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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 306810
COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

RIVERVIEW COMMUNITY GROUP,

Appellant,

v.

SPENCER & LIVINGSTON, a Washington Partnership, and/or its
successors in-interest, and GEORGE T. and SHEILA LIVINGSTON,
husband and wife, and the marital community composed thereof, and
S.O.S. LLC, a Washington Limited Liability Company, and/or its
successors-in-interest, et al.

Respondents.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Appellant, Riverview Community Group, respectfully submits this consolidated reply to the responsive briefs of Respondents Spencer & Livingston, *et al.*, (“GSL”) and S.O.S. LLC (“SOS”). GSL has incorporated the responsive brief of SOS but makes no argument itself on the issue of equitable servitudes. *GSL Brief @ 22*. For its part, SOS seeks to distance and separate itself from GSL with respect to: a) the existence of a writing supporting imposition of the equitable servitude sought by Riverview; and b) responsibility under the remedy fashioned by the court.

II. APPELLANT’S REPLY

A. Motion to Disregard/Strike – Insufficient Briefing

GSL has responded to Riverview’s opening brief with a lengthy exposition of the standard of review for dismissal for failure to join indispensable parties, with extensive citation to decisional law regarding party indispensability and with a chorus of allegations that all (apparently) Deer Meadows’ and Deer Heights’ landowners are indispensable to this case. *Id. @ 9-19*.

Riverview moves the court to strike or disregard whatever analysis, arguments or citation GSL makes regarding party indispensability because the trial court did not conclude that any landowners were indispensable. GSL’s exposition and analysis is beside the question on this appeal. One

look at the trial court's order on GSL's motion for dismissal pursuant to CR 12(b)(7) discloses that Judge Frazier adjudicated the landowners "necessary" parties only under CR 19(a) – not indispensable under CR 19(b). *CP-212, CP-246*.¹ The court should disregard all reference to GSL's analysis of "indispensable parties".

It is not conceivable that Judge Frazier deemed all Deer Meadows' and Deer Heights' landowners "indispensable" parties to this action -- he didn't conclude that in his Memorandum Decision or Order; he made no findings or conclusion to the effect (as required by CR 19[b]) that a person "cannot be made a party"; he made no consideration of the factors set out under CR 19(b), and simple assignments from Riverview's members only would have readily satisfied whatever concerns he had about affording relief to GSL, not the impossible task of compelling all landowners in the Lake Roosevelt golf-course community to be named and joined outright.

Also, the label of "indispensable" is attached only after deciding whether, in equity and good conscience, [an] action can proceed. *Aungst v. Roberts Construction*, 95 Wn.2d 439, 443, 625 P.2d 167 (1981); *Metro Mortgage and SEC v. Cochran*, 138 Wn. App. 267, 274, 156 P.3d 930 (Div. III, 2007). Before that happens, it must be determined that the person

¹ GSL attempts to confuse the court by repeated characterization of the landowners as "indispensable parties", using that term interchangeably with "necessary parties". By Riverview's count, this shading of terms (say obfuscation) occurred more than a dozen times in GSL's briefing.

joinable “cannot be made a party” *CR 19(b)*. And before that, the person joinable must be identified. *Id.* GSL has not identified the persons it says are “indispensable”. It can’t show they (whomever) cannot be made a party. And, nowhere did Judge Frazier decide, in his good conscience, that this case should not proceed; just the opposite is true. *CP-248 (“plaintiff has a meritorious argument”)*. He wants it to proceed. *CP-249 (review “proceed immediately” for best interest of justice)*.

GSL has not, and cannot, meet its burden of proving indispensability without identifying these persons and showing they cannot be made parties. *Gildon v. Simon Prop., 158 Wn.2d 483, 495, 145 P.3d 1196 (2006) (burden on party raising defense)*. And, the trial court never got to the point of weighing the factors enumerated in *CR 19(b)* for a determination of indispensability. Even GSL’s companion defendant, SOS, recognizes that Judge Frazier never reached or considered party indispensability; its briefing never discusses it, only the provisions of *CR 19(a)* respecting “necessary parties”. *SOS Reply Brief @ 10-14*.

Since the trial court did not characterize any person as indispensable to this case in its orders, and since it did not exclusively require joinder of either Deer Meadows’ landowners or Riverview’s members (instead giving elections for members to assign), GSL’s entire analysis about indispensable parties should be disregarded. It’s simply not defensible. That’s going to

leave for this court's consideration Judge Frazier's characterization of Riverview's members as "necessary" for this litigation, an issue discussed below.

Further, GSL makes a host of contentions in its responsive briefing which are wholly unsupported by citation to authority. These include, for example: (a) That an organizational purpose of investigating a lawsuit does not create a basis for standing, and/or that Riverview's purpose of investigating and bringing a lawsuit is not "legitimate". *GSL Reply Brief @ 18*; (b) Riverview's standing to sue requires a transfer of some property rights by deed or contract from individual landowners. *Id @ 10*; (c) RCW 24.03.035(2) does not confer "universal" standing on non-profit associations. *Id. @ 15*; (d) Organizational standing depends on "actual" standing. *Id. @ 15*; (e) Organizational standing depends on the identification of all individual members. *Id @ 17*; and (f) Only a statutorily-created homeowner's association has standing to sue a developer. *CP-155*.

Variouly, but quickly, none of these contentions or propositions are supported by any authority and should not be considered by this court. *State v. Rolax, 7 Wn. App. 937, 944, 503 P.2d 1093 (1972)*. (*appellate court will not consider an argument on appeal if it is unsupported by authority*); *Milligan v. Thompson, 110 Wn. App. 628, 42 P.3d 418 (2002)*

(need not consider contentions on appeal unsupported by citation to authority); Lewis v. Boehm, 89 Wn. App. 103, 108, 947, P.2d 1265 (Div. III 1997) (declining to consider contentions on appeal which are unsupported by citation to legal authority); State v. Morreira, 107 Wn. App. 450, 456, 27, P.3d 639 (Div. III 2001) (claims or issues unsupported by reasoned argument and citation to authority not considered).

Riverview cannot address arguments on acknowledged questions of law for which no legal authority is presented. The court should disregard all the various unsupported contentions and arguments made by GSL, enumerated above, which fail to meet this important requirement of appeal.

B. Necessary Parties Issue

Since GSL's alleged issue of party indispensability under CR 19(b) is dispelled, Riverview addresses Judge Frazier's express determination that Deer Meadows' landowners were "necessary" parties. *CP-246*. Riverview contends, respectfully, that Judge Frazier erred in conditionally granting GSL's motion to dismiss under CR 12(b)(7). Specifically, Riverview submits Judge Frazier erred when he properly recognized that CR 17 "controls the determination of who may prosecute or defend an action", *CP-208*, but then found that Riverview "does not fall within the category of individuals or entities that have legal authority to act in a representative capacity by statute or under the terms of CR 17(a)." *CP-210*.

As previously briefed, Riverview has statutory standing to prosecute this action. *RCW 24.03.035(2)*; *Appellant's Opening Brief @ 10*. It was error to decide otherwise. Judge Frazier also recognized CR 17(a), “exempts certain categories or persons from the general requirement that the named plaintiff be the real party in interest”, *CP-208*, but didn't recognize Riverview's status under the rule's express exemptions. This was error and an abuse of discretion. A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, and namely, when the court relies on unsupported facts, takes the view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *Gildon v. Simon Prop.*, 158 *Wn.2d* 483, 494, 145 *P.3d* 1196 (2006). If Riverview falls into the exemption provided by CR 17(a), as it asserts, then it may prosecute this action in its own name -- and here are the operative words of the rule -- “without joining with him the party for whose benefit the action is brought”. *CR 17(a)*. The trial court applied the wrong legal standard in concluding Riverview could not bring this action under the rule and in ruling Riverview's members be joined or issue assignments. Interpretation of a court rule is a question of law. *Bus. Servs. of Am. v. Wafertech*, 174 *Wn.2d* 304, 307, 274 *P.3d* 1025; (*En banc April 2012*). The starting point is the rule's plain language and ordinary meaning. *Id.* Here, the plain

language and ordinary meaning of CR 17(a) permits a party authorized by statute to bring suit without joining with him the party for whose benefit the action is brought. That would be the Riverview Community Group, the non-profit association of aggrieved landowners in the Lake Roosevelt golf-course community organized pursuant to state law and expressly empowered to “sue and be sued, complain and defend in its corporate name.” *RCW 24.03.035(2)*.

Moreover, Judge Frazier’s reasoning included his apprehensions that Riverview “would have no right or interest in the servitude created”, *CP-210*, or did not “have any interest that would be materially affected by the outcome of the case.” *Id.* This too, is error and an abuse of discretion. Under Washington’s Non-Profit Association Act, *RCW 24.03.035 et seq.*, Riverview has the power to “purchase, take, receive... or otherwise acquire, own, hold, improve, use and otherwise deal in and with real or personal property or any interest therein, wherever situated.” *RCW 24.03.035(7)*. Riverview has the power to own, hold or deal with, on behalf of its members, any servitude created upon the golf-course property. Judge Frazier, again, applied the wrong legal standard and an erroneous view of the law in determining it couldn’t.

The trial court further erred when it recognized that Riverview was not seeking monetary damages but conditionally dismissed GSL anyway.

Riverview seeks the impression of a servitude upon the golf-course property and injunctive relief preventing its continued waste. No member of Riverview is seeking monetary damages in this case. *CP-208*. No member of Riverview is seeking to have individual contractual rights or obligations determined. No particularized injury is being claimed for each individual landowner. The case is brought into equity. Under the U.S. Supreme Court's holding, and our State Supreme Court, as briefed, Riverview may be "an appropriate representative of its members" and certainly so where seeking only an injunction or some other form of prospective relief which will inure to the benefit of the members of the association. *Hunt v. Washington State Apple Adver. Commission*, 432 U.S. 333, 343, 97 S. Court 2434, 53 L. Ed. 2d 383 (1997); *Firefighters v. Spokane Airport*, 146 Wn.2d 207, 214, 45 P.3d 186 (2002). Consistently, Division I properly ruled that in circumstances where a plaintiff does not seek adjudication of contractual rights or obligations of a non-party, joinder under CR 19 is not required. *Freestone Capital v. MKA Real Estate*, 155 Wn. App. 643, 671 230 P.3d 625 (2010). *And see, Floor Express, Inc. v. Daily*, 138 Wn. App. 750, 756-7, 158 P.3d 619 (2007). (*party landowners had only an incidental interest, not necessary parties*). That is the case here. It was error to compel Riverview members to issue assignments of their damages claims when damages aren't sought. Assignments are not always required to satisfy

standing principles, even when money damages are sought, but they are not required when money damages are not being sought. Neither GSL nor SOS have any authority to the contrary. Judge Frazier erred in ordering assignments.

CR 17(a) is designed to expedite litigation and is not intended to allow technicalities to interfere with litigable merits. *Walter Implement, Inc. v. Focht*, 42 Wn. App. 104, 106, 709 P.2d 1215 (Div. III 1985), citing *Eastlake Construction Company v. Hess*, 33 Wn. App. 378, 381, 655 P.2d 1160 (1982), *aff'd in part*, 102 Wn.2d 30, 686 P.2d 465 (1984). As GSL has no defense on the merits of this case, it must be recognized that it needs to hurl vagrant procedural ordnance at Riverview in an attempt to break the case into hundreds of different pieces, all intended to allow technicalities to interfere with the merits. This is completely antithetical to the ruling in the *Firefighter's* case that the “pragmatic view” be taken. *Firefighters*, *supra* @ 213, 216 (“*associational representation... the most convenient and efficient method of litigating the issues*”). It is also completely antithetical to the purposes of CR 17 (a) in trying to expedite litigation.² This court is now in a perfect position to facilitate a decision on the merits – appropriate facts have been found by the court, reversible error has been clearly illuminated, and the trial court is beseeching this court to conduct review

² Court rules are construed in accord with their purpose. *Bus. Servs. of Am.*, *supra* @ 307.

“immediately”, in order to best serve the interests of justice. CP-248. Absent compelling reasons not to do so, an appellate court should normally exercise its discretion under RAP 1.2(a) and decide a case on its merits. *Knox v. Microsoft*, 92 Wn. App. 204, 213, 962 P.3d 839 (1998), *State v. Olson*, 126 Wn.2d 315, 323, 893 P.2d 629 (1995). There are no reasons not to do so here.

There is nothing ambiguous about the language of CR 17 (a) making exemption for parties who are authorized by statute to sue in their own name “without joining with him the party for whose benefit the action is brought”. All of Riverview’s members are adequately represented by the association itself and it is not necessary, just, speedy or inexpensive to bring them in individually, much less every Deer Meadows’ landowner in the past 25 years. Neither the statute nor the rule admits any exceptions for GSL or SOS and this court should not carve one out for them.³

GSL complains there is going to be a risk of incurring double, multiple, or inconsistent obligations. It wants “protection”. *GSL Reply Brief @13*. This is wrong, too. Without speculating (or conceding) what’s

³ SOS argues, citing *Timberlane v. Brame*, 79 Wn. App. 303, 901 Wn.2d 1074 (1995), that “express authority” is required for an organization to sue to enforce members’ rights. *SOS Response Brief @ 12*. This ignores the statute, the rule and the state supreme court’s *Firefighters’* holding. It also ignores the record of the case demonstrating members’ authority for Riverview to bring the action. See *Declarations of Mark Jensen, Ken Sweeney, James Linville, Howard Walker, et al. (consent to group’s representation of interests)*. CP-88, CP-104, CP-114, CP-131. *Timberlane* is inapposite.

going to happen in the future, it seems highly unlikely that an individual member of Riverview (or a Deer Meadows' landowner) is going to bring a civil suit in equity for the same relief brought here by the association itself. That's a figment of GSL's imagination and they haven't identified any person claiming so. Besides, each member of Riverview is in privity with the association. *Stevens County v. Futurewise*, 146 Wn. App. 493, 503, 192 P.3d 1 (Div. III 2008) (party has privity with non-party if adequately represented in a prior proceeding). GSL may get its *res judicata* "protection" with this privity. Other than that, if Riverview is successful in this action, it seems ludicrous to imagine that any member of the Deer Meadows golf-course community is going to sue GSL for the same relief.

Thus, it cannot be said that GSL has met its burden of proving that it is subject to "substantial risk" of incurring multiple or inconsistent obligations. This eliminates any basis for necessary party joinder under CR 19(a)(2)(B)⁴.

Whatever apprehension Judge Frazier was laboring under about joining the individual members of Riverview must have been contemplated, then, under the provisions of CR 19(a)(1), i.e., that in their absence (or without their assignments) complete relief could not be accorded among

⁴ There is no issue in this case of anybody claiming an interest relating to the subject of the action and being so situated that disposition of the action may impair or impede his/her ability to protect that interest, thus, eliminating the necessity for considering the provisions of CR 19(a)(2)(A). No such claim has been made.

those already parties. This was error. Surely, the trial court, having assumed equitable jurisdiction over this matter, can grant complete relief to the plaintiff, Riverview. And just as surely, it can grant complete relief to GSL and SOS by denying Riverview altogether. Along the spectrum of those two possible outcomes may be a number of others; but all of them are completely within the court's equitable discretion. It can fashion any remedy it sees fit and thereby give complete relief to everybody. This is the purpose of equity; the court has the power to fashion any equitable remedy it sees fit. *Carpenter v. Folkerts*, 29 Wn. App. 73, 627 P.2d 559 (Div. III 1981); *Hornback v. Wentworth*, 152 Wn. App. 504, 132 P.3d 778 (Div. III 2006) (*A court of equity exercises broad discretion in shaping relief; the purpose is to do substantial justice*); *Zastrow v. W.G. Plats, Inc.*, 57 Wn.2d 347, 350, 357 P.2d 162 (1960). Once a court of equity has properly acquired jurisdiction over a controversy, such a court can and will grant whatever relief the facts warrant, including the granting of legal remedies. Significantly, the purpose of this rule is to avoid a needless multiplicity of litigation. *Id.*⁵

There is a distinction to be drawn between the shaping of equitable

⁵ SOS argues complete relief cannot be accorded without joining individual landowners for two reasons – the association has no property interest at stake and judgment would be “ineffectual”. *SOS Response Brief @ 13*. Again, this ignores the statute expressly authorizing Riverview to hold or deal in or with any interest in real property on behalf of its members. *RCW 24.03.035(4)*.

relief to do substantial justice in a case, and these defendants' assertion that they're entitled to "protection", i.e., a litigation guarantee against suits in equity or at law from any or all past and present Deer Meadows' landowners, now or anytime in the future. That simply goes too far and is beyond Riverview's power to effect. GSL and SOS are asking the court to decree that before any Deer Meadows' landowner can sue them/it, or any collection or association of landowners sue them/it, to redress these wrongs, every person who may have had a claim in the past or may have a claim in the future (whether they want to assert it or not) must come forward and participate in this litigation at this time -- or nobody can, forever. GSL and OS want a bullet-proof jacket, but cannot cite, again, to any authority for the proposition of its entitlement to the same. If GSL and SOS could have such immunity from civil liability or prosecution, there wouldn't be any use for an association statute, or a rule whose purpose is to expedite litigation. The joinder rules are not intended to prospectively provide eternal immunity from civil liability.

There is no issue of indispensability on this appeal because the trial court never determined there were indispensable parties somewhere out there. The determination by the trial court that Deer Meadows' landowners should be joined as "necessary" was erroneous because it failed to recognize the plain exemption provided by CR 17(a). GSL has failed in

every way to meet its burden to prove joinder is necessary because there's no "substantial risk" of incurring multiple or inconsistent obligations. It's all illusory and intended to break this litigation into hundreds of different pieces and drag it out for years, or more, delay the proceedings forever, and multiply litigation by orders of magnitude. Finally, only equitable relief is being sought here by Riverview, and the court has complete and broad jurisdiction to fashion any remedy it sees fit to do justice in the case. It can give complete relief to Riverview, and it can give complete relief to GSL and SOS. These are the only defendants who are "already parties" under the rule.

C. Memorandum Decision Issue.

GSL asserts the trial court did not enter findings of fact. *GSL Brief @ 20*. SOS doesn't make this argument, saying instead, Riverview's authority is distinguishable. *SOS Brief @ 9*. Alternatively, GSL argues that if the trial court did enter findings of fact, it never intended to. *GSL Brief @ 21*. These assertions are belied by the court's Memorandum Decision (dated January 5, 2012) filed by the trial court itself, setting out numerically the ten "FACTS" upon which it was making its decision. *CP-206*. The trial court made express reference therein to the other motion in this case; both had been considered at the time of filing. *CP-211*. Clearly, the trial court intended to enter findings of fact – because it did. So, GSL

calls its failure to challenge Judge Frazier's findings "unforeseeable". *GSL brief* @ 21. It contends that findings of fact cannot be made absent a trial. Again, GSL cites to no authority to support this contention. What they really want is to delay justice – exactly what the trial judge doesn't want. *CP-249*.

There's little Riverview needs to do more than point to the facts enumerated in the trial court's Memorandum Decision. But, Riverview asks this court to remember that Judge Frazier's findings of fact and conclusions are those which support the court's orders dismissing all defendants. It's as if to say that GSL and SOS will accept the benefit of the court's dismissal orders, while rejecting the findings and conclusions upon which they are based. That's more than terribly inconsistent; it's completely anomalous. Trial courts regularly determine factual issues before trial. And, appellate courts regularly decide appeals, even in the total absence of findings of fact or conclusions of law where the record "makes clear what questions were decided by the trial court..." *Knudsen v. Patton*, 26 Wn. App. 134, 135, f.n. 1, 611 P.2d 1354 (1980). An appellate court may even look to the superior court's oral decision to understand the court's reasoning. *Grieco v. Wilson*, 144 Wn. App. 865, 184, P.3d 668 (2008); *Goodman v. Darden, et al*, 100 Wn.2d 476;670 P.2d 648 (1983); *Lakewood v. Pierce County*, 144 Wn.2d 118, 30 P.3d 446. If

either GSL or SOS wanted to contest the basis on which they were dismissed from the case, or otherwise had their motions granted, the time to do it would have been on appeal. They didn't. Neither should be heard to complain now that the trial court's reasoning was deficient, but approve of and accept what it did.⁶

Considering the facts found, this court should follow RAP 1.2(a) and its liberal construction mandate to promote justice and facilitate a decision of this case on the merits. It should exercise this authority. *RAP 1.2(a)*. It "normally" does. There are no compelling reasons not to.

D. The Equitable Servitude Issue.

Significantly, SOS doesn't argue with the facts found by the trial court that it, along with the other defendants, did exactly what Riverview complains it did, i.e., developed and sold residential lots in a golf-course

⁶ Once again, respondents cite to no authority for their contention that findings of fact and/or conclusions of law can only be made following a full trial or evidentiary hearing. Trial courts routinely decide questions of fact without trial. *Dutton v. Washington Physicians*, 87 Wn. App. 614, 522, 943 P.2d 298 (1997). (*courts may decide an issue or fact as a matter of law if reasonable minds could not differ*). The record on this appeal substantially supports Judge Frazier's findings; it is replete with evidence that these defendants did exactly what Riverview says they did. No reasonable mind could differ that these defendants sold hundreds of lots in the golf-course community. No reasonable mind could differ that after selling, these defendants shut it down, tried to sell it off and let it go to waste. They admit it themselves, euphemistically calling it the "cessation of operations". No reasonable mind could differ that SOS and GSL were part of a common enterprise – they shared the same people and principals; they shared corporate ownership and management; they shared skills, experience and equipment; their developments shared domestic water systems and roadways. And no reasonable minds could differ that all these defendants represented, during the course of their enterprise, that the golf-course complex would continuously operate. Judge Fraizer has it completely right. These are the facts of the case.

community, and once sold, closed it down and put it up for sale. *CP-206*. SOS doesn't argue that it was not part of a joint venture or common enterprise with GSL and the other defendants; it only argues that "no writing exists establishing an equitable servitude against SOS." *SOS Response Brief @ 18*. It is the absence of a writing "against it", SOS asserts, that makes SOS separate from its companion defendant, GSL. SOS just wants to untie itself from GSL and avoid all liability or responsibility "against it". And to get there, it employs terminology that belies reasoning. SOS argues it can't be bound in this case, because no writing exists in which it promised an "operation and maintenance servitude". *Id. @ 2, passim*. That's wrong. Here's why:

The equitable servitude Riverview seeks is the "legal device" which creates an interest in the real property, the golf-course property itself. *Restatement (Third) of Property, Servitudes §1.1; Country Club v. Hunt, Mfd. Homes, 120 Wn. App. 246, 84 P.3d 295 (2004)*. The servitude arises because all (or any) of the developers of the Lake Roosevelt golf-course community represented that the golf course would operate continuously, because Riverview's members changed their positions on the basis of these representations, and injustice can only be avoided by its establishment. *Restatement (Third) of Property, Servitudes @ 2.10*. But that's all the servitude does; it gets created, it doesn't compel these joint venture

developers to do anything. SOS confuses the legal device which creates the servitude (which runs with the land) with the remedy which cures the injustice. It equates a servitude with the relief, the injunction being sought in the case. The injunction portion of Riverview's relief is different from the servitude; it reaches beyond the burdened land to all those defendants who acted in concert, jointly developed lots in the golf-course community and sold them to the plaintiff's members based on representations of continuous operation. Because SOS was involved, as the trial court found, it will also be bound by the injunctive remedies sought by the plaintiff preventing its waste. Because SOS was a joint venturer in the common enterprise, it does not get excused or exempted from the reach of the injunctive relief. The remedy which cures the injustice runs against all the defendant developers who jointly combined their principals, property, money, equipment, skills, labor and experience. It doesn't matter who owns the property now. An ownership or propriety interest in the subject matter (of a common enterprise) by all parties is not essential. *Paulson v. Pierce Co.*, 99 Wn.2d 645, 655, 664 P.2d 1202 (1983). Basically, SOS and GSL were partners and the trial court so found. CP-206 (*Livingston and the other defendants in this action...*). The trial court considered all this prior to filing its Memorandum Decision, including the plaintiff's briefing and affidavits showing the common enterprise and the commonality of interests.

CP-167-181. It recognized that the “S” in SOS was Charlie Spencer of the predecessor partnership with George Livingston and the owner of defendant Deer Meadows Golf, Inc., which owned and operated the golf course. Mr. Spencer was also owner of the defendant Deer Meadows Development Company. Mr. Spencer was not only an owner of SOS, he was its managing member. *CP-170-189.* He signed the plats for the Deer Heights portion of the development on behalf of SOS. *Id.* He signed the plats for Deer Meadows plats. *Id.* His sales representations of the many hundreds of home sites surrounding the golf course included both Deer Meadows and Deer Heights. *CP 169.* The Deer Heights developments and the Deer Meadows developments were tied together by the same domestic water systems. They were tied together by roadways. They were tied together by brokerage houses, which had exclusive listing agreements for all the lots in both Deer Heights and Deer Meadows, owned by Charlie Spencer. *CP-170.* This substantial evidence, considered by the trial court, was obviously enough for it to conclude that SOS belonged to the venture; that they were part of a common enterprise. Now they should be part of the cure for the injustices perpetrated. There’s really no such thing as an “operation and maintenance servitude”. That’s a contrivance. There’s the servitude, then there’s the injunctive relief – whatever the court fashions in its good conscience.

Despite SOS's protestations, they are not a separate and distinct entity from the old partnership and the other corporate defendants in this case. The trial judge's reasoning and the questions he decided are clear. SOS's argument that relief can be granted only to an "original party" under its "writing-is-required" theory ignores both the error of the theory and SOS's involvement as an original party in every respect – the same principals, the same personalities, the same water systems and roadways, and the same money, equipment, skills, labor and experience, etc.

SOS next relies upon a disclaimer theory and a merger theory to insulate itself. These are "red herrings", argued upon the margins of its self-serving interpretation of its contracts with Riverview's members and public disclosures omitting altogether references to the golf-course complex. They argue without showing any explicit negotiation for any alleged disclaimers or any showing that public policy favors its alleged merger argument.⁷ Besides, equity has the right to step in and prevent the enforcement of any legal right, whenever enforcement of it would be inequitable. *Malo v. Anderson*, 62 Wn.2d 813; *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446 (Div. III 2002); *Proctor v. Huntington*, 169 Wn.2d 491 (2010). In whatever respect SOS claims to distance itself from

⁷ Disclaimers are disfavored and must be specifically bargained – for or they are not valid. *Lyall v. DeYoung*, 42 Wn. App. 252, 257, 711 P.2d 356 (1985); *Hartwig Farms v. Pacific Gamble*, 28 Wn. App. 539, 625 P.2d 171 (Div. III, 1981) (without explicit negotiation and agreement, no disclaimer can be effective).

responsibility, it fails on the facts. In whatever respect SOS claims to distance itself on contract defenses, it fails. Without explicitly bargaining for disclaimers, they're ineffective and SOS admits repeatedly that none of its transaction documents say a word about the golf course. *SOS Reply Brief @ 6-7*. (“no mention” and “no reference” to any golf course). In whatever respect SOS claims equitable servitudes cannot arise by estoppel or implication, it also fails. Its argument that no writing exists “against it” upon which the servitude may be based or that the golf-course property was not in its possession ignores the distinction between the property servitude and the responsibility for preventing its waste, which runs to all responsible defendants, including SOS.

Finally, SOS argues that estoppel may not be used by a plaintiff. *SOS Reply @ 26*. To say that the doctrine of estoppel cannot be used by plaintiff is belied by the cases. Courts recognize a “plaintiff’s claim” of equitable estoppel, *Ecology v. Campbell and Gwinn, LLC*, 146 Wn.2d 1, 43 P.3d 4 (2002), and courts recognize its “proper use” by plaintiffs. *Farm Crop Energy v. Old National Bank*, 38 Wn. App. 50, 54, 685 P.2d 1097 (Div. III 1984). Our courts recognize its use is properly analyzed and determined by attention to its effect, i.e., its use as the preventative or preclusion of one party (or the other’s) ability to assert rights or defenses, which is sensible. *Id.* Our Supreme Court recognizes multiple forms of

estoppel, including estoppel by acquiescence, equitable estoppel, estoppel by recital, statutory estoppel, estoppel by misrepresentation, estoppel *in pais*, promissory estoppel, and others. *Chemical Bank vs. WPPSS*, 102 Wn.2d 874, 901-907, 691 P.2d 524 (1984). Our Supreme Court recognizes that estoppel in American case law is well established, but “unevenly analyzed.” *Id* @ 901. It says estoppel in American case law has been sometimes limited to defensive use and sometimes used affirmatively. *Id*. It says equitable estoppel is, according to the usual statement, a shield, not a sword, but that “not all Washington cases have strictly adhered to this rule”. *Id* @ 902.⁸ Here, SOS and GSL ask this court to give its approbation to conduct reprehended specifically by the American Law Institutes’ Restatement (Third) of Property and by this court’s sister states, and by every principle of Washington’s equitable jurisprudence in order to perpetrate the injustice which has torn the Lake Roosevelt golf-course community apart. They want it done despite courts’ recognition that all forms of estoppel have one purpose, to prevent injustice. Riverview’s assertion of servitude by estoppel is properly applied here to preclude SOS from asserting that a writing is required “against it”, if it was required at all,

⁸ “The multiplicity of these terms has obscured rather than clarified the law...”. *Chemical Bank, supra*, @ 904.

or to assert contract disclaimers, or merger.⁹

Estoppel is one of the “greatest instrumentalities” to promote justice. *State v. NW Magnesite*, 28 Wn.2d 1, 73, 182 P.2d 643 (1947); *Moar v. Beaudry*, 62 Wn.2d 98, 104-5, 381 P.2d 240 (1963). Common honesty dictates these defendants not be permitted to accept the benefits of their hundreds of lot sales in the Lake Roosevelt golf community based on representations, acts, statements, and conduct that the golf course would continue to operate and then shutter it, auction it off, list it for sale and allow it to go to waste and weeds. Common honesty is an object of public policy, estoppel is its greatest instrument. SOS’s argument that estoppel may not be used by the plaintiffs here is incorrect.

III. CONCLUSION

Despite the trial court’s informal and inappropriate use of the word “indispensable” in the body of its Memorandum Decision, nowhere did it say or order that any person was indispensable in this case. It never got to any of the issues to be determined under CR 19(b), like what person it was and why she/he couldn’t be made a party and whether the factors, which must be weighed, actually were. That never happened and GSL can’t make

⁹ It would appear anomalous to argue that an equitable servitude could only arise from an express written instrument. There would be no sense or need to call it “equitable” if a writing was required. If rights in real property could never be obtained and irrevocably fixed and determined in equity, the doctrine of equitable estoppel would also require a writing as it may apply to rights and obligations in property. That’s simply not the case, as discussed in Riverview’s Opening Brief.

it happen by their twisted interchange of terms. At most, the trial court was concerned about just adjudication and held that Riverview members should be brought into this case individually, but this was error. CR 17 (a) is unambiguous in its exemption of non-profit Washington corporations. Riverview is one.

The trial court made findings of fact in its Memorandum Decision. It made them after considering both pre-trial motions. Its reasoning, and the factual issues it decided, are ones upon which reasonable minds in this case could not differ. They were not challenged by these defendants. It's completely anomalous for GSL and SOS to accept the benefits of the trial court's orders and disparage findings and conclusions upon which they were based.

No writing is required at law to create an equitable servitude. Equity has the power. It doesn't matter if SOS is no longer a record title owner or possessor of the golf-course property; it was part of the common enterprise in every respect and is bound by its conduct with GSL in perpetrating the same injustice.

In this case, to prevent or remedy injustice, this court should recognize the integrity of Judge Frazier's factual decisions, (upon which reasonable minds could not differ anyway) recognize the errors of law asserted by Riverview, recognize Riverview's and Judge Frazier's

expression of the manifest need for justice to be done on this appeal, exercise the mandate of RAP 1.2(a), and decide the case on the merits. The court should reverse the summary judgment of dismissal, reverse the conditional order granting CR 12(b)(7), remand to the trial court with instruction to enter judgment in Riverview's favor by estoppel and/or implication, instruct the court to enter an appropriate order of injunctive relief, and to schedule hearings for appointment of receivers. Justice cannot be avoided any other way. And with specific application to the undeniable facts of this case, the Restatement agrees, sister courts agree, and Washington's jurisprudence agrees.

RESPECTFULLY SUBMITTED this 8th day of August, 2012

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