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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 37974-1-II
COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION

JOHN RAYMOND BRADFORD and CINDY BRADFORD, husband and wife;
LAWRENCE KERBS and CHRISTINE KERBS, husband and wife;
and JAMES VANSHUR and NANCI VANSHUR, husband and wife,

Respondents.

v.

CHARLES AND RUTH ADAMS TRUST,

Appellant,

ADAMS' REPLY BRIEF

Gregory M. Miller, WSBA No. 14459
Counsel for Appellant Adams Trust

CARNEY BADLEY SPELLMAN P.S.
701 Fifth Ave., Suite 3600
Seattle, WA 98104-7010
(206) 622-8020

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I. INTRODUCTION & GENERAL REPLY.

Notwithstanding the Respondents' attempt to color Adams as a bad neighbor, the record is undisputed that, in fact, Adams and his Lot 4 predecessors permitted the Respondents' use of the dock for years without charge or contribution, asking for only reasonable neighborly respect in the permitted use of the dock which was (and is) outside the physical bounds of the easement. Adams reluctantly revoked this permission only after the Respondents' repeated abuses of the privilege created a nuisance, including not only driving on the "nonvehicular" easement but, most seriously, the underage drinking which creates a heightened risk of injury to the Respondents' teens and their (non-resident) guests and a dramatically heightened liability for Adams as owner of the dock.

The record reflects Adams tried to resolve the issues, but the Respondents repeatedly refused Adams' multiple requests to follow reasonable restrictions on time and use. They also refused Adams' request for a hold-harmless and indemnity agreement. Either would have solved the problem. Instead, rather than cooperation or indemnification for the unnecessary and unreasonable risks they imposed on Adams, Respondents challenged Adams' right to ownership and control of the dock – an improvement constructed by Adams' predecessor without participation of the owners of Lots 1, 2 or 3, and over state-owned lake bed on which *only* Adams, as owner of Lot 4, could build and maintain a dock.

Respondents do not address the "ownership" issue at all in their Response Brief other than summarily asking for this remedy in the

Conclusion at page 29.¹ But Respondents provide no citation to authority, no argument, nor any explanation whatsoever as to how or why they are entitled to an “ownership” interest in the dock, or how the trial court could have correctly granted them such ownership under any legal theory. They do not offer any defense of the trial court’s ruling at all, nor any opposition to the arguments in Adams Opening Brief. On this record, the Court can only treat the ownership issue as abandoned by Respondents’ failure to argue it. *Holder v. City of Vancouver*, 136 Wn. App. 104, 107, 147 P.3d 641 (2006) (appellate court will deem issue abandoned when it is not briefed on appeal); *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990); RAP 10.3(a)(5) (appellate brief should contain argument supporting issues, citations to legal authority, and references to relevant parts of the record); *Johnson v. Department of Licensing*, 71 Wn. App. 326, 332, 858 P.2d 1112 (1993) (issues not supported by argument and specific citation to authority will not be considered).

Given that review is *de novo* by this Court and the lack of authority or argument by Respondents on the key issue of ownership of the dock, this Court should vacate the trial court’s ruling and hold, as a matter of law, Respondents have no ownership interest in Adams’ dock because there is no authority that allows easement rights for access and use to ripen into ownership rights of appurtenant improvements.

¹ The trial court ruled that “[o]wnership and control of the dock is with all the owners.” CP 16.

The trial court also ruled, as an issue of fact, that the construction of the dock interferes with the recreational use of the lake by the other owners in violation of the Declaration of Access and Use (“Use Grant”).² CP 86.³ On this basis, the trial court ruled not only that “[a]ll owners are entitled to its full use” (CP 87), but further ruled that Adams “does not retain the right to remove it [the dock] without the consent of all the property owners.” CP 32-33. The trial court explained that this part of its ruling -- barring Adams from removing the dock -- flowed from the trial court’s ruling on “ownership.” CP 33. However, again, the Response provides no citation to authority, no argument, or any explanation whatsoever as to how or why Adams should not be permitted to remove the dock as his own remedy. Adams, in contrast, cited controlling authority that Respondents have no right to the continued maintenance of an improvement. *See* Opening Brief, pp. 37-38. Tellingly, Respondents did not address those cases but abandoned the ownership issue.

Given *de novo* review and Respondents’ failure to provide citation to authority or argument on the ownership issue, this Court should also

² Adams defined the Declaration of Access and Use as the “Use Grant” in the Opening Brief for ease of reference and will continue that convention.

³ Respondents still assert the dock prevents their access to the lake. But the undisputed facts show otherwise. Mr. Fraser, who built the dock, testified he could bring his 12-foot boat up to the shore with the full dock in place. CP 200. Randy Adams testified that when he repaired structural defects in 2006, he removed six feet of the dock and added pea gravel to the beach area, CP 155, enhancing lake access in at least two ways with a sheltered and more gradual entry point which could be used by, for example, swimmers, canoers, or kayakers. *See also* CP 148 (App. H-1) (photo showing only the very narrow walkway impeding the 50-foot shoreline) and Opening Brief, p. 28. Nevertheless, since Adams is willing to remove his dock and restore all the lakefront to the condition when the Use Grant was made, this Court’s job is easy.

vacate the trial court's ruling that enjoins Adams from removing the dock.

As more fully discussed *infra*, the Court should rule substantively that 1) Adams alone owns the dock; and 2) Adams has the right to remove the dock. This will restore the waterfront area to the condition that existed at the time the easement rights were first granted.

II. REPLY ARGUMENT.

A. **The Rules of Construction for Easements and Restrictive Covenants Do Not Permit Changing the Meaning of What Was Written in the Use Grant by Ms. Greaves.**

Respondents' argument that in construing the Use Grant, the applicable rules of construction are those pertaining to restrictive covenants, not easements, is a red herring. The Response Brief goes on to acknowledge that the Use Grant both "prohibits" uses *and* "grants affirmative rights." Response, page 16. Adams disagrees with Respondents' characterization of the document as a purely "restrictive covenant" since the Use Grant contains restrictions *and* grants easement rights that run with the land, points the Opening Brief recognized, *e.g.*, pp. 24-26.

Nonetheless, the parties' respective characterizations of the document does not change what it says. Whether the document is denominated a "restrictive covenant" or an "easement," the language found in the Use Grant controls when determining and enforcing the rights and obligations of the parties, and in determining the intent of Ms. Greaves, who created the easements and drafted the Use Grant. Indeed, it is Respondents who argue that the language of covenants is given its

ordinary and common meaning “so as not to defeat its plain and obvious meaning,” citing *Viking Properties, Inc. v. Holm*, 155 Wn.2d 122, 120, 118 P.3d 322 (2005). *See*, Response, p. 14.

Respondents then proceed to argue that “intent” is more important than “strict construction,” in an effort to change the meaning of the Use Grant.⁴ Finally, Respondents argue that *all* interests of *all* parties must be considered. Response, p. 24. None of these rules, however, change what was written by Ms. Greaves. Nor do these rules of construction change the Rules of Evidence to automatically allow hearsay evidence, or permit extrinsic evidence to add to or change the documents at hand.

B. Proper Extrinsic Evidence Does Not Include Hearsay, Irrelevant Statements, Or Merged Provisions; Nor Can Such Extrinsic Evidence Change the Terms of Easements or Restrictive Covenants.

While the “context rule” allows the introduction of extrinsic evidence to discern the meaning or intent of words used in a contract, the extrinsic evidence must be “admissible.” Admissible evidence *does not include* 1) evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term; or 2) evidence that would show an intention independent of the instrument; or 3) evidence that would vary, contradict, or modify what is written. *Hollis v. Garwall, Inc.*, 137 Wn.2d

⁴ For example, Respondents argue that Ms. Greaves would have specifically reserved the right of the owner of Lot 4 to build a dock at the end of the property if she had intended for that to be done by putting language into the Use Grant. Response, p. 23. But in fact, there was no need for any such specific reservation because the Use Grant did not explicitly take away that preexisting right from Lot 4 which it had under RCW 79.105.430. In other words, there was nothing in the Use Grant that necessarily removed that “stick” of property rights from the bundle possessed by Lot 4.

683, 974 P.2d 836 (1999). A trial court **may not consider** inadmissible evidence when ruling on a motion for summary judgment. *Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wn. App. 787, 790, 150 P.3d 1163 (2007). Hearsay evidence is **not** admissible and may **not** be considered. *Id.* at 792. Respondents' suggestion that **all** extrinsic evidence is admissible is made without any supporting authority and is simply incorrect.

The Respondents further suggest that representations made to them in marketing materials by their predecessors-in-interest real estate agents, and made part of real estate purchase and sale agreements, are somehow relevant and admissible in defining their access rights. Respondents, again, cite no authority to support their assertions.

Notably, these “representations” were not made by Adams, the Appellant herein. Nor were they made by Margareta Greaves, who drafted the Use Grant. To the extent these statements contradict what is written in the Use Grant – and they do -- they are inadmissible and cannot be considered under *Hollis* and the above authorities.

Moreover, the recorded Use Grant, which is incorporated in the Respondents' respective Statutory Warranty Deeds, trumps any verbal or written representations made by the Respondents' respective predecessors-in-interest, made by realtors, found in marketing materials, or incorporated in the Respondents' respective purchase and sale agreements. Under the merger doctrine, the provisions of a real estate purchase and sale agreement merge into the deed upon execution of the deed. *Black v.*

Evergreen Land Developers, Inc., 75 Wn.2d 241, 248, 450 P.2d 470 (1969); *Davis v. Lee*, 52 Wash. 330, 331, 100 P. 752 (1909). As such, once each of the property owners, Respondents and Adams included, accepted the deed to their respective property, each became bound by the **deed** provisions, which include the Use Grant. The Use Grant thus controls the parties' rights, not the sales materials. *Snyder v. Roberts*, 45 Wn.2d 865, 871, 278 P.2d 348 (1955).

To the extent representations inconsistent with the Use Grant were made by others, the Respondents' claims for damages, if any, are against those who made the alleged misrepresentations. These representations cannot bind Adams. But since Respondents apparently either do not want to sue their realtors or former neighbors; or fear they have no claims there because of Washington's clear law putting the burden on the buyer to ascertain just what they are getting,⁵ they chose to try and bully their way with the newcomer and then, when he asserted his rights, sought to create a legal right where none exists. The conclusive, factual demonstration that Respondents' have no genuine claim based on sales representations is seen by the undisputed fact the Kerbs bought Lot 2 in 2005 with a listing agreement and purchase and sale agreement which **both** indicated the dock use was permissive and "day-use only." CP 227, 229; Opening Brief, pp. 7-8 & n.2. If all the Respondents have the same rights under the Use Grant (as they must), this undisputed fact also eliminates the claims for the other lot owners.

⁵ See Opening Brief, p. 8, n.3, citing illustrative real estate "buyer beware" cases.

Respondents concede in their brief that “[t]he principal act of courts, when interpreting restrictive covenants, is to ascertain and implement the intent of the grantor. The general rule of interpretation is to ascertain and give effect to the intent of the original grantor.” Response, p. 14. Under the Merger Doctrine, that intent must be derived from the Use Grant and its express terms.

C. The Use Grant Does Not Grant Ownership in Other Parties’ Improvements Within the Bounds of the Easement; Nor Does it Control Improvements Outside the Bounds of the Easement.

The Use Grant expressly reserves to the owner of Lot 4 (now Adams) the right to make improvements on Lot 4 so long as “sufficient area” is preserved for ingress and egress to Lake Sutherland:

[T]here is hereby further dedicated, a non-vehicular easement for ingress and egress to the owners of the above parcel to allow for access to Lake Sutherland. . . . **This dedication shall not preclude the owner of Lot 4 from any development upon that above-described portion of Lot 4 subject to this easement so long as sufficient area is preserved for said non-vehicular ingress and egress to Lake Sutherland.**

CP 191, Use Grant, p. 2. (App. B-2) (emphasis added).

The Use Grant also prohibits improvements *within* the southerly part of the easement *only* if the improvement interferes with the recreational use of Lake Sutherland:

The owners of the above parcels shall not place any improvements upon or make any use of said dedicated area that are inconsistent with the intent of preserving said area for recreational purposes.

CP 191-192, Use Grant, pp. 2 – 3 (App. B-2-3) (emphasis added).

It is undisputed that the dock is not located within the easement

area. Rather, it extends south into the lake from where it abuts the southern terminus of the easement area. It provides only one means of access to Lake Sutherland from the easement area, but it in no way provides the exclusive means of access. Contrary to Respondents' unsupported assertion based on a picture, it does not prevent access from the shore. As noted in footnote 3, *supra*, the dock at issue as repaired in 2006 and shown in the photo in App. H-1, CP 148, has only a narrow walkway that impedes lake access for a tiny part of the 50-foot shoreline.

Nonetheless, to the extent the dock is an "improvement," that is "inconsistent with the intent of preserving" the defined shoreline area "for recreational purposes," the Use Grant, in prohibiting "inconsistent" improvements could, at most, require removal or reduction in the size of the dock. Even so, nothing in the Use Grant gives Respondents an affirmative ownership interest to *improvements* made by the owner of Lot 4, especially those *outside* the easement. Nor do Respondents provide legal citation or present argument to support the notion that they are entitled to an "ownership" interest in the dock, as noted *supra*. In fact, *Drainage Dist. No. 2 of Snohomish County v. City of Everett*, 171 Wash. 471, 479-80, 18 P.2d 53 (1933), holds that Respondents have no right to the maintenance of the improvements even if it was *within* the bounds of the easements, which it is not.

The injunction which is dependent on Respondents' non-existent claim of ownership therefore must be vacated so Adams is free to remove the dock and restore the waterfront area to the original condition that

existed at the time the easement rights were first established. This will give Respondents the “full access” they claim to seek to Lake Sutherland and allow Adams to remove a dock that has become a liability risk. It also resolves the untenable ruling of the trial court ordering the parties to agree on reasonable use, upkeep, and improvements of the dock. After all, it was the parties’ inability to reach agreement on precisely these issues that led them to court in the first place.

Ironically, even though Respondents’ complaint sought a determination of a right to use and also an order granting access to the dock “at all times” and “restoration” of the debated portion Adams repaired in 2006 (CP 245); and even though they got an order forbidding Adams from removing the dock; removal is actually consistent with their appellate argument that Adams had no right under the Use Grant to build it in the first place, *see* Response, pp. 23-24.

D. RCW 79.105.430 and WAC 332-30-144 Apply and Demonstrate the Order Granting Respondents Ownership Must be Reversed and Ownership Confirmed in Only Adams.

Respondents’ assertion that RCW 79.105.430 and WAC 332-30-144 are inapplicable ignores the plain definition of “abutting residential owner,” which references the “owner of record of property physically bordering on public aquatic land.” None of the Respondents are, or claim to be “owners of record” of Lot 4. None of the Respondents fall within this definition. Respondents cannot be owners of the dock consistent with the statute. Ownership must be confirmed in Adams.

Under the plain language of these regulations, the Respondents' respective easements over a portion of Lot 4 to access Lake Sutherland do not make them "owners of record" of Lot 4. Respondents cite no authority allowing them to "piggy-back" onto the rights afforded to the owner of Lot 4 as the "abutting residential owner" as defined under the statute or the regulations. Indeed, to do so would rewrite the statute. Under the plain language of the statute and the regulations, the Respondents can have no ownership rights vis-à-vis the dock. They do not seriously contend otherwise.

III. CONCLUSION.

The relief granted by Judge Wood contradicts the express provisions of the Use Grant and RCW 79.105.430. The Use Grant expressly reserves to the owner of Lot 4 – Adams – the right to make improvements on Lot 4 so long as "sufficient area" is preserved for *ingress* and *egress* to Lake Sutherland. The Use Grant also prohibits improvements *within* the southerly part of the easement, *if* the improvement interferes with the recreational use of that defined area bordering Lake Sutherland and (necessarily) *if* the improvement is *within* the bounds of the easement. It does *not* give the Respondents, expressly or implicitly, an ownership interest in any such improvements.

There is no dispute the dock is not within the bounds of the easement. It is over the lake bed and not over Lot 4; it is appurtenant to Lot 4 and the easement for access and use. There is no basis under any law (and Respondents have cited none) that gives the trial court authority

to grant ownership of this improvement under any theory. Ownership certainly cannot be granted as an “extension” of the easement given settled Washington law that the easement right (which is far less than full ownership right) cannot be extended by the dominant estate. Nor can it be extended contrary to the legislative policy embodied in RCW 79.105.430 that *only* abutting landowners may own a dock over the lake bed.

There is also no factual dispute as to whether the dock prevents the Respondents’ access to Lake Sutherland since the dock never covered the entire 50 foot lakefront when it was at its widest. Repairs Adams performed in 2006 reduced the “coverage” of the shoreline to only a few feet for the walkway, making virtually all the waterfront available on the shoreline. In fact, those modifications created a sheltered area for getting in and out of the lake, actually enhancing the recreational use of the specified property for all the owners. On these facts, reasonable minds can reach only one conclusion: Adams’ dock does not restrict Respondents’ access to the lake nor is it “inconsistent with the intent of preserving [the defined 50 x 75 foot strip] for recreational purposes. *See* CR 56(c); *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985) (summary judgment is appropriate on fact issue where reasonable minds can reach only one conclusion from the evidence presented).

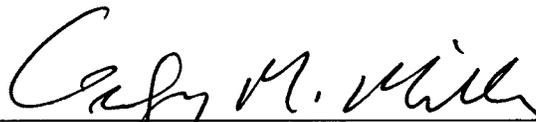
However, because Adams’ main concern is the liability risk presented by the Respondents’ misuse of the dock and Judge Wood’s order prevents Adams from exercising *any* measures to remedy or protect his own interests, Adams seeks to remove it. By recognizing that Adams,

as the owner of Lot 4, is entitled to restore the waterfront to its original condition – the condition that existed at the time the easement was established by the Use Grant – Respondents’ easement rights remain as contemplated at the time the easement was created. This also makes any determination of the impact or lack of impact of the dock on those easement rights both irrelevant and moot.

The trial court’s overreaching remedy in giving the Respondents an ownership interest in the dock and enjoining Adams from removing it has no support in the law. For the reasons set forth above, and those in the Opening Brief, Adams respectfully asks the Court to vacate the judgment and confirm his right as the sole owner of the dock and his right to remove it. The trial court’s award of attorneys fees should also be vacated and Adams awarded attorneys fees and costs on appeal and for trial as the prevailing party pursuant to the Use Grant’s fee provision.

DATED this 3rd day of June, 2009.

CARNEY BADLEY SPELLMAN, P.S.

By 
Gregory M. Miller, WSBA No. 14459
Counsel for Appellant Adams Trust

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I declare under penalty of perjury that I caused copies of Adams' Reply Brief, and this Certificate of Service by causing a true copy thereof to be served to counsel of record on June 3, 2009 as follows:

Craig L. Miller, WSBA #5281 CRAIG L. MILLER, P.S. 711 East Front Street, Suite A Port Angeles, WA 98362-3635 P: (360) 457-3349 F: (360) 457-3379 Email: cmiller@craigmiller.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> Fax <input type="checkbox"/> Email <input type="checkbox"/> Other
Gary R. Colley, WSBA #721 Platt Irwin 403 South Peabody St. Port Angeles, WA 98362-3210 P: (360) 457-3327 Fax: (360) 452-5010 Email: gcolley@plattirwin.com	<input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Messenger <input type="checkbox"/> Fax <input type="checkbox"/> Email <input type="checkbox"/> Other

DATED this 3rd day of June, 2009.



 Gregory M. Miller

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