not be determined without relying on oral testimony. *Id.* at 734.

A declaration of covenants can create a servitude (including covenants and easements), but the declaration must still satisfy the statute of frauds for creation of an easement. *Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.*, 120 Wn. App. 246, 253, 84 P.3d 295 (2004) (stating that declaration of covenants can create a servitude, and discussing enforceability of a restrictive covenant). Easements contained in a declaration of covenants must still have definite and certain language clearly conveying an easement, identifiable grantees, and the other elements outlined above.

The Second Amendment to the CC&R's did not create an easement for failure to satisfy the statute of frauds. Foxview relies on paragraph 3.6, which provides:

There exists a 15 ft wide Access Easement encumbering Foxview Lot 8. This roadway is a Limited Common Element and provides limited access to the Storm Drainage

Tract “A” and the on-site wetland Tract “B”, together with possible and/or potential pedestrian access to the adjacent railroad right-of-way and the beaches and tidelands of Puget Sound, pursuant to long-standing easements and/or agreements of record. This access road is an expressed condition of plat approval by the City’s Hearing Examiner. The maintenance and repairs of such access road shall be an obligation of the Association.

CP 90. This language fails to create an easement for various reasons.

First, there is no language indicating a present intent to convey, as required by *Zunino*. The amendment clearly references an easement, but implies that the easement was previously created, and therefore *not* created in this instrument: “there *exists* a 15 ft wide Access Easement” This is not a grant or conveyance, but merely a description of what was believed to already exist. The Second Amendment to the CC&R’s also does not specify the grantees of any easement. As with the instruments at issue in *Zunino*, this language does not create an easement regardless of what the drafter intended.

Second, the language is not sufficiently certain. Regarding pedestrian access, there is nothing definite about the terms “possible and/or potential.” Neither word indicates an actual intent to convey a defined right of access, and any attempt to specify the scope of the access based on these words is impossible. In particular, “potential access” by

definition is access that does not currently exist, and may never exist.²

This cannot meet *Beebe*'s requirement of "definite and certain" language.

The Second Amendment to the CC&R's allegedly creates access "pursuant to long-standing easements and/or agreements of record," referencing the historical easement across the railroad right of way. CP 22, 90. The instruments creating an easement across the right of way, referenced at page five of Foxview's brief, are not the equivalent of an access easement across Lot 8.³ Lot 8 and Tract A did not even exist at the time the historical instruments were executed. Thus, the Second Amendment to the CC&R's attempts to grant an easement pursuant to historical agreements that have nothing to do with access across Lot 8. Furthermore, pedestrian access across Lot 8 in particular is not strictly necessary in order to utilize an easement across the right of way.

Additionally, the language of the Second Amendment to the CC&R's is insufficient because it does not refer to pedestrian access across Lot 8 to Tract A, but rather to "the adjacent railroad right-of-way and the beaches and tidelands of Puget Sound." Foxview is trying to

² Potential is defined as "Existing in possibility but not in act. Naturally and probably expected to come into existence at some future time, though not now existing" BLACK'S LAW DICTIONARY 809 (Abridged 6th ed. 1991). Similarly, possible means only that it is "capable of existing," not necessarily that it exists. *Id.* at 808.

³ Strictly speaking, the 1907 deed did not reserve an easement for access across the right of way, but rather the right to construct and maintain a railroad crossing. CP 42, 147, 211. It is questionable whether Foxview could claim an access easement across the right of way when no crossing exists.

enforce pedestrian access to Tract A, contrary to the language of the easement.

Even if there were an easement for limited access across Lot 8 to Tract A, despite the lack of language of conveyance and failure to identify a grantee, Foxview cannot use such an easement to access any adjacent land, including the railroad right of way or the beach. *See Brown v. Voss*, 105 Wn.2d 366, 371-72, 715 P.2d 514 (1986) (express easement across Lot A for access to Lot B cannot be used for access to Lot C or to a home constructed on the boundary between Lots B and C).

No written instrument conveyed an easement across Lot 8 for pedestrian access to Tract A, and the Court should affirm summary judgment. The Second Amendment to the CC&R's has no language of conveyance, it does not identify any grantees, and its language regarding pedestrian access is indefinite and uncertain. At best, the language is ambiguous, and must be construed strictly against the grantor.

2. *The drafter's testimony does not cure deficiencies in the CC&R's.*

Because the language on its face does not create an easement, the intent of the grantor is irrelevant. As illustrated by *Zunino* and *Dickson*, intent alone does not satisfy the statute of frauds without an adequate written instrument.

Easements and covenants are interpreted according to the rule outlined in *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990). *Butler v. Craft Eng Const. Co.*, 67 Wn. App. 684, 698, 843 P.2d 1071 (1992). Intent must be determined from the language of the instrument if it is not ambiguous, and a court should only resort to extrinsic evidence if intent cannot be determined from the instrument. *Sunnyside Valley Irrigation. Dist. v. Dicke*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003); *City of Seattle v. Nazareus*, 60 Wn.2d 657, 665, 374 P.2d 1014 (1962). The language used is to be given its “ordinary, usual, and popular meaning.” *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005); *see also Beebe*, 58 Wn. App. at 380 (“The words are to be construed in their ordinary and popular sense.”). Under the *Berg v. Hudesman* rule, the court must focus on the objective manifestation in the agreement rather than on the subjective intent of the parties. *Hearst Comms, Inc.*, 154 Wn.2d at 503. In other words, the court declares the meaning of what was written, not what was intended to be written. *Id.* at 504; *Wimberly*, 136 Wn. App. at 336-37 (applying rule to restrictive covenants).

The law relied on by Foxview at pages 21 and 22 of its brief is inapplicable to this dispute. It cites *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 118 P.3d 322 (2005), and *Green v. Normandy Park Riviera*

Section Community Club, Inc., 137 Wn. App. 665, 151 P.3d 1038 (2007), which dealt with the interpretation of restrictive covenants, not easements. Although covenants may be interpreted to favor the reasonable expectations of those affected, no such principle governs interpretation of easements.⁴

As discussed above, there is no need to go beyond the language of the Second Amendment to the CC&R's because the language is simply insufficient to create an easement. The testimony of the drafter does not explain what he wrote, but rather describes what he intended to write, and cannot be considered by the Court. CP 22. He may have intended to create an easement across Lot 8 for pedestrian access to the beach, but the language he chose did not accomplish that purpose for the reasons stated above.

The drafter's testimony does not clarify any ambiguity in the language of the Second Amendment to the CC&R's. The drafter confirmed that he used "possible and/or potential" in reference to the pedestrian access because he did not want to guarantee that the easement was valid. CP 22. It is clear from the words used that it is the pedestrian access itself that is "possible and/or potential," but this language creates

⁴ The servitude at issue here is clearly an easement. An easement is a right to use real property belonging to another. *Dickson*, 132 Wn. App. at 731. A covenant limits the way in which an owner may use his or her own land. *Id.*

no definite right or obligation, and is by its terms unenforceable. *See Interchange Assocs. v. Interchange, Inc.*, 16 Wn. App. 359, 557 P.2d 357 (1976).

Construing the language against the grantor, as required for easements, the Second Amendment to the CC&R's merely restates the grantor's belief that residents may have pre-existing easement rights across the railroad right of way from somewhere within the subdivision, according to historical deeds. It does not create a new easement for pedestrian access across Lot 8.

Affirming summary judgment does not render the language meaningless because the language chosen by the drafter is already meaningless. "Possible and/or potential pedestrian access" is access that does not exist and cannot be enforced. The requirements for creation of an easement cannot be avoided in order to give meaning to otherwise unenforceable language—the easement instruments in *Zunino* and the covenant language in *Dickson* were also rendered "meaningless" by application of the statute of frauds. *Zunino*, 140 Wn. App. 215; *Dickson*, 132 Wn. App. 724.

Furthermore, although their expectations are irrelevant in interpreting an easement, the other homeowners cannot have had a

reasonable expectation of access to the beach when that access is described as merely “possible and/or potential.”

The deficient language of the Second Amendment to the CC&R’s cannot be cured by the testimony of the drafter. The language failed to create an easement under the statute of frauds and under general rules of interpretation of deeds and contracts. Summary judgment must be affirmed.

C. Fenberg Is Entitled to Attorney’s Fees.

Fenberg should recover her attorney’s fees incurred in defending this appeal. She was awarded attorney’s fees below pursuant to section 15.13 of the CC&R’s authorizing an award of attorney’s fees to the prevailing party. She is therefore entitled to attorney’s fees on appeal under the CC&R’s, pursuant to RAP 18.1.

If Foxview prevails on its argument that the individual homeowners are necessary parties, it should not be awarded fees on appeal. Even if the homeowners are necessary parties, the injunction as to Foxview would be unaffected, because addition of parties under CR 19 is not a jurisdictional question, as discussed above. Accordingly, the injunction would remain as to Foxview, and Fenberg, not Foxview, would not be the substantially prevailing party on this appeal.

CONCLUSION

Summary judgment enjoining Foxview and its members from trespassing on Fenberg's property was appropriate. Foxview's argument that necessary parties were not joined was not preserved for appeal. In any event, the individual homeowners are not necessary because their interest is fully represented by Foxview. The homeowners' interest, if any, is derived from their status as members of Foxview, and it is authorized to defend on their behalf.

No written instrument created an easement across Fenberg's lot for pedestrian access. The Second Amendment to the CC&R's does not have language of conveyance and does not identify any grantees. Further, the pedestrian access is referred to as only "possible and/or potential," meaning that it did not exist at the time the Second Amendment to the CC&R's was drafted. The language chosen by the drafter was not sufficiently clear and definite to show intent to create a pedestrian access easement across Lot 8. Regardless of what the drafter now testifies, the his intent alone cannot compensate for incurable deficiencies in the language used.

Finally, Fenberg was properly awarded her attorney's fees below as the prevailing party. She is entitled to her attorney's fees on appeal under the same provision.

For the foregoing reasons, Respondent Fenberg requests that the trial court's entry of summary judgment be affirmed in all respects.

Respectfully submitted this 6th day of August, 2008.

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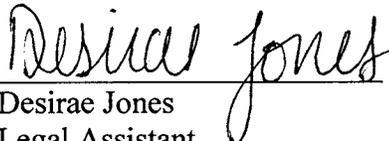
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