

TABLE OF CONTENTS

ARGUMENT 1

 A. The Millenium Covenant Does Not Affect the Trust
 and Is Not Enforceable by The Trust. 1

 B. The Trust Cannot Raise Claims Not Brought Before
 The Trial Court..... 3

CONCLUSION 7

APPENDIX A – Pierce County Code 18F.10.020

TABLE OF AUTHORITIES

CASES

Demelash v. Ross Stores, Inc.,
105 Wn.App. 508, 527, 20 P.3d 447 (2001)..... 3

Leighton v. Leonard,
22 Wash.App. 136, 139, 589 P.2d 279 (1978)..... 2

M.K.K.I., Inc. v. Krueger,
135 Wn.App. 647, 145 P.3d 411 (2006)..... 6

State v. McFarland,
127 Wash.2d 322, 332-33, 899 P.2d 1251 (1995) 3

Van Buren v. Trumbull,
92 Wash. 691, 159 P. 891 (1916) 6

STATUTES

RCW 58.17 5,6,8

OTHER REFERENCES

Pierce County Code 18F.10.020 5,7

RAP 2.5(a)..... 3

Respondent Barbara Nevins Hall Revocable Living Trust (hereafter referred to as the "Trust") devotes the lion's share of her Brief of Respondent to arguing that substantial evidence supports the Trial Court's determination that the Millenium/Bentley settlement agreement (the "Millenium Covenant") prohibited Bentley from allowing motor vehicles to cross the parties' common property boundary. However, the Trust entirely fails to address the central argument set forth in the Brief of Appellants Richard and Karin Manthei (hereafter referred to as "the Mantheis"), which is that the Trust has no standing to enforce the provisions of the Millenium Covenant. Nor do any of the other arguments advanced by the Trust, including new arguments not made before the Trial Court, have any merit.

ARGUMENT

A. The Millenium Covenant Does Not Affect the Trust and Is Not Enforceable By The Trust.

As the Trust noted in its trial brief and the Mantheis addressed at length in their Appellate Brief, "The prerequisites for a covenant to "run with the land are these: (1) the covenants must have been enforceable between the original parties, such enforceability being a question of contract law except insofar as the covenant must satisfy the statute of frauds; (2) the covenant must

“touch and concern” both the land to be benefitted and the land to be burdened; (3) the covenanting parties must have intended to bind their successors-in-interest; (4) there must be vertical privity of estate, i.e., privity between the original parties to the covenant and the present disputants; and (5) there must be horizontal privity of estate, or privity between the original parties. Leighton v. Leonard, 22 Wash.App. 136, 139, 589 P.2d 279 (1978) (CP 33).

In the present case, the Millenium Covenant does not “touch and concern” the Trust property. The Trust cannot thus meet the second required element set forth above. Nor is there vertical privity of estate between the original parties to the Millenium Covenant and the Trust. The Trust therefore cannot meet the fourth required element set forth above, and thus has no right to enforce the terms of the Millenium Covenant.

The Trust makes absolutely no attempt to address this fatal flaw in its attempt to enforce the Millenium Covenant. Instead, it entirely ignores this flaw and proceeds to devote the majority of its Brief to arguing that the Trial Court was correct in concluding that the Bentleys (the Mantheis’ predecessors in interest) could not accept the grant of the easement from Doremus (the Trust’s predecessor in interest) (hereafter the “Easement”), because it

asserts that doing so was a breach of the terms of the Millenium Covenant.

The Mantheis previously in their Appellant Brief refuted the Trust's assertions that the Bentley's acceptance of the Easement in no way violated the terms of the Millenium Covenant. However, that issue is moot, as the Trust has failed to raise any issue regarding its lack of standing to even raise the issue. As a result, the Trial Court clearly erred in granting judgment in favor of the Trust based on its conclusion that the Easement was in violation of the Millenium Covenant.

B. The Trust Cannot Raise Claims Not Brought Before The Trial Court.

The Trust correctly notes in its Brief that a reviewing court can affirm a trial court's decision on a different basis than that relied upon by the Trial Court. However, Appellate Courts will not consider arguments or theories that were not raised in the trial court. RAP 2.5(a); State v. McFarland, 127 Wash.2d 322, 332-33, 899 P.2d 1251 (1995). See also Demelash v. Ross Stores, Inc., 105 Wn.App. 508, 527, 20 P.3d 447 (2001) (“[Appellate Courts] will generally not consider issues, theories, or arguments that were not raised before the trial court.”)

1. The Trust asserts in its Response Brief that the Easement is void due to a failure of consideration. The Trust never raised this argument before the Trial Court. It did not include this claim in either its complaint (CP 1-19) or its trial brief (CP 96-105), nor did it raise the issue in its oral argument at trial (RP 2-18). This Court should therefore not consider this argument, raised for the first time on appeal.

Nor is there any factual support for this claim. The document creating the Easement specifically states that the Easement was granted “for good and valuable consideration.” (CP 4) While the document does not identify the consideration, there is absolutely no basis for the Trust’s speculation that the consideration was the Bentley’s later grant of an easement to Doremus.

The Bentley easement to Doremus was not granted until four months after the creation of the Easement, and the document creating the later easement, while containing provisions explaining the background of the easement grant, makes absolutely no reference to the previous Easement, either as consideration for the later easement or for any other purpose. (CP 56) There thus is absolutely no factual basis for the Trust’s assertion that there was

any connection between the two easements, and nothing other than the Trust's mere speculation that there was any failure of consideration for the Doremus grant of the Easement to the Bentleys.

2. The Trust also asserts in its Response Brief that the Easement is void because the Bentleys did not amend the previously filed short plat. While the Trust did assert in its trial brief and oral argument before the Trial Court that the short plat was required to be amended under Chapter 58.17 RCW, the Trust for the first time on appeal claims that Pierce County Code 18F.10.020 also required that the short plat be amended in order for the Easement to be valid. This is a new argument, which cannot be considered for the first time on appeal.

In both its trial brief and its Response Brief, the Trust asserts that the Bentleys were required to amend the plat pursuant to Chapter 58.17 RCW, but nowhere does the Trust cite to a particular provision of that Chapter to support the claim that no easement can be valid without amending the short plat. As the Easement simply grants the owners of the Manthei property the right to use a small portion of the Trust property for ingress and egress, in the area around the front of the Manthei home, but in no way changes the

formal access to either the Manthei or Trust property to or from the public road, there simply is no basis for the claim that Chapter 58.17 RCW required an amendment to the plat before the Easement could be valid. The Trust certainly fails to provide any analysis to support its claim to the contrary, which must therefore be rejected by this Court.

Nor is the case cited by the Trust, M.K.K.I., Inc. v. Krueger, 135 Wn.App. 647, 145 P.3d 411 (2006) relevant to the present case. In Krueger, a party sought to extinguish by quit claim deed an easement that was created by and described in a short plat. The Court of Appeals affirmed the Trial Court's determination that the quit claim deed was ineffective to terminate the easement, relying on Van Buren v. Trumbull, 92 Wash. 691, 159 P. 891 (1916) for the proposition that "once the property had been platted, the owners, or their successors, could not defeat the rights of a person who purchased property by reference to the recorded plat." Krueger, 135 Wn.App. at 658. The Court went on to state that, "with limited and specific exceptions, once a private easement is depicted on a short plat, the easement cannot be extinguished without amending the plat document." Id. at 659.

That holding is of no relevance to the present case, where no one attempted to extinguish, or even amend, any easement created by or described in the short plat. Instead, the Easement granted to the Bentleys is in addition to and separate from any rights they enjoyed pursuant to the short plat. The Trust has provided no authority for the proposition that owners of property created by short plat cannot grant additional easements not in existence at the time the short plat was created.

Even if the Trust's argument regarding Pierce County's regulations had been raised before the Trial Court, and was thus properly before this Court, its argument is entirely without merit. PCC 18F.10.020, a copy of which is attached hereto for the Court's convenient reference, was not adopted until 2005. It therefore clearly is of no relevance in determining the validity of an easement created in 1999.

CONCLUSION

The Easement in no way violates the terms of the Millenium Covenant, but even if it did, the Trust has entirely failed to establish that it has any standing to enforce the terms of the Millenium Covenant.

Though the Trust now claims that the Easement should fail for lack of consideration, it failed to raise that issue before the Trial Court. Nor are there any facts to overcome the clear statement in the document creating the Easement that it was granted in consideration of good and valuable consideration, or to support the Trust's mere speculation that the consideration for the Easement was a grant of a different easement, four months later, by the Bentleys to Doremus.

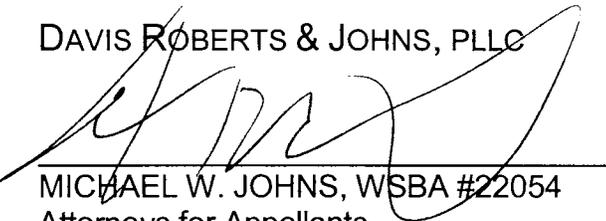
The Trust further fails to explain how the grant of the Easement necessitated an amendment to the previously filed short plat under Chapter 58.17 RCW. The Trust for the first time on appeal claims that the Pierce County Code also required an amendment to the short plat, though the provision it cites to was not adopted until over five years after the easement was created and thus is clearly not applicable.

As the Trust has failed to establish any valid basis to support the Trial Court's judgment in its favor, the Trial Court's judgment must be reversed and this Court should remand this matter to the Trial Court with instructions to vacate the judgment entered in favor of the Trust and to enter judgment in favor of the Mantheis,

dismissing the Trust's claims with prejudice and awarding the Mantheis statutory attorney's fees and costs.

Respectfully submitted this 11th day May, 2010.

DAVIS ROBERTS & JOHNS, PLLC



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CERTIFICATE OF SERVICE

STATE OF WASHINGTON

BY _____

I hereby certify that on the 12th day of May 2010, I caused to be served the foregoing REPLY BRIEF OF APPELLANTS on the following individuals in the manner indicated:

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(X) Via Hand Delivery (ABC Legal Messengers)

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SIGNED this 12th day of May, 2010, at Gig Harbor, Washington.


KRISTINE R. PYLE

APPENDIX A

Chapter 18F.10

GENERAL PROVISIONS

Sections:

- 18F.10.010 Purpose.**
- 18F.10.020 Applicability.**
- 18F.10.040 Administration.**
- 18F.10.050 Application Filing, Review and Final Decision.**
- 18F.10.060 Exemptions and Exclusions.**
- 18F.10.070 Reconsideration and Appeals.**
- 18F.10.080 Fees.**
- 18F.10.090 Compliance and Revocation.**
- 18F.10.100 Innocent Purchasers.**

18F.10.010 Purpose.

The purpose of this Title is to regulate the division of land and to promote the public health, safety and general welfare in accordance with standards established by the State to prevent the overcrowding of land; to lessen congestion in the streets and highways; to promote effective use of land; to promote safe and convenient travel by the public on streets and highways; to provide for adequate light and air; to facilitate adequate provision for water, sewerage, parks and recreation areas, sites for schools and schoolgrounds and other regulatory requirements; to provide for proper ingress and egress; to promote conformance with comprehensive plan policies and development regulations; to adequately provide for housing and commercial needs of the citizens of unincorporated Pierce County; and to require uniform monumenting of land division actions and conveyance by accurate legal description. (Ord. 2005-11s2 § 1 (part), 2005)

18F.10.020 Applicability.

Unless otherwise expressly granted an exemption or exception under this Chapter or otherwise provided by law, any division or redivision of land, boundary line adjustment, amendment or alteration to previously granted approvals covered by this Title shall require County approval and shall comply with the provisions of Chapter 58.17 RCW and this Title. (Ord. 2005-11s2 § 1 (part), 2005)

18F.10.040 Administration.

The primary authority designated to administer this Title is the Department of Planning and Land Services. It is recognized that there are various County departments and other agencies with expertise in certain fields. Departments or agencies with review responsibility shall forward their respective recommendation(s) to the Director or Examiner as appropriate. All approvals, disapprovals, modifications, and recommendations shall be in writing, signed and dated. (Ord. 2005-11s2 § 1 (part), 2005)

18F.10.050 Application Filing, Review and Final Decision.

A. Application Requirements.

- 1. Preliminary Review.** The provisions for conducting a preliminary review of any application filed pursuant to this Title are set forth in Chapter 18.40, Application Filing.