

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY Ca
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NO. 47033-I-II

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

CASEY W. DOUGHERTY,

Appellant/Plaintiff

v.

HOLIDAY HILLS COMMUNITY CLUB, INC.,

Respondent/ Defendant

REPLY BRIEF OF APPELLANT

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I. ARGUMENT IN REPLY

A. THERE IS NO EXPRESS EASEMENT

Respondent continues to argue that it has always had an express easement for “access and utilities” for the benefit of its members over lots 24 and 25 of Alderview estates, even though it concedes that the express easement that it relies on only expressly grants an easement for the benefit of lots 24-27. See Respondent’s brief, page 15, lines 2-11. Interestingly, however, Respondent then attempts to argue some kind of hybrid “express/adverse possession type” theory to support its argument that it has an express legal right to locate the water tank in its original and modified locations, even though Respondent was NOT even a party to any express written easement at all¹. See Id., lines 11-17. Respondent, without citing any supporting legal authority for the same, seems to argue that if a party is benefited by an easement (original lots 24-27), but another party obtains benefit from that easement by “actual use for 30 years” (Holiday Hills), then the later party (Holiday Hills) somehow obtains a

¹ Respondent also states in the body of its brief that it was located within the “F-3 easement”, but then backhandedly admits in a footnote that not all of the original tank was in the easement. This is consistent with Respondent’s willingness to play somewhat “fast and loose” with the facts in this case.

vested express easement. Simply put, there is absolutely no legal authority to support such a contention.

Respondent relies on Moe v. Cagle, 62 Wn.2d 935, 385 P.2d 56 (1963) citing Powell on Real Property, Sec. 415. P.459, to support the contention that it can expand an easement to essentially allow Respondent to place the water tank wherever necessary for its purposes, despite the language of the original easement. Respondent's brief, page 16-18. Respondent's theory is misplaced, however, if for no other reason that Respondent admittedly, is not even an express party to the original easement. One cannot argue that it is entitled to expand an easement that it does not own in the first place.

Respondent clearly has no express easement for the location of the original water tank, as it was never a grantee of the same. Furthermore, even if it had an express easement for its original location, it certainly does not have an express easement for the new tank, which is located not in an "expanded" location, but in a completely different spot on the property, including areas never encompassed by the easement.

Respondent's argument that it somehow has an express easement clearly fails as a matter of law.

B. HOLIDAY HILLS CANNOT ESTABLISH PRESCRIPTIVE EASEMENT RIGHTS

1. Because the location and use of the original tank was permissive, there cannot be adverse possession or prescriptive rights.

Respondent argues that there is “no evidence” of permissive use of the property at issue. This is simply a false statement. As argued in the opening materials which was unrefuted by Respondent, Respondent actually affirmatively admits in its pleadings that its installation of the original tank was permitted by Appellant’s predecessor in interest. (CP 12, line 10), and such an acknowledgement should be treated as a verity on summary judgment². Respondent’s answer, paragraph 1.6, indicates as follows:

“In answer to paragraphs 12, 13, and 14, the answering defendant admits that Mundens were aware of and participated in the construction of the improvements referred to therein, and admits that the defendant does not “own” the property referred therein, but denies that the Defendant’s use of the land in question is “permissive”, and denies all other allegations contained therein.”

(CP 12, line 10) (***Emphasis added***)

² When a pleading or affidavit is properly made and is un-contradicted, it may be taken as true for purposes of passing upon the motion for summary judgment. Leland v. Frogge, 71 Wash. 2d 197, 200, 427 P.2d 724, 727 (1967)

It is unclear how Appellant's predecessor in interest's being aware of, and actually participating in the construction of the water system is not evidence of "permissive use" as alleged in the same paragraph.

Second, despite the fact that Respondent authenticated its own business records which demonstrate that Appellant's predecessor permitted the installation of the tank, the trial court improperly excluded the records. (CP 126, 199³, and Respondent's brief Page 19 citing CP 410).

The company notes, authenticated by Robert White, then a board representative, read as follows:

"Authorization for the placement of this tank in its present location was orally given by the owners of Lot 24. There is no legal easement in place."

(CP 126)

Respondent, through a Declaration of Robert White (CP 409), tries to discount his former statement made in the company records, but that does not affect its admissibility. Appellant cited proper exceptions to the hearsay rules which should have permitted admission of these documents, but Respondent failed to address the issue in its Response brief (See **ER 801(d)(2); 803(a)(5); 803 (a)(6)**). The trial court should not have excluded this evidence as inadmissible hearsay.

³ Respondent also misstates the evidence cited by Appellant in his opening brief, leaving out CP 199 as additional evidence of permissive use.

Finally, Respondent produced evidence contained in the very Variance Hearing Report and Decision which Respondent relies on for support of location of the new water tank to demonstrate that the original tank's location was permissive. In that report, former President Jenkins testified that:

“Holiday Hills Corporation owns no land, and this parcel is the only place that they have permission to place the tank, as one is placed there now”.

(CP 136 -137)

Yet despite the fact that this is testimony offered at an administrative hearing, by an agent of the Respondent, and further despite the fact that Respondent relies heavily on the result of this report to support its basis to have the new tank remain where it is located, Respondent somehow argues that the statement “lacks foundation and was not provided by sworn affidavit”, citing no legal authority to support these contentions. See Respondent's brief, page 20, lines 1-5. Contrary to Respondent's allegation, Mr. Jenkins' testimony is part of a public record, and was sworn before the hearing examiner, as the report indicates on page 3X that:

“Parties wishing to testify were sworn in by the examiner.”

(CP 136)

Mr. Jenkins' testimony regarding Respondent's permissive use of the subject property is not inadmissible hearsay, in light of **ER 801(d)(1)(2)**; and or falls under a hearsay exception, pursuant to **ER 803(a)(1), (5), (6), (8), (14), and (15)**.

Respondent's argument that there is "no evidence" of permissive installation of a large water system on the property owner's property is completely unfounded. In fact, Respondent confusingly contradicts this very argument on Page 23, line 17 of its brief when it says:

"...there is ample evidence here that the prior owners of Dougherty's property (the Mundens) recognized Holiday Hills' [sic] to be the owner of this system – Holiday Hills paid all costs associated with the water system and its maintenance, and collected assessments from its members (including Mundens) for the water service".

How can Respondent argue that its use of the property was hostile and adverse, and at the same time say that Dougherty's predecessor (Mundens) "recognized Holiday Hills as the owner of the system, accepted water from it, and paid assessments"? This is not evidence of anything but permissive use. Clearly this statement makes Appellant's argument for it.

Not only is there "some" evidence, certainly enough to defeat summary judgment on the issue, there is ample compelling evidence of permissive use. Notwithstanding the fact that there is a presumption of

permissive use which Respondent must overcome, Appellant clearly produced ample evidence of permissive use to not only survive summary judgment, but to entitle him to Summary Judgment dismissing Respondent's adverse possession and prescriptive easement claims.

2. There is no basis to award prescriptive rights to the location of the new tank, installed in 2011.

Other than citing a case which sets forth the general elements of a prescriptive easement, Respondent cited absolutely no legal authority for the supposition that in just (3) short years, it obtained prescriptive easement rights which somehow would allow it to install a new water tank on a completely different location on Appellant's property, and maintain a RIPRAP pad, water lines, and access roads to the new location.

Again, like its argument that it had an "express easement" for the location of the original tank, Respondent appears to argue that its prescriptive right to relocate the water tank to a completely different location on Appellant's property is derived from 'expansion' of a historic use of a water tank at a different location. (Respondent's brief, pages 24-28). Respondent's argument fails not only because the original use was permissive⁴, but because the new location is not a mere technical defect

⁴ Interestingly on page 27, line 16 of Respondent's brief, it suggests that "historic business records of Holiday Hills support the contention that there was no permissive use of the property. Yet Respondent argues to exclude some of those "historic business

like the type described in Moe v. Cagle cited above. It is a completely different location, and has only been there since 2011.

C. TRIAL COURT IMPROPERLY DENIED DISMISSAL OF RESPONDENT'S ADVERSE POSSESSION CLAIMS.

For the reasons set forth in its opening brief; the permissive use in the location of the original tank discussed above; and the lack of appropriate duration of the location of the new tank also discussed previously and above, the trial court should have ruled on, and dismissed Respondent's adverse possession claims, and awarded attorney fees, pursuant to **RCW 7.28.083(3)**⁵.

D. RESPONDENT CANNOT SHOW MUTUAL RECOGNITION AND ACQUIESCENCE

In order to show that Respondent is entitled to location of the current new water tank under the theory of Mutual Recognition and Acquiescence, it must demonstrate, at a minimum, the following:

“(1) The line must be certain, well defined, and in some fashion physically designated upon the ground, e.g., by monuments, roadways, fence lines, etc.; (2) in the absence of an express agreement establishing the designated line as the boundary line, the adjoining landowners, or their predecessors in interest, must have in good faith manifested, by their

records” when convenient, trying to exclude the very remarks of Robert White when he acknowledged Munden's oral permission to locate the original tank.

⁵ Respondent in its response brief, page 35, argues another confusing hybrid of express easement/adverse possession theories, and attempts, without legal justification, to explain why the new tank was installed in another location. None of these remarks support a finding of adverse possession.

acts, occupancy, and improvements with respect to their respective properties, a mutual recognition and acceptance of the designated line as the true boundary line; and (3) the requisite mutual recognition and acquiescence in the line must have continued for that period of time required to secure property by adverse possession”.

Lamm v. McTighe, 72 Wash. 2d 587, 592-93, 434 P.2d 565, 569 (1967)

Respondent is not only unable to meet all of these very basic elements; it cannot meet any of them. First of all, there is not a well defined line on the ground recognized by the parties, as Respondent simply installed the new tank in its new location. Second, there has not been an express agreement with respect to the location of the new tank. Finally, the new tank has only been in its current location since 2011, and thus, on that basis alone, Respondent is unable to legitimately argue this legal theory.

There is no such “broadening” or “prenumbra” doctrine available to Respondent on the issue of Mutual Recognition and Acquiescence, as Respondent might suggest. For the reasons set forth in Appellant’s opening brief and the arguments made herein, the trial court should have dismissed (and this court should dismiss) this legal claim.

E. THE TRIAL COURT ERRED IN AWARDING JUDGMENT FOR PAST DUE ASSESSMENTS

1. Increasing of water dues. The HHCC bylaws permit annual water assessments for “maintenance and operation” of the HHCC Water System”. CP 533. This is the section that Respondent argues gives it authority to authorize, by “*simple* majority vote of members present at a meeting”, capital improvements of \$ 343,316.

The Articles of Incorporation provide as follows:

*“The purposes for which this corporation is formed are:
...14. To fix, establish, levy, and collect annually such charges and/or assessments as may be necessary, in the judgment of the board of trustees to carry out any or all of the purposes for which this corporation is formed, **but not in excess of the maximum from time to time fixed in the bylaws**” (Emphasis Added).* (CP 171).

The Bylaws provide as follows with respect to amendment:

“Article VII.

*Amendments to the bylaw may be submitted by any member with voting rights in the HHCCC. These amendments must be submitted in writing to the recording Secretary not less than six weeks prior to the general meeting or at a special election meeting. The by-laws amendment will be mailed to the membership with the general meeting notices and will be voted on at the next general meeting. **A 2/3 majority will be needed to amend the by-laws.**”*

(Emphasis Added) (CP 183)

Articles of Incorporation represent a contract between the corporation and its shareholders (or members), and should be reasonably

interpreted so as to not render meaningful language superfluous. Walden Inv. Grp. v. Pier 67, Inc., 29 Wash. App. 28, 31, 627 P.2d 129, 131 (1981)

The Articles clearly intend for there to be maximum assessment limits set forth in Bylaws, which would mean that the membership would control, by a supermajority, whether the association could incur such a large expense, and charge the membership with such a large increase in their financial responsibility. It is not that this board could not incur a large expense and then assess the membership for the same, it is that maximum limits should have been established, and a supermajority the membership should have voted to exceed that maximum by amending the Bylaws. Interpreting the bylaws to mean that there were no maximum limits set or required, would render Article 14 referenced above “superfluous”, and would give the HHCC Board of directors ‘carte blanche’ to charge the membership whatever it wanted (by simple majority of only a handful of members appearing at a meeting), no matter how extreme, without any future regulation by the membership. That is what occurred in the instant case.

2. Increasing of road dues. The issue of road dues is similar to the water assessment in that a supermajority vote of the membership is required to increase the assessment. However, in the case of the road maintenance dues, a maximum amount was fixed by the bylaws in the

amount of \$24.00 per year, and, contrary to argument by Respondent, that amount is a maximum, as the provision says:

“This fund shall be twenty-four dollars per year”.

(CP 180)

Again, the Respondent interprets its governing documents in a manner which essentially strips the Board of any restriction, by allowing adjustment of this maximum with just a simple majority vote of members present. Road dues should not have been increased to \$45, absent an amendment of the Bylaws.

3. Challenge to assessments not “ultra vires”. As in Hartstene Point Maint. Ass’n v. Diehl, Appellant does not challenge the authority of the corporation, but only the method of exercising it. In other words, Dougherty challenges that the way the control was exercised does not conform to the governing documents of the association. Such challenges are not barred by the ultra vires statute of limitations as argued by Respondent. Hartstene Pointe Maint. Ass'n v. Diehl, 95 Wash. App. 339, 345, 979 P.2d 854, 856 (1999). To hold that such a challenge is barred by ultra vires would be to hold the regularly adopted corporate procedures a nullity, and the corporation would be free to disregard its own governing documents. Id. “In short, the corporate articles and bylaws would be largely meaningless”. Id.

Appellant's challenge to the assessments is not barred by an ultra vires statute of limitations.

F. RESPONDENT CANNOT IGNORE ITS REQUIREMENT TO GIVE NOTICES OF MEETINGS.

Respondent cites Roats v Blakely Island Maintenance Association, 169 Wn.App. 263, 279 P.2d 943 (2012) for the contention that notice requirements of **RCW 64.38.035** can be ignored by a Homeowner's Association, having no effect on any action taken without proper notice. Quite simply this contention is false. Roats does not say what Respondent argues it says⁶.

As the court will see by reading Roats, the court found eighteen (18) violations of the statutory notice requirements, however it did not award any damages or attorney fees. The issue in Roats wasn't that statutory notice doesn't matter. Rather, the issue in Roats is that the notice didn't matter in that case, and on the issues in dispute (in that case).

The issue in Roats was whether or not the Association's original governing documents gave the Association the legal authority to operate a Marina. At the time the association was formed, it already

⁶ As the court can see from a look at **RCW 64.38.035**, the Roats case is not even an annotation, nor does the case from its dicta, express any statement on its effect on the Requirements of **RCW 64.38.035**. Plaintiff's interpretation of this case is both skewed and strained.

was a Marina. The Roats' apparently did not allege at the trial court, or even argue on appeal that an action dispositive to the outcome of the case was taken at one of the meetings where the notice requirements were vitiated by the board⁷. Rather, the Roats argued that meeting notices of random meetings were not observed, and that as a result they deserved damages and award of attorney fees for those violations.

The issue is completely different in the instant case because Appellant in the instant case is challenging acts taken at the meetings where notice was ignored, namely the increasing of dues without a supermajority vote. In the instant case, actions *were* taken at meetings in which there were no advance notices given, not only to Mr. Dougherty, but to the membership at large. Mr. Dougherty is adversely affected by these facts, and the lack of notice impacted specifically, issues that were the subject of this dispute.

Contrary to the authority cited by Respondent, where an association does not follow its governing documents, or where appropriate, statutes as to notice or quorums for a meeting and membership approval of measures taken, it is without power to enforce the same. East Lake Water Ass'n v. Rogers 52 Wash.App. 425, 426,

⁷ (The Roats quite simply were challenging only the Association's original governing authority).

761 P.2d 627, 628 (Wash.App.,1988)24.03.010⁸. Where a meeting of a nonprofit corporation is not in accordance with its bylaws (or other appropriate statutory requirements), its proceedings are void. State Bank v. Wilbur Mission Church, 44 Wash.2d 80, 91–93, 265 P.2d 821 (1954).

Respondent has not demonstrated that it provided notice of meetings consistent with either its governing documents, or according to relevant Washington statutes. The actions taken at these meetings should be voided by the Court.

G. RESPONDENT IS NOT ENTITLED TO ATTORNEY FEES AND COSTS, BUT APPELLANT IS.

Holiday Hills should not be the prevailing party, and thus is not entitled to an award of attorney fees and costs.

On the other hand, should the court determine that Appellant is the prevailing party, attorney fees and costs should be awarded, pursuant to **RCW 4.84.030, RCW 64.38.050 and RAP 14.2**, and related court rules.

II. CONCLUSION

For the above reasons, this court should:

⁸ Interestingly enough in Eastlake, while the court found that notice was not properly given for the meetings, it ruled against the person challenging notice based on equitable estoppel, because he was the former board officer responsible for notice.

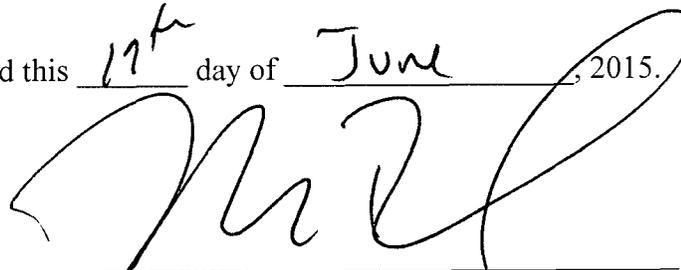
(1) Reverse the trial court's order denying Summary Judgment to Plaintiff, and granting Summary Judgment to Defendant, and should grant Summary Judgment in favor of Plaintiff as follows:

- Dismissing Defendants claims for quiet title generally
- Dismissing Defendant's claim of express easement
- Dismissing Defendant's claims for prescriptive easement and adverse possession as plead in its Answer, Affirmative Defenses and Counterclaims
- Dismissing Defendant's claims for a judgment for damages
- Dismissing Defendant's claims for injunctive relief

(3) Remand the matter back to the trial court for any further proceedings, if necessary, consistent with its opinion.

(4) Award reasonable attorney fees and costs as deemed appropriate by the court.

Respectfully submitted this 17th day of June, 2015.



MARK E. BARDWIL, WSBA #24776
Attorney for Appellant Casey Dougherty

Certificate of Service

On June 19, 2015, the undersigned caused to be sent by first class mail, postage prepaid in the mails of the United States at Tacoma, Washington, and also by electronic mail, a copy of the Reply Brief of Appellant to the following:

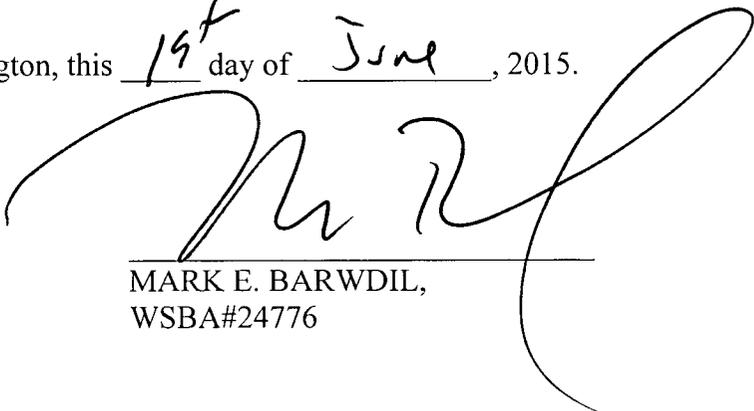
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I certify under penalty of perjury under the laws of the State of Washington that the forgoing is true and correct.

Signed at Tacoma, Washington, this 19th day of June, 2015.



MARK E. BARWDIL,
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