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No. ~~31~~87-2-II

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

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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DEPUTY

RAINIER VIEW COURT HOMEOWNERS ASSOCIATION, INC.,
Appellant,
v.

EDWARD W. ZENKER and "JANE DOE" ZENKER, and RAINIER
VIEW COURT, LLC,
Respondents.

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

Rainier View Court Homeowners Association, Inc. (“Homeowners”), the Plaintiffs in a Pierce County Superior Court action entitled Rainier Court Homeowners Association, Inc. v. Edward W. Zenker and “Jane Doe” Zenker, Pierce County Superior Court No. 08-2-07179-6, respectfully submit the following Reply Brief in support of their appeal from the trial court’s March 27, 2009 grant of summary judgment in favor of Defendants/Respondents Edward and “Jane Doe” Zenker. The following Reply Brief is in strict reply to the arguments made by Respondents in their Brief of Respondent in this matter, as provided by RAP 10.3(c).

B. REPLY TO RESPONDENTS’ ARGUMENTS

- 1. The Dedications in the Plat of Rainier View Court, a PDD, Phase I, are numerous, but do not convey *any* easement in Tract B. Reading a grant of easement into the plat dedication, in the absence of any language indicating such a grant, violates the Statute of Frauds. The trial court erred to the extent it found a grant of an express easement on the face of the Plat.**

In their Brief, Respondents agree that “an easement is an interest in land and its express creation must comply with the Statute of Frauds,” (Brief of Respondent at 10), and that “the language [creating an express easement] must show an intent to grant with terms that are certain and

definite.” (*Id.*). Respondents then argue that the following language on the face of the recorded Plat of Rainier View Court, Phase I grants an easement in Tract B, in “terms that are certain and definite,” *to the future lot owners of Rainier View Court Phase III*:

We the undersigned owners of the herein described property dedicate these lots to the purchasers thereof.

(Br. of Resp. at 11). The Homeowners agree that an express easement can be created by a dedication on a recorded plat, provided the dedicatory language satisfied the statute of frauds. And a common area such as Tract B is, technically, a “lot” as defined by RCW 58.17.020(9).

The problem with Respondent’s argument is that the language cited above merely dedicates the “lots” in Rainier View Court Phase I, to the purchasers of those lots. Even if common areas such as Tract B are included in this dedication, Note 9 of the Notes and Conditions of Approval on the recorded Plat of Phase I makes it quite clear that the individual lot owners in Phase I, and the HOA, are the only “purchasers” of Tract B:

All lot owners shall have a 1/86th undivided interest¹ in Tracts “B”, “E”, and “F” for taxing purposes, with said tracts to be deeded to the Rainier View Court Homeowners Association for ownership.

¹ Not coincidentally, there are 86 residential lots in Rainier View Court Phase I.

(Plat of Rainier View Court, Exh. A to Declaration of Jill Guernsey, CP at 289; CP at 399). Once again, no mention is made of Phase III, let alone Phase III lot owners. Respondents do not merely argue that a general dedication of “lots” in Phase I “to the purchasers thereof” *implies* a dedication to Phase III lot owners: this would be difficult enough, considering that the Phase I Plat contains not a single mention of Phase III lot owners. Respondents are actually arguing that the general dedication of lots in Phase I “to the purchasers thereof” cited above, “show[s] an intent to grant with terms that are certain and definite.” This can only be described as absurd.

As for Respondents’ argument that “[t]he dedication of a private park in a plat conveys an easement in the park in favor of the dedicator’s intended grantees,” (Br. of Resp. at 11, citing Rainier Avenue Corp. v. Seattle, 80 Wn.2d 362, 366, 494 P.2d 996 (1972)), the language on the face of the Plat regarding Tract B, (see above), clearly shows that the “dedicator’s intended grantees” in this case are the Phase I lot owners, and the HOA. Furthermore, the interest in Tract B dedicated on the face of the Plat is not of an easement, to anyone, but rather of a fee simple, to the Phase I lot owners and the

HOA. Again, this is hardly a “certain and definite” grant of an easement to Phase III lot owners.

2. “The Intended Grantees” are found on the face of the Plat, and nowhere else; there are no intended grantees of an easement in Tract B on the face of the plat, because neither grantees, nor any easement, are ever mentioned.

Respondents’ next assertion, that “the intended grantee of the park dedication was all of the owners of all phases of the Plat of Rainier View Court, and not just the owners of Phase I,” (Br. of Resp. at 12), is simply not based in fact. Again, the Plat does contain an express conveyance of Tract B, in fee simple, but the conveyance is not to “all of the owners of all phases of the Plat.” Again, the actual language, actually found on the Plat, grants “a 1/86th undivided interest” in Tract B to each lot owner for tax purposes, and mandates that Tract B is to be “*deeded* to the Rainier View Court Homeowners Association *for ownership*.” (CP at 289).² The Homeowners Association consists of lot owners in Phases I and II; Phase III is not

² Respondents correctly point out that this provision “addresses only the fee ownership of Tract B; it does not address who has the right to use the park.” (Br. of Resp. at 14). The problem for Respondents is that *nothing* in the Plat “address[es] who has the right to use the park.” *The Plat is completely silent on this point*. Respondents ask the court to add conditions to the Plat that are not there, and which have remained “hidden in the mind of the landowner,” (*see Selby v. Knudson*, 77 Wn. App. 189, 194, 890 P.2d 514 (1995)), until after this litigation began.

included, and the restrictive covenants contain no provision for expanding HOA membership to include Phase III.

Moreover, it would be mathematically impossible to grant “a 1/86th undivided interest” in Tract B to “all of the owners of all of the phases of the Plat,” as Respondents contend has been done. There are a total of 179 residential lots in Phases I and II alone, with an additional 64 multifamily units planned if Phase III is platted. (Br. of Resp. at 2; CP at 279, 290). 243 lot owners *cannot* each hold “a 1/86th undivided interest” in Tract B. The dedication of a 1/86th undivided interest in Tract B only supports an inference that the grant (at least for tax purposes) was made only to Phase I homeowners, and only they were contemplated at the time of the dedication.

The “intended grantees” of fee simple ownership of Tract B are thus clearly shown on the face of the Plat. There are no grantees of any easement on, across, or over Tract B, both because no easement for access to or use of Tract B is mentioned anywhere on the Plat, and because the only grantees of *any* kind of interest in Tract B who are actually mentioned on the Plat, are the HOA and the Phase I Homeowners.

Respondents argue in their Brief that “[i]f the plat is unambiguous, the intent, as expressed in such plat, cannot be contradicted by parol evidence.” (Br. of Resp. at 12, citing Selby v. Knudson, 77 Wn. App. 189, 194, 890 P.2d 514 (1995)). The Homeowners could not agree more. The language from the Plat cited above is clear and unambiguous. The intended grantees are clearly identified.

Respondents next argue (or at least strongly imply) that the language dedicating the purported easement against Tract B is somehow ambiguous: ambiguity in the terms of the dedication would of course allow them to introduce evidence regarding the “surrounding circumstances” (Br. of Resp. at 12) to show what the dedicators, (i.e., they themselves) *really* meant.

First of all, Respondents had just finished arguing, *on the preceding page of their Brief*, that these very same dedications were sufficiently “certain and definite” to satisfy the Statute of Frauds. (Br. of Resp. at 11). They cannot also argue that the very same terms are ambiguous. The Homeowners agree that the dedications are in fact certain and definite – they certainly, definitely, grant Tract B in fee to

the HOA “for ownership.” And they certainly, definitely, *do not* mention any easement to some other party or parties in derogation of the HOA’s ownership interest in Tract B.

Secondly, while Respondents correctly cite the well-known principle that a written instrument is ambiguous “when, on its face, it is susceptible to two meanings, both of which are reasonable,”

Panorama Village Condo. Owners’ Ass’n v. Allstate Ins. Co., 144 Wn.2d 130, 137, 26 P.3d 910 (2001), *quoting American National Fire Ins. Co. v. B&L Trucking & Constr. Co.*, 134 Wn.2d 413, 427-28, 951 P.2d 250 (1998), *we are never told what the two meanings are.*

Instead, we are again told that due to the “surrounding circumstances,” the meaning of the language in question is that an easement against Tract B was dedicated on the Plat to all lot owners of all Phases of Rainier View Court, including Phase III.

“Surrounding circumstances” (i.e., parol evidence) cannot be considered unless Respondents can demonstrate ambiguity. *Selby*, 77 Wn. App. at 194-95. They make no attempt to do so: instead they move right on to the parol evidence.

In this case the dedicatory language is clear, and no ambiguity has been shown. The clear language of the dedication therefore controls. Although Respondents would like us to believe that “[j]ust as important is what is not on the plat,”³ (Br. of Resp. at 14), this argument is used only because what is on the Plat of Rainier View Court is unfavorable to Respondents. Respondents repeatedly ask the court to read things into the Plat that are simply not there, without giving an adequate reason for departing from the clear language of the Plat. The court should decline to do so.

3. Easements and other interests in real property are not conveyed by “surrounding circumstances” – they are conveyed by deed. The trial court erred in considering “surrounding circumstances” where there was no ambiguity on the face of the Plat.

Respondent’s mantra is “the face of the Plat and the surrounding circumstances.” The phrase permeates their briefing. The Homeowners have demonstrated at some length (see above) that “the face of the Plat” contains no grant of any easement, or any other property interest, to Phase

³ This wording is actually used to introduce an argument that, because the Plat does not contain language restricting the use of Tract B, use of Tract B, by everybody, is absolutely unrestricted. (Br. of Resp. at 14). Those of us who own residential real property in fee simple, (as the Homeowners own Tract B), would be quite surprised to learn that we cannot restrict outsiders from using our land. The right to exclude others is a fundamental attribute of property ownership. *Manufactured Housing Cmte. v. State*, 142 Wn.2d 347, 355, 13 P.3d 183 (2000).

III lot owners or residents. All we are left with, then, are the “surrounding circumstances.” Respondents essentially ask the court to decide this appeal based on “surrounding circumstances,” either ignoring the clear language of the Plat, or adding language to it to fit Respondents’ needs.

Here Respondent Zenker contends, essentially, that the Homeowners are obligated to give up whatever property rights Zenker sees fit to sacrifice on their behalf, to ensure that he will be able to secure plat approval from Pierce County for a real estate development he is pursuing for his own financial gain, and that will not become part of the HOA. But Respondents fail to demonstrate why the Homeowners should be asked to give up certain property rights to help Zenker obtain his development permits and make more money. In other words, how Zenker as a developer complies with applicable county Ordinances governing development, or with specific conditions imposed on his development and plat approval by Permitting and Land Services (PALS), is the developer’s problem, not the Homeowners’, and should be dealt with at the developer’s sole expense, not the Homeowners’. After all, the Homeowners will not profit from Zenker’s eventual sale of homes or lots in Phase III – only Zenker will. Respondents’ detailed briefing regarding the various requirements imposed on a developer by the County are irrelevant – the Homeowners have no ownership interest in Zenker’s

business and are under no obligation to assist him in obtaining permits from the County for subsequent developments.

Finally, there is absolutely no reason why the development conditions imposed by the County cannot be fulfilled by Zenker himself, without exacting uncompensated easements from the Homeowners to help him satisfy the County's requirements. For example, if the County requires creation of a park or a certain amount of open space to offset the planned high density of Phase III, there is no reason why Zenker could not have created a second park within Phase III by using one of his building lots. Obviously, it would be better for him to use a lot (Tract B) that already belongs to the HOA in fee to fulfill this requirement. It would also be inequitable and injurious to the Homeowners and the HOA Zenker served as Director until quite recently.

4. **The record clearly shows that the trial court did in fact rely on the decision of the hearing examiner, effectively assigning precedential value to a hearing examiner decision. Because the hearing examiner has no jurisdiction over property disputes between private parties, the trial court erred in relying on his decision.**

Although Respondents maintain that the trial court did not rely on the decision of the Pierce County Hearing Examiner in granting summary judgment in favor of Respondents, (Br. of Resp. at 18), the trial court itself

said otherwise in its oral ruling granting Respondents' motion for summary judgment:

The Hearing Examiner's decision is clear. I don't find that it's ambiguous at all. I find it's very clear. I find that [approval of] the PDD would never have been granted [by Pierce County], except for the use of Tract B by all of the residents.

...

I'm not sure that . . . the HOA would have had any right to exclude the residents of Phase III *because they would be bound by the Hearing Examiner's decision* that the park is there for the purpose of every single resident . . .

(RP at 29:24-30:3; RP at 30:6-17) (emphasis added). The Homeowners respectfully submit that this sounds an awful lot like reliance on the Hearing Examiner's decision. Indeed, Respondents seem to rely on it as well: part of this very same passage is cited by Respondents in their Brief, (Br. of Resp. at 17), once again on the page immediately preceding the page (18) where they reverse course and argue that it is irrelevant.⁴

Respondents' attempt to differentiate *Chausee v. Snohomish County*, 38 Wn. App. 630, 689 p.2d 1084 (1984), arguing that Chausee is inapposite to the facts of this case because "[t]he Hearing Examiner [in that case] did not assert subject matter jurisdiction in [the] matter. The issues decided by the trial court were never submitted to the Hearing

⁴ Pages 3 through 5 of Respondent's Brief contain long passages from the Hearing Examiner's decision, quoted verbatim.

Examiner, considered by the Hearing Examiner, or decided by the Hearing Examiner.” (Br. of Resp. at 19).

These are classic examples of distinctions without a difference. Generally speaking, a “distinction without a difference” exists where the *principle* upon which the case or issue was decided does not depend in any way on the proffered factual distinction. *See, e.g., Besel v. Viking Ins. Co.*, 146 Wn.2d 730, 737, 49 P.3d 887 (2002); *Lough v. John Davis & Co.*, 30 Wn. 204, 209, 70 P. 491 (1902). In *Chausee*, the appellant had introduced evidence at a hearing before the County Hearing Examiner regarding Chausee’s claims of due process violations and equitable estoppel. The Hearing Examiner ultimately declined to rule on the legal and equitable issues raised by the Chausee at the hearing, holding (correctly) that a County Hearing Examiner did not have subject-matter jurisdiction over these claims. *Chausee appealed the Hearing Examiner’s decision declining jurisdiction*, first to the County Council, and then to the Superior Court. *Chausee*, 38 Wn. App. at 633-34. The subject-matter jurisdiction of a County Hearing Examiner was thus placed directly at issue in both cases, and the *principle* upon which *Chausee* was decided applies equally to the case at bar: a County Hearing Examiner whose authority is limited by County ordinance to certain subject-matter areas, has no jurisdiction over general legal issues outside his statutory jurisdiction. The Pierce

County Hearing Examiner has no authority to decide private property issues between individuals, and his decisions may not be relied on, as precedent or otherwise, in resolving such disputes. The trial court erred by relying on the Hearing Examiner's decision in adjudicating a private property dispute between individual litigants.

5. **If Zenker had not believed it necessary to Record an easement for use of the Tract B Park in favor of Phase III owners, he would not have done so. There is no grant of any such easement on the face of the Plat, and the fact that Zenker subsequently felt it necessary to record an instrument expressly granting the easement is the best possible indication of the "grantor's intent."**

Respondents argue that the Homeowners' claims against Zenker for breach of fiduciary duty "are based entirely upon the incorrect assumption that the Grant of Easement recorded by Mr. Zenker granted to Phase 3 some right that Phase 3 did not already have." (Br. of Resp. at 20). Respondents maintain that the Plat of Rainier View Court, Phase I, Recorded in September 2002, already granted an easement to the Tract B park to Phase III residents. (*Id.*).

As we have demonstrated at some length above, the Phase I Plat grants precisely *nothing* in the way of property rights, of *any* kind, to the future homeowners of Phase III, and nothing in the way of an easement onto or across Tract B, for *anyone's* benefit. Because no property right in an easement across Tract B was conveyed by the Plat, we are left only

with the September 11, 2002 written easement. Because this was conveyed by Zenker, who was at the time a Director of the HOA, for no value, to a development company controlled by Zenker, we have prima facie evidence of both fiscal irresponsibility and self-dealing in violation of Zenker's fiduciary duty as an HOA Director.

Finally, it is highly unlikely that Zenker caused his attorney to draft an instrument creating and conveying an express easement to Tract B in favor of the future owners of Phase III, if he did not feel it was necessary to do so at the time – that is, he would not have taken this measure if he believed that the Plat of Phase I already created such an easement. This is perhaps the only reliable indicator we have of the dedicator's actual intent in creating both the Plat, and the lien.

The Homeowners quite certainly have raised a claim for breach of fiduciary duty in this matter, and have shown sufficient evidence to create an issue of material fact. The claim was raised again before the trial court on reconsideration. The trial court erred in ignoring both the claim and the evidence submitted in support thereof.

D. CONCLUSION

For the reasons set forth above, Appellant Rainier View Court Homeowners Association, Inc. asks the Court of Appeals to REVERSE

the trial court's March 27, 2009 Order Granting Defendants' Motion for Summary Judgment, and REMAND this matter back to the trial court for further proceedings in accordance with the opinion of the Court of Appeals.

RESPECTFULLY SUBMITTED this 30th day of October, 2009.

BRITTON LAW OFFICE, P.S.

by:



DAVID J. BRITTON, WSBA# 31748
*Attorney for Appellant Rainier View Court
Homeowners Association, Inc.*

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BY [Signature]
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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RAINIER VEIW COURT
HOMEOWNERS' ASSOCIATION, INC., a
Washington non-profit corporation,

Plaintiff / Appellant,

v.

EDWARD W. ZENKER and "JANE
DOE" ZENKER, individually, and the
marital community they together compose,
and RAINIER VIEW COURT, LLC, a
Washington limited liability company,

Defendants / Respondents.

Trial Court Cause No. 08-2-07179-6
Court of Appeals No. 39187-2-II

**DECLARATION OF SERVICE:
REPLY BRIEF OF APPELLANT**

DAVID J. BRITTON hereby declares as follows:

On the 30th day of October, 2009, I caused to be delivered to the address set forth below,
true and correct copies of the REPLY BRIEF OF APPELLANT in the above-captioned matter,
addressed to the following person(s):

1. James R. Tomlinson
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DECLARATION OF SERVICE
(REPLY BRIEF) - 1

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

SIGNED at Tacoma, Washington this 30th day of October, 2009.



DAVID J. BRITTON