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NO. 37974-1-II

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

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

vs.

CHARLES AND RUTH ADAMS TRUST,

Appellant.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Respondents, John Raymond and Cindy Bradford, Lawrence and Christine Kerbs, and James and Nanci Vanshur (“Vanshurs”) own Lots 1, 2 and 3 of a 4 lot subdivision which has access to Lake Sutherland in Clallam County, Washington through the subdivision’s covenants. The access is over Lot 4 of the subdivision, the portion of which abutting the lake is “...dedicated and reserved...” to the “recreational use” of all four lots. The underlying proceedings became necessary when the owner of Lot 4, Appellant The Charles and Ruth Adams Trust (“Adams”), unilaterally blocked access and use of a dock, asserting that the dock, built touching and lakeward of Lot 4, was owned and for the exclusive use of the owner of Lot 4. Vanshurs brought this action pursuant to the covenants. The trial court, the Honorable William Knebes, Court Commissioner, granted summary judgment in favor of Vanshurs, granting them equal use and enjoyment of the dock off Lot 4. Upon multiple motions for reconsideration and revision, the Honorable George Wood upheld Commissioner Knebes’ decision. Adams was further enjoined from preventing Vanshurs’ use of the dock. Vanshurs also received a judgment for attorneys’ fees incurred in protecting their covenant rights.

II. ISSUES ON APPEAL

1. Did the trial court properly interpret the language of the governing covenants to provide to Vanshurs use and enjoyment of the dock, constructed after the easement was recorded, but both touching the area dedicated for recreational use of all of the owners, and obstructing access to the lake from the dedicated area?
2. Were the covenants ambiguous, so that the court could look at extrinsic evidence to interpret them?
3. Does RCW 79.105.430 have any effect on the rights of the four lot owners to use the dock?
4. Should Vanshur's award of attorneys' fees and costs before the trial court be affirmed, and should Vanshurs be entitled to an award of attorneys' fees and costs on appeal?

III. STATEMENT OF FACTS

When Marguerite Greaves decided to subdivide her piece of property abutting on Lake Sutherland, she was referred to Linda deBord, a long-time real estate agent in Clallam County. CP 169-173. Greaves lived in California. DeBord met her over the telephone. DeBord and Greaves conferred frequently by telephone about the property and approaches to sale of the property. DeBord pointed out that the proposed Lot 4 had a much greater value than the other three lots because of the finger of access to Lake

Sutherland. Access to the lake would greatly enhance the market value of Lots 1, 2, and 3. Greaves was emphatic that all four lot owners were to share the finger of access to Lake Sutherland. CP 170.

DeBord enlisted the assistance of attorney Gary Colley in preparation of the covenants. DeBord acted as go-between from Greaves to Colley regarding the preparation of the covenants. DeBord repeatedly discussed with Colley the intent of Greaves that all lot owners have equal access to the lake through the finger of land off Lot 4.

On April 13, 1987, Marguerite Greaves recorded a Short Plat in the Clallam County Auditor's Office, in Volume 16, Page 11 of Short Plats, subdividing her piece of property into Lots 1, 2, 3, and 4. CP 189. Only Lot 4 had access to the lake. Easements are noted on the Plat for all four lot owners to have access through Lot 4 to Lake Sutherland.

Also on April 13, 1987, Greaves recorded her Declaration of Access and Use Covenants, CP 190, which provide in pertinent part:

1. Access. The road access identified as the Lake Sutherland Road upon the face of the above-described short plat is hereby dedicated as a non-vehicular easement for ingress and egress to the owner of the above parcels to allow for access to that portion of Lot 4 depicted upon said short plat, which is located in the southeast corner of said Lot 4, and is an area approximately 50 feet wide by 423 feet long with its southern terminus being Lake Sutherland . . .

In addition to the above-described access, there is hereby further dedicated a non-vehicular easement for ingress and egress to the owners of the above parcels to allow for access to Lake Sutherland . . .

2. Use. A portion of Lot 4 of the above-described short plat being an area approximately 50 feet wide and 75 feet long and described as the southerly 75 feet of said Lot 4, is hereby reserved and dedicated to the recreational use of all of the owners of the above-described parcels. This dedication is to allow for the joint use and enjoyment of Lake Sutherland and its immediately adjoining upland property.

The covenants do not say anything about the nature of the granted rights at the shoreline.

A predecessor in interest of Adams, Tim Fraser, built the dock extending from this finger of land on Lot 4 out onto the lake. Fraser also owned Lot 2 at the time of construction of the dock. Fraser did not, as asserted in the Adams brief, obtain “a pile driving permit to build the dock.” Fraser stated in his deposition that he thought the guy hired to do the pile driving got the permit. CP 197. The dock constructed by Fraser connected to a deck built along the shoreline and on the dedicated property. CP 221, CP 236-237. As can be seen in these identified photographs, access to the lake could only be over the dock.

The Adams brief makes great effort to emphasize the fact that Fraser asserted that the dock belonged only to him as he was the one who built and paid for it. However, he admitted that the other lot owners regularly used the

dock. CP 199. Fraser also admitted that when he decided to sell the lot, he approved the brochure designed by the real estate agent, Margo Petersen. CP 149-150. The brochure said the dock was a community dock. CP 198.

The statement in Adams' brief that the Vanshur family, owners of Lot 1, used the dock seasonally is not correct. They used it year round. In her Declaration, Nanci Vanshur tells of recreational use of the dock from May to September. Even though the Vanshur family was not swimming and skiing during the winter months, they "... would go out to the dock with coffee and enjoy the view." CP 208. The Vanshur family kept the paddle boat at the dock year round, not from May to September, as asserted in the Adams brief. CP 208.

The documents presented to each of the Respondents Vanshurs at the time of their purchase of their properties all contained references, in differing language, to the existence of the dock, and to its community character. The multiple listing description reviewed by James and Nanci Vanshur states:

DESCRIPTION: This treed parcel is not on the lake. However, it shares 50 feet of lake frontage and a very nice dock with the owners of Lots 2, 3, and 4. CP 212.

The Purchase and Sale Agreement at Page 2 states:

PRELIMINARY TITLE: Buyer has reviewed and approves of the easement to the lake and use of the dock, (Lake Sutherland). CP 215.

The Statutory Warranty Deed dated May 14, 1993, includes the easement and covenants. CP 216.

Kerbs purchased Lot 2 from Baker and Rosencrantz, who had purchased both it and Lot 4 from Fraser, the builder of the dock. The multiple listing description of the lot, relied upon by Kerbs in purchasing Lot 2 says, “This property comes with easement rights for lake access on Lot 4. Per seller, dock is for day use only.” CP 227. It is a reasonable inference that their description of dock use was based upon the brochure used by Frasers to sell their property. An Addendum to Kerbs’ Purchase and Sale Agreement for Lot 2 states, “Buyer acknowledges that a verbal agreement regarding dock use requests usage be for day use only .” CP 229. The term “day use” does not translate to “permissive use.” Kerbs’ Statutory Warranty Deed for Lot 2 includes the covenants giving Kerbs the right to access and use the finger of land on Lot 4 for recreational purposes. CP 228.

The Adams brief mischaracterizes the facts surrounding the purchase of Lot 3 by Bradfords by saying they purchased under the “erroneous representation” that they shared lake frontage, dock and picnic area. There was nothing erroneous about their purchase. Ray Bradford’s Declaration in Support of the successful Motion for Summary Judgment says nothing about erroneous representations. CP 230-232. Bradford does say that the purchase

documents assured them of access and use of the dock. CP 230-232. The listing document attached to his Declaration assured the purchaser of

... 50' shared lake frontage, dock, picnic area and beach.
4 Owners share equally 75' depth. CP 233.

Bradford's Statutory Warranty Deed includes the easement and covenants.

A misrepresentation of the facts which requires correction is the assertion, beginning at page 8 of Adams' brief, that Randy, the Adams' son, was concerned with a constant flood of friends of the Vanshur sons drinking and partying at the dock right after Randy Adams moved in. In his deposition, Adams said that on one occasion right after he moved to Lot 4, he encountered the Vanshur sons driving along the easement to the dock. CP 108, and that there were three other such occasions. CP 112. Adams said absolutely nothing about drinking and parties. CP 112-115.

Adams purchased their property from Baker and Rosencrantz, who had purchased it and Lot 2 from Fraser. At the time of their closing with Baker and Rosencrantz, in May of 2004, Adams executed an addendum to their earnest money agreement with their sellers, stating, CP 131:

Buyer has received and accepts the recorded easement for non-vehicular access for property owners in the Greaves SP Vol. 16 , Pg 11, AFN# 574181, a cross Lot 4 of Greaves SP to Lake Sutherland and the dock.

One year later, Adams recanted the language of the addendum, asserting to the other property owners that he owned the dock exclusively.

In a letter to the Bradfords, he asserted that the

...dock lies outside the boundaries of the easement and is the sole use personal property of the owner of Lot 4. CP 141.

Adams repeated this in a letter of May 31, 2005 to the Vanshurs. CP 138. In direct contravention to the addendum he had signed with them a year earlier, CP 142, he even asserted this position against Baker and Rosencrantz who were then in the middle of selling their Lot 2 to Kerbs. In fact, in his deposition and the letters attached as exhibits, Adams admits that he really wanted to reduce the rights of the other lot owners. Adams repeatedly asserted that only Lot 4 had a right to dock access and that, perhaps, he would work out a license agreement with the other three lot owners.

Randy Adams admits in his deposition that on the same date of the letter to Vanshurs, he arbitrarily blocked the other lot owners from access to the dock and continued to do so by reconfiguring the access to the dock and placing a gate and lock at the entrance to the dock. CP 115.

IV. PROCEDURE

Vanshurs filed their Complaint on May 8, 2006, seeking judicial declaration of their right to access and use the dock at all times; mandatory injunction compelling Adams to permit access to the dock; damages to

restore the dock to its prior condition; and attorneys' fees and costs. CP 246-250.

Adams' Answer filed August 3, 2006 denied all of Vanshur's claims and asserted the affirmative defense that RCW 79.105.430 made Adams, as owner of Lot 4, sole owner and user of the dock. CP 258.

The Adams brief asserts that the issue of prescriptive easement was first raised when the Vanshurs filed their Motion for Summary Judgment. That is not correct. On March 27, 2007, Vanshurs filed a First Amended Complaint adding a cause of action for prescriptive easement. CP 241-245.

Vanshurs filed their Motion for Summary Judgment on July 6, 2007 on all issues raised in the Complaint and First Amended Complaint. CP 174-231.

Adams filed their response to the Motion for Summary Judgment reflecting the items asserted in their answer and alleging that there were factual disputes on the issue of prescriptive easement. CP 159-168.

Adams also filed their Cross Motion for Summary Judgment asking that the Court declare that the covenants permit use of the dock only by the owners of Lot 4. CP 151-152.

Both summary judgment matters were heard by a Commissioner, William Knebes, on August 10, 2007, and the Commissioner's ruling was issued in a Memorandum Opinion of August 23, 2007:

The dock is appurtenant to the land. The covenants envision an equal sharing of the right of access to Lake Sutherland. Each property owner is entitled to full use of the dock that is appurtenant to the land and Defendant's actions in barring Plaintiffs' use of the dock is in direct violation of the covenants and shall be enjoined. Plaintiffs are entitled to reasonable attorney fees for having to enforce the covenants in a court of law. CP 99.

In the Memorandum Opinion, the Commissioner also held that RCW 79.105.430 does not grant ownership of the dock to Adams, owner of Lot 4.

The Commissioner opined that is not the purpose of the statute.

The purpose of the statute is:

. . . to establish the preeminence of the State of Washington as to State-owned shore lands, tidelands or related beds of navigable waters. CP 99.

The Adams brief expresses dismay that the Commissioner did not decide on dock ownership. That is not a correct representation of the Commissioner's Opinion. Basically, the Order says that ownership of the dock does not matter. All four lot owners have equal access and use of the dock.

Adams filed a Request for Revision of the Commissioner's Ruling on August 30, 2007. CP 93-95. Adams also filed a memorandum in support of the request for revision. CP 88-92. This memorandum repeated Adams' assertion that the covenants gave the owner of Lot 4 sole use of the dock and

that the Commissioner had come to an erroneous conclusion that all four lot owners had equal access and use of the dock. CP 90.

Judge Wood issued a Memorandum Opinion and Order re Motion for Revision on September 18, 2007. Judge Wood ruled that the dock impairs the use of the dedicated recreational area, unless it is jointly used. Judge Wood emphasized that the covenants “dedicated” the area for the joint use and enjoyment of all four lot owners. Judge Wood opined,

Joint use cannot occur if one party is allowed to construct improvements and use those improvements to the exclusion of the other lot owners. CP 86.

Also on September 18, 2007, the Court signed its Order Granting Vanshur’s Motion for Summary Judgment and Injunction, stating that the Court considered the Memorandum in Support of the Motion for Summary Judgment, the attached exhibits and the Declarations and attached exhibits of Linda deBord, Gail Frick, Nanci Vanshur, and Margo Petersen. CP 82-84.

Adams filed a Motion to Reconsider or In the Alternative Amend the Judgment on September 27, 2007. CP 79-91. Adams asserted that the issue of dock ownership had not been addressed. CP 72-74. Adams wanted an order amending the Court’s Orders giving Lot 4 ownership of the dock and providing the owners of Lots 1, 2, and 3 “reasonable access”.

At a hearing on October 5, 2007, both parties were ordered to submit, by November 2, 2007, additional briefing on issues not resolved by

Summary Judgment. The Court's Memorandum Opinion of November 29, 2007 states that the Court received requested briefing on certain issues including "... ownership of the dock and reasonable attorney fees." CP 32-35. The Court held, regarding the issue of ownership:

With regard to ownership of the dock it is clearly implied within the covenants that once an improvement is built within the dedicated area it becomes itself a part of the dedicated area, available for the joint use and enjoyment of all the property owners. Once constructed, a party does not control the use of that improvement and it likewise follows that said party does not retain a right to remove it without the consent of all of the property owners. As a part of the dedicated area, ownership and control of the improvement is with all the owners. CP 32-38.

In its Memorandum Opinion of November 29, 2007, the Court held, again, that Vanshurs as the prevailing party were entitled to attorneys' fees and costs. However, the Court said such award would not apply to attorneys' fees on the unresolved issue of prescriptive easement. The Court asked Vanshur's Counsel for a more detailed billing history.

The detailed billing was provided and a Memorandum Opinion was issued March 6, 2008, ordering Adams to pay Vanshur \$16,947.60 in attorneys' fees and costs. CP 28-31.

Finally, on June 20, 2008, a Judgment was entered granting Vanshur equal access and use of the dock, enjoining Adams from preventing that use, and awarding attorneys' fees and costs to Vanshur of \$17,269.00.

V. ARGUMENT OF COUNSEL

A. Summary.

A “rose is a rose is a rose. . .” (from, *Sacred Emily*, Gertrude Stein, 1913)

The Adams brief arguments are an insistence that the issue before the Court is one of easement law, and lengthy arguments about why the limitations of such law do not support the decision of the trial court. These arguments fly in the face of the language of the documents at issue, which denominate themselves as a “Declaration of Access and Use Covenants.” Adams’ arguments ignore, without rebuttal, the covenant language analysis of the documents performed by the trial court. Adams’ brief goes so far in its attempts to say that this case is not a covenant case, that it invents a new term to describe the document at issue: it is a “Use Grant.” To the best of Vanshur’s knowledge, this is not a term of art previously used in Washington law.

This case is, at its base, a case involving interpretation of a set of protective covenants. If analyzed as covenants, as was done by the trial court, the grant of summary judgment and an injunction, and the award of attorneys’ fees to Vanshurs should be affirmed.

B. Standard of Review.

Summary judgment is appropriate where no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. CP 56c. A court of appeal reviews orders on Motion for Summary Judgment “de novo.” *Fawn Lake Maintenance Commission v. Abers*, 2009 WA-0318.492 at Page 2. However, as required by Rule of Appellate Procedure 9.12:

On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.

Therefore, the numerous efforts in the Adams brief to add new evidence and issues on appeal must not be considered.

C. The duty of the courts is to interpret the covenants for the protection of the homeowners’ interests.

The 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. The language of covenants will be given its ordinary and common use “...so as not to defeat its plain and obvious meaning.” *Viking Properties Inc., v. Holm*, 155 Wn. 2d 112, 120, 118 P.3d 322 (2005).

This general rule is modified in situations such as this one, where the original grantor is not a party to the dispute. In *Riss v. Angel*, 131 Wn. 2d 612, 623, 934 P.2d 669 (1996), the Washington State Supreme Court stated that:

The time has come to expressly acknowledge that where construction of restrictive covenants is necessitated by a dispute not involving the maker of the covenants, but rather among homeowners in a subdivision governed by the restrictive covenants, rules of strict construction against the grantor or in favor of the free use of land are inapplicable. The Court's goal is to ascertain and give effect to those purposes intended by the covenants. Ambiguity as to the intent of those establishing the covenants may be resolved by considering evidence of the surrounding circumstances.

Riss v. Angel involved the interpretation of a "consent to build" covenant, requiring any property owner within the subdivision at issue to submit plans to an architectural control committee.

The court re-affirmed this holding in *Viking, supra*:

More recently, however, we have indicated that "...where construction of restrictive covenants is necessitated by a dispute not involving the maker of the covenants, rules of strict construction against the grantor or in favor of the free use of land are inapplicable." *Viking Properties Inc. v. Holm*, 155 Wn. 2d 112, 118 P.3d 322 (2005).

The restrictive covenants in *Viking* had a racial restriction and limited structures to one residence per half acre. All parties and the court agreed the racial restriction was invalid. The State Supreme Court held that the

restriction could be severed from the covenants leaving the structure restriction. The Court held that the goal in interpreting subdivision covenants is to "...ascertain and give effect to those purposes intended by the covenant..." and that "... the court will place special emphasis on arriving at an interpretation that protects the homeowners' collective interests." (*Viking* at page 120).

The covenants at issue in both *Viking* and *Riss* were negative covenants; they prevented a particular owner within a subdivision from doing something with his or her property. The covenant at issue here has two effects: 1) it permits the owners of Lots 1 through 3 of the Greaves short plat to prohibit any uses of a portion of Lot 4 inconsistent with "recreational purposes" by the owner of Lot 4; and 2) it grants an affirmative right to the owners of Lots 1 through 3 to use the same portion of the Adams' property for those "recreational purposes." There are, thus, affirmative and negative covenants involved. See, *Lake Arrowhead Club vs. Looney*, 112 Wn. 2d 288, 770 P.2d 1046 (1989), in which the obligation to pay dues is recognized as an "affirmative covenant." In response to this, Adams' principal argument is that covenants are negative easements. Thus, despite the language of *Viking* and *Riss*, interpreting restrictive covenants, Adams submits that narrow easement rules of construction apply.

For this proposition, that all covenants are only negative easements, Adams cites *City of Olympia vs. Palzer*, 107 Wn.2d 225, 778 P. 2d 135 (1986). This case involved the question of whether a covenant that restricted and required that certain property be maintained as a greenbelt survive a tax foreclosure sale of a portion of a Planned Unit Development. The court found that such restrictive easements constituted “easements” for the purpose of RCW 84.64.460, which states that easements survive a tax sale. This case contains no discussion of the proper method of interpretation of subdivisions (or PUD) covenants.

The question of the proper method of construction of affirmative subdivision covenants was recently addressed by this court, in *Fawn Lake Maintenance Commission v. Abers*, 2009 WA 0318.492 (2009). This case did not involve the construction of a negative restriction on use, as was involved in *Viking Properties, Inc., v. Holm*, 155 Wn.2d 12, 118 P.3d 322 (2005) and *Riss v. Angel*, 131, Wn.2d 612, 934 P.2d 669 (1996), but involved the interpretation of the portion of a subdivision covenant which permitted assessments and their collection. The court interpreted the covenants using the interpretation principles delineated in *Riss vs. Angel, supra*:

Moreover, the covenant’s purposes support the conclusion that the Aberses’ property remains two distinct subdivision lots. When a dispute arises between a land owner and the other owners in a subdivision, courts interpret

covenants in a way that “place[s] ‘special emphasis on arriving at an interpretation that protects the homeowners’ collective interests.’” *Riss*, 131 Wn.2d at 623-24 (quoting *Lakes* at *Mercer Island Homeowners Ass’n v. Witrak*, 61 Wn. App 177, 181, 810 P.2d 27 (1991)). We do not apply rules of strict construction; rather, we determine a covenant’s intent by looking to the purposes sought to be accomplished by it. *Riss*, 131 Wn.2d at 623; *Lakes* 61 Wn. App at 180. Here, the Fawn Lake charges and assessments covenant provides benefits to each and every lot, including roads, a lake, water service, gate security, and other operating expenses. Presumably, the developer intended active use of each lot in the subdivision.

Fawn Lake conclusively rebuts the proposition raised by Adams.

Only one set of principles of interpretation apply to covenants. Adams argues for a different set of principles which apply strict rules of construction and, (apparently, since they do not even cite to *Viking* or *Riss*), there is no other basis. This is not the applicable law.

D. The trial court’s interpretation of the covenants is supported by the language of the documents themselves.

What then, should be made of the covenants that are at issue in this case? The language used leans strongly toward an interpretation that the four lot owners are to have equal rights and access to the lake:

1. Access. In addition to the above described access, there is hereby further dedicated a non-vehicular easement for ingress and egress to the owners of the above parcels to allow for access to Lake Sutherland...

this dedication shall not prevent the owner of Lot 4 from any development upon that above-described portion of Lot 4 as subject to this easement so long as sufficient area is preserved for said non-vehicular access to Lake Sutherland. CP 191.

That language further leans strongly toward an interpretation that the portion of Lot 4 abutting the lake is for the joint recreational use of all lot owners and that improvements on that area must be for the recreational use of all of the lot owners:

2. Use. A portion of Lot 4 of the above-described short plat being an area approximately 50 feet wide and 75 feet long and described as the southerly 75 feet of said Lot 4, is hereby reserved and dedicated to the recreational use of all of the owners of the above-described parcels. This dedication is to allow for the joint use and enjoyment of Lake Sutherland and its immediately adjoining upland property. 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.

The language of the covenants quoted above seems to establish the intent of the Grantor. All four lots were to have equal rights to enjoy the finger of property on Lot 4 that was immediately adjacent to, and provided access to the lake. The dock, of course, was built after the covenants were written. However, the dock is appurtenant to the finger of land off Lot 4, wherein the four lot owners have joint use for recreational purposes. Consistent with the covenants' intent that all four lot owners should be able to use this property

for recreational purposes, any structures constructed on or appurtenant to this area must also be for the use of all four property owners.

Both the Commissioner and the trial judge who issued opinions on this case were impressed by the intent of this language, which they interpreted to give equal rights to recreational use of the property at the end of the finger of Lot 4 and equal rights to any improvements which touched that piece of property.

Adams makes no argument about what Ms. Greaves' intent was, derived from the covenants at issue. Instead, their brief focuses only on how there are really only easements at issue, and these must be narrowly construed. Vanshurs would suggest that this failure to address the grantors' intent recognized that the language of the covenants establishes the intent that there was to be joint use. Only by ignoring that intent, and seeking to interpret the covenants as easements can there be an argument that the covenants do not grant joint use of the recreation area and improvements constructed upon or touching that area.

The argument advanced by Adams goes against the grantor's intent by granting only one of the four lots she created to have a superior right to the other three, such that it, and it alone, had a right to construct a dock or other improvement waterward from the upland piece of property. It is a rather easy inference that such a situation would not enhance the salability of

the grantor's other three lots, and was almost certainly not the grantor's intent.

Finally, the interpretation suggested by Adams violates the specific language of the covenants. They argue for a right, solely in Lot 4, to construct an improvement on or touching the "recreational area", which can be for the recreational benefit of only one of the owners. As currently constructed, the dock touches the piece of property which is reserved for the recreational use of all four owners. To the extent that the owners of Lots 1, 2, and 3 cannot use the portion of the recreational area which is occupied by the access to the dock, they have been denied their rights in the dedicated "recreational" property. Going back in time, the dock as originally constructed touched the "recreational property" for a large piece of its width. This was unilaterally altered by Adams, without participation or acquiescence by Vanshurs. Either as originally constructed, or as it now exists, use of the dock only by Adams would violate the language of the covenants for "joint use."

E. Extrinsic Evidence may be considered, if the covenants are ambiguous.

It is the contention of Vanshurs that the plain language of the covenants is clear. However, if the Court feels that the covenants of the Greaves Short Plat are not clear and unambiguous, the Court may consider

extrinsic evidence of the circumstances surrounding the creation of the covenants. This was the holding of the Washington State Supreme Court regarding another set of restrictive covenants limiting use of a subdivision to residential use. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 974 P.2d 836 (1999). The Court applied the “Berg Rule” of contracts to the interpretation of restrictive covenants. In *Berg v. Hudesman*, 115 Wn. 2d 657, 801 P.2d 222, (1990) the Court held that “...extrinsic evidence may be relevant in discerning that intent, where the evidence gives meaning to words used in the contract.” *Hollis*, at page 692.

In this matter, any doubt as to the intent of the grantor is clarified by the Declaration of Linda deBord. She states the intent of Greaves was that all four lot owners have equal and ongoing use of the finger of land on Lot 4 for recreational purposes and, therefore, the same would apply to any structures added to that finger of land. CP 169-173.

This was the reasoning applied by the Commissioner in considering extrinsic evidence to interpret the Greaves covenants in his opinion of August 23, 2007:

In the present case, the parties are not the makers of the covenants and the Court’s goal is to ascertain and give effect to those purposes intended by the covenants. The Court can look to the evidence of the surrounding circumstances at the time the covenants were created, but the Court agrees with the Riss court that the purpose is to protect the collective interests of the land owners as

opposed to applying rules of construction that favor the free use of land. CP 98-99.

The purpose of the covenants was to enhance the profitability of the entire parcel so that Marguerite Greaves could obtain the most money possible for her investment. To do that, she had to make each of the lots accessible to Lake Sutherland. That is why she dedicated a parcel of property 50 feet wide and 75 feet long at the terminus of Lot 4 to the recreational use of all of the owners of the parcels for the joint use and enjoyment of Lake Sutherland. Had Ms. Greaves wanted to preserve the right to Lot 4 to build a dock on the end of the recreation property, she could have reserved that right. She did not do so and it is clear that she intended the lot owners to work together so that they could jointly use and enjoy Lake Sutherland. CP 98-99.

F. Easement cases are inapplicable.

Adams strenuously and repeatedly asserts that the law regarding easements requires ownership of the dock in them alone. They do this by citing to easement cases, where the scope of the easement is construed so that “a party...is privileged to use another’s land only to the extent expressly allowed by the easement.” Adams brief at 21. The case cited subsequent to this quote deals with relocation of an easement, and asserts that expansion may only occur with the consent of both the servient and dominant estates. *Crisp v. VanLaecken*, 130 Wn. App 320, 122 P.3d 926 (2005). Adams then

argues that restrictive covenants are only negative easements, and only prohibit the actions which an owner of that land can take. Adams brief at 23. This line of argument continues, as Adams cites cases that hold that easements are to be strictly construed, *e.g.*, *Sanders vs. City of Seattle*, 160 Wn.2d 198, 156 P.3d 874 (2007) or cases that hold that easements can only be expanded if such is contemplated by the language of the easement. *Sunnyside Valley Irrigation District vs. Dickie*, 149 Wn.2d. 873, 73 P.2d 369 (2003).

This line of analysis has at least two flaws. First, the language at issue here is not merely a negative covenant. It grants certain enumerated and specific rights to the owners of the other lots in that subdivision, to make active use of a specific piece of property. Adams impliedly recognizes this in their term created for the document, which they describe as a “use grant”. This term means nothing, if it does not acknowledge the grant of an affirmative right, and not the imposition of a mere negative easement.

Secondly, the argument ignores the instructions of *Riss vs. Angel*, *supra*, and its progeny to interpret the subdivision’s covenants in a manner which preserves the rights of all of the property owners within the subdivision.

Adams essentially argues that this court should reject all of the cases cited above which involve the interpretation of covenants, and begin a new

line of case law, in which covenants are interpreted according to rules of interpretation governing easements. They cite no authority for this concept, nor do they assert any policy or argument which would underlie this shift in the method of analysis of covenants.

G. RCW 79.105.430 and WAC 332-30-144 are not determinative of any issue in this case.

RCW 79.105.430 states in pertinent part:

(1) The abutting residential owner to state-owned shorelands, tidelands, or related beds of navigable waters, other than harbor areas, may install and maintain without charge a dock on the areas if used exclusively for private recreational purposes and the area is not subject to prior rights, including any rights of upland, tideland, or shoreland owners as provided in RCW 79.125.460, 79.125.410, and 79.130.010. The dock cannot be sold or leased separately from the upland residence....

(2) The abutting residential owner to state-owned shorelands, tidelands, or related beds of navigable waters, other than harbor areas, may install and maintain a mooring buoy without charge if the boat that is moored to the buoy is used for private recreational purposes....

(a) The buoy must be located as near to the upland residence as practical, consistent with applicable rules and regulations and the provisions of this section. The buoy must be located, or relocated if necessary, to accommodate the use of lawfully installed and maintained buoys.

WAC 332-30-144 states:

Private recreational docks.

(1) **Applicability.** This section implements the permission created by RCW 79.105.430. Private recreational docks, which allows abutting residential

owners, under certain circumstances, to install private recreational docks without charge. The limitations set forth in this section apply only to use of state-owned aquatic lands for private recreational docks under RCW 79.105.430. No restriction or regulation of other types of uses on aquatic lands is provided. This section shall not apply to port districts managing aquatic lands under a management agreement (WAC 332-30-114).

(2) **Eligibility.** The permission shall apply only to the following:

(a) An “abutting residential owner,” being the owner of record of property physically bordering on public aquatic land and either used for single family housing or for a multifamily residence not exceeding four units per lot.

Commissioner Knebes ruled that this statute has nothing to do with the rights of Adams to the dock. As the Commissioner stated:

The purpose of the statute is to establish preeminence of State of Washington as to State owned shore lands, tidelands or related beds of navigable waters. CP 99.

Judge Wood did not address the argument based upon RCW 79.105.430 in either of his memorandum opinions in this case.

Adams argues, without citation of authority, that this statute effectively limits the right to build a dock to him, and him alone. There is no citation to any cases considering this statute, and so its applicability to the present case must be based upon its language alone. There is no evidence in the record to indicate how the State of Washington may interpret this statute, so, again, reference may be had only to the language of the statute and the regulations adopted under it. In that regard, it is of note that the numbers of

users of the dock is not an issue, as the cited WAC permits joint use of a dock by up to four property owners. Vanshurs submit that the purpose of the statute, at least as it relates to the upland property owners, is to assure that those who construct a dock have some connection to the upland property. The State does not wish anyone to be able to build a dock or install a float, even if they do not own any property on the body of water where the improvement is located. This statute, and its regulations, establish, at most, a requirement that the property owners using a dock on waters of the State have some connection to the water they are using. That is present here, as all four property owners are granted rights by the applicable covenants.

H. The Court's remedy is not overly broad.

The covenants at issue provide for their enforcement in paragraph 4 of the document, CP 192.

If the parties hereto or any of them, their heirs, assigns or successors in interest shall violate or attempt to violate any of the covenants and dedications herein contained, it shall be lawful for any other person or persons owning any real property situated in said short plat, or having a vendee's interest under a real estate contract to purchase any real property situated in said short plat to prosecute a proceeding at law or equity against the person or persons violating or attempting to violate any such covenants to prevent him or them from so doing...

The remedy used by the trial court, acting as a court of equity, was to enter an injunction requiring all four property owners to be involved in

decisions concerning the recreational area created by the covenants, including the dock. All four property owners were also to be involved with upkeep and improvement of the recreational area and the dock. The court's duty was to implement its determination of the intent of the covenants. It is to be noted that the dock had, for many years, essentially obstructed all access to the lake except over it. As such, consistent with the covenants, it became an improvement upon the recreational area, for the joint use of all four residents of the subdivision. The court's remedy recognized and implemented this fact.

I. The fee award to Vanshur should not be vacated and Vanshur should also be awarded fees and costs for this appeal.

Adams' brief requests reversal of the award of attorney fees to Vanshurs, in the event that they prevail upon the appeal. Adams brief at 41. Vanshurs agree with this proposition, since the covenants provide for an award of fees to the prevailing party. Should the identity of the prevailing party change, then so, too, would the award of attorneys' fees. Vanshurs submit, however, on the basis of the argument above, that the trial court should be affirmed in all respects, which would continue them as the prevailing party.

J. Vanshurs request an award of fees on appeal.

Since the covenants provide for an award of attorneys' fees, Vanshurs, should they prevail in this appeal, are entitled to an award of fees on appeal. Vanshurs therefore request an award of attorneys' fees on appeal, consistent with RAP 18.1.

VI. CONCLUSION

In concluding their brief, Adams prays that the court hold them the owners of the dock, or, alternatively, that the only remedy available to the trial court upon remand be the ability to order Adams to remove or reduce the size of the dock, so that their solitary use of it does not constitute an obstruction of the recreation easement. In essence, Adams wants to have sole and exclusive control of the existence and use of a dock at the water's edge on Lot 4 of the Greaves short plat. The language of the covenants at issue is simply not material to Adams, because it interferes with their desire for that sole and exclusive control. Many homeowners in subdivisions find themselves dissatisfied, for their own personal reasons, with the language of covenants governing their property. This is obvious from the volume of litigation which exists over the interpretation and implementation of subdivision covenants. However, it is well settled law that covenants are enforceable in equity, to give effect to their provisions for the benefit of all affected homeowners. The dissatisfaction of one homeowner cannot be allowed to destroy the legitimate and enforceable rights of the other

homeowners. The trial court's decisions, which grant equal rights to all of the homeowners in the subdivision, should be affirmed. Similarly, the award of attorneys' fees of the trial court should be affirmed, and Vanshurs should be awarded attorneys' fees on appeal.

Respectfully submitted this 15th day of April, 2009.

CRAIG L. MILLER, P. S.

By:


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Attorney for the Respondents Vanshur

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
BY _____
DEPUTY

CHARLES AND RUTH ADAMS TRUST, NO. 37974-I-II

Appellant,

vs.

DECLARATION OF
MAILING

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,

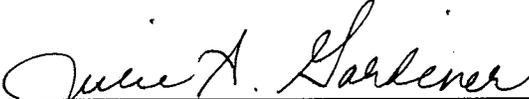
Respondents.

Affiant declares under penalty of perjury of the laws of the State of Washington, that on this day she forwarded by UPS Overnight Delivery in the United States of America, postage paid and properly addressed envelopes containing the Brief of Respondents, and the Declaration of Mailing to the following:

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DATED THIS 15th day of April, 2009.



Julie Anna Gardiner