FILED

JUN 15 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 306810

COURT OF APPEALS,
DIVISION THREE
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.

RESPONDENT GEORGE T. AND SHEILA LIVINGSTON'S BRIEF

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TABLE OF CONTENTS

I. Introduction 4

II. Assignments of Error 4

III. Statement of the Case 5

IV. Summary of the Argument 7

V. Argument 9

A. The standard of review for 12(b)(7) dismissals is abuse of discretion 9

B. The Deer Meadows landowners are indispensable parties pursuant to CR 19 10

C. Standing was not an issue on appeal. Regardless, Riverview lacks standing and a lack of standing may be raised at any time 13

1. Riverview has not established that the members have standing to sue in their own right 17

2. Riverview does not have a legitimate organizational purpose with regard to standing 18

3. Riverview cannot bring this lawsuit without the testimony of the Deer Meadows landowners 19

D. The trial court's memorandum decisions and orders do not represent findings of fact, despite Riverview's contention that they do 20

E. GSL incorporates S.O.S.'s response brief and the arguments, contained therein, addressing the trial court's decision to dismiss this matter on summary judgment 22

VI. Conclusion 23

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TABLE OF AUTHORITIES

Cases

Apostolic Faith Mission of Portland, Oregon v. Christian Evangelical Church, 55 Wn.2d 364, 347 P.2d 1059 (1960) 20

Firefighters v. Spokane Airport, 146 Wn.2d 207, 45 P.3d 186 (2002). 16,19

Gildon v. Simon Prop. Group, 158 Wn.2d 483, 145 P.3d 1196 (2006)..... 9

In re Johns-Manville Corp., 99 Wn.2d 193, 660 P.2d 271 (1983)..... 11

National Home Owners Ass'n v. City of Seattle, 82 Wn. App. 640, 919 P.2d 615 (1996) 7, 10

Nolan v. Snohomish County, 59 Wn. App. 876, 802 P.2d 792 (1990), review denied, 116 Wn.2d 1020, 811 P.2d 219 (1991)..... 10

Northwest Independent Forest Mfrs. v. Dept of Labor & Industries, 78 Wn. App. 707, 899 P.2d 6 (1995) 14

Orwick v. Fox, 65 Wn.2d 71, 828 P.2d 12 (1992)..... 11

Rinke v. Johns-Manville Corp., 47 Wn. App. 222, 734 P.2d 533 (1987)... 14

Stevens County v. E. Washington Growth Mgmt. Hearings Bd., 163 Wn. App. 680, 262 P.3d 507 (2011) 14

Veith v. Xterra Wet Suits, LLC, 144 Wn. App. 362, 183 P.3d 334 (2008). 21

Waterford Place Condominium Ass'n v. City of Seattle, 58 Wn. App. 39, 791 P.2d 908 (1990) 7, 10

Statutes

RCW 24.03.035(2) 15

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Court Rules

CR 17 ..... 8, 14, 16
CR 19 ..... 7, 8, 10, 11, 12, 13, 23
CR 52(a)(5) 20, 21

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I. INTRODUCTION

There are two questions of law to be determined on appeal: (1) has Riverview Community Group failed to add indispensable parties under CR 19, and (2) should current Washington law which requires that equitable servitudes be established in writing be overturned, thus recognizing the enforceability of equitable servitudes by implication?

II. ASSIGNMENTS OF ERROR

No. 1: The Appellant argues that the trial court erred in entering its order dated January 31, 2012 conditionally granting the defendants Livingstons' motion to dismiss under CR 12(b)(7).

No. 2: The Appellant argues that the trial court erred in entering its order dated February 13, 2012 summarily dismissing the defendants George T. and Sheila Livingston and defendant S.O.S. LLC.

ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

No. 1: Are the pertinent landowners in the Deer Meadows community indispensable parties that need to be joined to this land use case, pursuant to CR 19?

No. 2: Does Washington recognize equitable servitudes by implication?

No. 3: Does an equitable servitude require a writing?

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III. STATEMENT OF THE CASE

The Appellant, Riverview Community Group (hereinafter "Riverview"), is a non-profit organization that was created on September 20, 2010. *CP 87, CP 103, CP 114, CP 130, CP 148.* Riverview was created for the purpose of investigating and filing this lawsuit. *CP 87, CP 104, CP 114, CP 130, CP 148.*

Riverview filed a Complaint on March 1, 2011, in Lincoln County Superior Court, alleging that multiple defendants were part of a joint venture that promised to operate an 18-hole golf course in perpetuity if individuals unnamed in this lawsuit would agree to purchase adjacent residential lots.[1] *CP 5.* The legal theory proposed by Riverview asserts that the Respondents, George T. and Sheila Livingston (hereinafter "GSL"), Spencer-Livingston, and S.O.S. LLC (hereinafter "S.O.S."), as well as other named defendants, were obligated to operate the golf course, at any financial cost/loss, in order to remain compliant with implied equitable servitudes benefitting the owners of land in the Deer Meadows Community adjacent to the golf course. *CP 12-20.*

Every fact contained in the Complaint is alleged to have occurred prior to Riverview's existence as an organization. *CP 1-12.* Additionally

[1] The Complaint does not provide specific facts or circumstances regarding which defendants and/or agents of defendants allegedly made promises to landowners in the Deer Meadows Community or any other adjacent community. *CP 1-20.*

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relevant, Riverview does not claim to own any land in Lincoln County, Washington. *Id.*

In August 2011, the defendants GSL moved the trial court for dismissal pursuant to CR 12(b)(7) for failure to join indispensable parties. *CP 154.* GSL argued that CR 19 required Riverview to add the pertinent landowners who claim rights under the theory of implied equitable servitude. *CP 157- 58.*

After all parties had the opportunity to brief the court, oral argument was held on August 29, 2011. *RP (August 29, 2011).* The trial court granted the motion and entered its conditional order of dismissal on January 31, 2012. *CP 245-46.* The order stated that "the Deer Meadows landowners are necessary parties for a just adjudication of this action" and the landowners "shall be joined or assignments shall be obtained and filed with the Court within a reasonable period of time." *CP 246.* Riverview failed to join the necessary parties as required by the Court's order and, instead, Riverview decided to appeal the Court's order.

In October 2011, S.O.S. moved the trial court for summary judgment dismissal pursuant to CR 56. *CP 271.* GSL joined the motion. *CP 163-66.* S.O.S. argued that Washington law does not recognize

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implied equitable servitudes and that equitable servitudes require a promise in writing. *CP 277.*

After all parties had the opportunity to brief the court, oral argument was held on December 23, 2011. *RP (December 23, 2011).* The trial court granted the motions of S.O.S and GSL for summary judgment at the time of oral argument and subsequently entered its order of dismissal on February 13, 2012. *RP (December 23, 2011); CP 249.*

IV. SUMMARY OF THE ARGUMENT

The trial court dismissed this "land use" case because Riverview failed to name indispensable parties, the pertinent landowners. Washington courts routinely hold that property owners are necessary and indispensable parties in land use cases, pursuant to CR 19. See, e.g., *National Home Owners Ass'n v. City of Seattle*, 82 Wn. App. 640, 643-44, 919 P.2d 615 (1996); *Waterford Place Condominium Ass'n v. City of Seattle*, 58 Wn. App. 39, 42, 791 P.2d 908 (1990).

Washington courts have a two-part standard for determining whether a party is indispensable, pursuant to CR 19(a). First, the court determines if the party is needed for a just adjudication. Second, the court decides if joining the party is feasible. In this instance, the landowners are

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necessary parties and it is feasible to join them. These landowners are known to Riverview and they are readily ascertainable.

CR 19 analysis intends to afford complete relief to existing parties and to prevent subjecting any party to multiple liability. Here, the defendants are vulnerable to multiple liability if the pertinent landowners are not joined and Riverview failed to offer any reasonable explanation for the failure to name them.

Furthermore, Riverview is not a real party in interest pursuant to CR 17(a) and cannot satisfy the three-prong test for organizational standing. Riverview must prove 1) it's members have standing in their own right, 2) the interests the organization seeks to protect are germane to the organization's purpose, and 3) neither the claims or relief requested require the participation of the organization's members. Riverview cannot establish any of the three prongs: 1) Riverview has made no effort to establish what rights the individual members has against each of the defendants and when those rights came into being; 2) the organizational purpose of investigating and pursuing a lawsuit does not create a basis for standing; and, 3) Riverview has no "personal knowledge" of any of the pertinent facts underlying the alleged equitable servitude claims. The

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individual landowners are the only potential witnesses with personal knowledge of these facts.

V. ARGUMENT

A. The standard of review for 12(b)(7) dismissals is abuse of discretion.

Questions of joinder present mixed issues of law and fact that are reviewed for an abuse of discretion "with the caveat that any legal conclusions underlying the decision are reviewed de novo." *Gildon v. Simon Prop. Group, Inc.*, 158 Wn.2d 483, 493, 145 P.3d 1196 (2006) (discussing the standard of review for a trial court's dismissal under CR 12(b)(7) for failure to join an indispensable party under CR 19).

"A [trial] court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons." *Id.* at 494. This occurs when the court "relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law." *Id.*

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B. The individual landowners are indispensable parties pursuant to CR 19.

Washington courts have consistently held that property owners are necessary and indispensable parties in land use cases. See, e.g., *National Home Owners Ass'n v. City of Seattle*, 82 Wn. App. 640, 643-44, 919 P.2d 615 (1996) (an association's failure to add the actual landowner/developer of property warranted dismissal pursuant to CR 19(a)); *Waterford Place Condominium Ass'n v. City of Seattle*, 58 Wn. App. 39, 42, 791 P.2d 908 (1990) (the owner of the property was deemed an indispensable party in a land use action). The landowner is an indispensable party in land use cases as the person most affected in any review proceeding, "the purpose of which is to invalidate or otherwise affect the use of his property." *Nolan v. Snohomish County*, 59 Wn. App. 876, 880, 802 P.2d 792 (1990), *review denied*, 116 Wn.2d 1020, 811 P.2d 219 (1991). Riverview is not a landowner in Lincoln County and the individual landowners did not assign their respective rights, if any, and they did not transfer any property rights by deed or contract to Riverview. Riverview was created on September 20, 2011, well after the landowners' rights could have matured and Riverview has failed to offer any basis for its right to pursue these claims on behalf of the landowners.

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CR 19 establishes the standard for the Court's analysis of whether a party is an indispensable party. CR 19(a) provides in pertinent part as follows:

> (a) Persons To Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of Jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (A) as a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

The Supreme Court of Washington has established a two part standard for determining whether an indispensable party needs to be joined in a lawsuit, pursuant to CR 19(a), as follows:

> First, the court must determine if the absent person is needed for a just adjudication under CR 19(a), that is, if the absent person is "necessary", and, if so, whether it is feasible to join such person.

In Re Johns-Manville Corp., 99 Wn.2d 193, 197, 660 P.2d 271 (1983). In clarifying the Court's responsibility, the Court of Appeals (Division One) stated in *Orwick v Fox*, 65 Wn.2d 71, 79, 828 P.2d 12 (1992):

> This requires a determination of whether that person's absence from the proceedings prevents the court from

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> affording complete relief to existing parties to the action or whether the person's absence would either impair that person's interest or subjectany existing party to inconsistent or multiple liability. CR 19(a).

The trial court conducted this two-part analysis at the time of GSL's motion to dismiss, as well as taking into consideration whether the absence of the actual landowners, as named parties, would impair the court's ability to provide a just adjudication. *CP 208.* The trial court concluded:

> Clearly, the Deer Meadow landowners are necessary for a just adjudication of this action. The court will be unable to afford relief to the real parties in interest and to Livingston by failing to require the joinder of the landowners, and Livingston would be subjected to the possibility of multiple lawsuits and inconsistent judgments.

CP 212.

Riverview's opening brief failed to address CR 19 and the trial court's order deeming the Deer Meadows landowners as necessary parties. *App. Br. 1-30.* Accordingly, this Court should conclude that Riverview accepts the trial court's legal determination and conclusion. Instead, Riverview focused exclusively on standing and Riverview failed to appreciate that its failure to join indispensable parties is a distinctly different issue. It was the only issue addressed by the Court in its

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Memorandum Decision and it is the only issue on appeal from the trial court's order entered of January 31, 2012. *CP 245-46.*

Riverview's failure to amend its complaint and join the pertinent landowners prevents the trial court from a complete adjudication of the material facts that are asserted in Riverview's complaint. Otherwise, the Respondents have no protection from multiple claims of liability since there is no way to ensure that all potential homeowners that might assert potential claims are represented and the equitable servitude issue is determined on behalf of all interested potential plaintiffs and defendants.[2] Therefore, the trial court's decision to dismiss this matter pursuant to CR 19 was not "manifestly unreasonable," as the abuse of discretion standard of review requires in order to reverse the decision. The trial court's order, entered on January 31, 2012, should be affirmed. *CP 245-46.*

C. Standing was not an issue on appeal. Regardless, Riverview lacks standing and a lack of standing may be raised at any time .

The trial court did not rule on the issue of whether Riverview has standing and, as a result, standing is not an issue on appeal. *CP 209; CP*

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[2] Furthermore, Riverview is not a real party in interest with standing to bring suit. The applicability of the doctrines of res judicata and collateral estoppel to a decision only involving Riverview, and the ability of the Respondents to use it as a shield against subsequent litigation from the landowners, is seriously in question.

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245-49. However, standing has been a part of the conversation in some of the briefing at the trial court level, due to the fact that Riverview's lack thereof highlights the need to join the landowners that represent real parties in interest. *CP 56-59; CP 209; RP 8-11 (August 23, 2011)*. Moreover, standing challenges are jurisdictional and may be raised at any time by a party. *Stevens County v. E. Washington Growth Mgmt. Hearings Bd.*, 163 Wn. App. 680, 686, 262 P.3d 507 (2011). Therefore, GSL will respond to Riverview's standing arguments contained in their opening brief as a means of further stressing the importance of joining the indispensable parties in this case. *App. Br. at 10-13*.

CR 17(a) requires that "[e]very action shall be prosecuted in the name of the real party in interest." This rule addresses the identification of plaintiffs and the plaintiff's entitlement under substantive law to enforce a right. *Northwest Independent Forest Mfrs. V. Dept. of Labor & Industries*, 78 Wn. App. 707, 716, 899 P.2d 6 (1995). The purpose of CR 17(a) is to protect a defendant against a subsequent action by the party actually entitled to recover (if any entitlement to recover exists to begin with), and to insure that the judgment will have its proper res judicata effect. *Rinke v. Johns-Manville Corp.*, 47 Wn. App. 222, 227, 734 P.2d 533 (1987).

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Riverview correctly states that, pursuant to CR 17(a), a party authorized by statute "may sue in his own name without joining with him the party for whose benefit the action is brought." *App. Br. at 10.* However, Riverview does not have statutory standing.

Riverview's misguided claim to statutory standing relies upon RCW 24.03.035(2). RCW 24.03.035(2) authorizes bringing lawsuits in the name of a non-profit organization, but it does not confer universal standing upon any and all non-profits who choose to bring a lawsuit. Otherwise, anyone could simply manufacture standing out of thin air by creating a non-profit organization, regardless of whether the individual members are real parties in interest and regardless of whether the organization has a right to sue or suffered any actual damage.

There are no published decisions in Washington providing a non-profit organization standing purely based upon RCW 24.03.035(2). GSL does not argue that a non-profit organization cannot bring a lawsuit in its own name, as the statute provides. However, the organization must have standing to bring the lawsuit in the first place. In this case, Riverview does not have organizational standing or actual standing.

The trial court decided that Riverview does not have any land ownership interest in the Deer Meadows community and this

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determination was uncontested. Riverview admits that it did not obtain any assignments of rights or interests from the individual landowners. Riverview does not, and cannot, claim that Riverview, the non-profit entity, has or will suffer damages relating to the golf course closure or the failure of the facility to be reopened. CP 209. Riverview's opening brief does not contest any of the above points. *App. Br. at 1-30.* Therefore, in the absence of joinder of the pertinent landowners, the lawsuit lacks a plaintiff with actual standing.

Next, the Appellant argues that it has organizational standing as an attempt to circumvent the requirements of CR 17(a). *App. Br. at 11-13.* This argument fails because Riverview cannot satisfy the three prong test necessary to establish "organizational standing."

An organization has standing to bring an action on behalf of its members if 1) its members would have standing to sue in their own right, 2) the interests the organization seeks to protect are germane to its purpose, and 3) neither the claim asserted nor the relief requested requires the participation of the individual members of the organization in the lawsuit. *Firefighters v. Spokane Airport*, 146 Wn.2d 207, 213-14, 45 P.3d 186 (2002).

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1. Riverview has not established that the members have standing to sue in their own right.

Under the first prong, Riverview failed to prove that each of its members have standing to sue in their own right. Riverview provided five (5) affidavits of Riverview members who are individual landowners in Lincoln County. *App. Br. at 12-13; CP 85-153.* Riverview did not identify the remainder of its members or establish that those remaining members had standing. In fact, it is unclear who the rest of Riverview's members are, where they live, and whether the remaining individual landowners have any potential right to present an equitable servitude claim. Moreover, Riverview made no effort to establish what rights the individual members has against each of the defendants and when those rights came into being. Riverview is not suing one defendant. The individually named defendants in this case are involved for distinctly different reasons. Therefore, Riverview's members may be able to prove facts that might allow standing against one defendant, or set of defendants, but not another but Riverview's brief does not establish the required standing of the individual members.

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2. Riverview does not have a legitimate organizational purpose with regard to standing.

Under the second prong, Riverview does not have a legitimate purpose as an organization with regard to standing. Riverview concedes that it is not a legally formed homeowners association. *RP 12-13 (August 29, 2011); CP 209.* Riverview members' declarations state that the organization was created for the sole purpose of investigating and bringing a lawsuit and that is not a purpose germane to the landownership rights asserted in the Complaint. *CP 87, CP 104, CP 114, CP 130, CP 148.*

Contrary to the aforementioned declarations and the only evidence offered by Riverview below, Riverview argues now in its opening brief that the purpose of the organization is "preventing these defendants from 'luring them into permanent residences' in the golf-course community by false representations...." *App. Br. at 13.* Riverview's new statement highlights exactly the organizational standing problem. Riverview fails to distinguish the individual landowner's rights, which the individual landowners retained, and Riverview's rights, which do not exist without some assignment, transfer or passing of the individual landowner's rights to the entity, which never happened. Riverview's new argument fails to acknowledge this real and important distinction.

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Moreover, it is uncontroverted that every fact contained in the Complaint occurred prior to Riverview's existence as an organization. *CP 1-12.* All of the property was purchased prior to September 20, 2011 when Riverview was organized. *Id.* How can Riverview claim to assert rights that preexisted its existence and attempt to prevent something that had allegedly already occurred before it was created?

3. Riverview cannot bring this lawsuit without the testimony of the individual landowners.

Under the third prong, Riverview cannot bring this lawsuit independently without the participation of the individual landowners. The potential "claims," "relief," and proof are dependent solely upon facts known to the real parties in interest, the individual landowners. Riverview has no "personal knowledge" and cannot testify to the underlying facts in this case because the facts occurred before Riverview existed. *CP 1-12.*

Riverview argues that the participation of the individual landowners is unnecessary because Riverview does not seek monetary damages. *App. Br. at 13.* This argument ignores the organizational standing case law and has no legal support. Riverview cites *Firefighters v. Spokane Airport*, 146 Wn.2d 207, 45 P.3d 186 (2002). *Firefighters* adopted the three-prong test for organizational standing and it required

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proving that "*neither the claim asserted* nor relief requested" requires member participation. *Firefighters*, 146 Wn.2d at 214 (emphasis added).

The *claims* in this case are the enforcement of each individual landowner's alleged right to enforce an equitable servitude. In order to establish the prima facie case of each claim, the individual landowner will have to testify to the facts and circumstances supporting their respective claim. Therefore, Riverview cannot satisfy the third prong.

Riverview has not cited a single case in Washington where an organization successfully established standing under similar conditions. Riverview is not a real party in interest, but Riverview is the only party making claims in this case. The landowners are unnamed, and the fact that they claim to be members of Riverview does not create standing for the organization. *See Apostolic Faith Mission of Portland, Oregon v. Christian Evangelical Church*, 55 Wn.2d 364, 367-68, 347 P.2d 1059 (1960) (stating that a non-profit organization is an entity both separate and distinct from its members).

D. The trial court's memorandum decisions and orders do not represent findings of fact, despite Riverview's contention that they do.

The trial court did not enter findings of fact. CR 52(a)(5) states "[f]indings of fact and conclusions of law are not necessary... [o]n

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decisions of motions under rules 12 or 56...." The two orders of dismissal on appeal reflect the court's decisions on motions pursuant to rules 12 and 56 respectively, and therefore the trial court did not need to enter findings of fact and the court did not do so. *CP 245, CP 247.*

Moreover, Riverview cannot, and does not, cite to the court record that allegedly supports its contention that the trial court *intended* to enter findings of fact and conclusions of law. *App. Br. at 1-30.* At the presentment hearing held on January 30, 2012, Judge Frasier stated clearly and equivocally that he had no intention of entering formal findings of fact.[3] *See attached Declaration of David A. Kulisch.*

Riverview's opening brief inaccurately states that the trial court's Memorandum Decision filed on January 3, 2012 established findings of fact in this matter. *App. Br. at 6, FN 1.* The case relied upon by Riverview, *Veith v. Xterra Wet Suits, LLC, 144 Wn. App. 362 (2008)*, stated that a memorandum opinion issued after an evidentiary hearing is sufficient "to fulfill the *requirement* for findings of fact." *Veith*, 144 Wn. App. at 365 (emphasis added).

[3] It was unforeseeable to the Respondents that Riverview would contend that formal findings of fact were entered by the trial court. Riverview did not order a verbatim transcript of proceedings for the presentment hearing on January 30, 2012 when this issue was resolved by the court. As a result, the Declaration of David A. Kulisch will support our argument.

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However, as previously mentioned, the trial court did not enter findings of fact when it decided the Rules 12 and 56 motions, and the trial court was not required to do so. CR 52(a)(5). Therefore, *Veith* is not on point and it is distinguishable from the matter before this Court.

There are no undisputed facts in this case. The parties have not engaged in any meaningful discovery at this point. In fact, GSL has not even answered the complaint because their motion was granted. It is important to note this when reviewing Riverview's opening brief because the "Statement of the Case" contained therein asserts that the facts in this case are entirely established, *App. Br. at 5-6*, and that is simply not accurate.

E. GSL incorporates S.O.S.'s response brief and the arguments, contained therein, addressing the trial court's decision to dismiss this matter on summary judgment.

To prevent the Court from reading the same arguments twice, GSL incorporates the arguments contained in S.O.S.'s response brief addressing Washington law pertaining to equitable servitudes. The trial court's order granting summary judgment dismissal of all claims in this matter, entered on February 13, 2012, should be affirmed. *CP 247-49*.

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VI. CONCLUSION

The current configuration of this lawsuit does not provide the defendants with the shield of res judicata or collateral estoppel. There is nothing to prevent the defendants from succeeding against Riverview and subsequently having to defend additional litigation waged by the individual landowners.

However, if Riverview is successful, individual landowners that are not joined in the present action may use the sword of res judicata or collateral estoppel in future actions while the defendants are prevented from using the sword or res judicata or collateral estoppel to defeat the claims of the latecomer real parties in interest. This scenario does not reflect the "just adjudication" contemplated by Washington courts in CR 19 and its analysis.

Riverview had several options available for bringing this lawsuit. Riverview could have simply obtained assignments of interest from the pertinent landowners but Riverview failed to do so. Riverview could have joined the landowners as plaintiffs and the trial court ordered it to do so but it ignored the trial court's order and filed this appeal. Riverview could have brought a class action lawsuit pursuant to CR 23 but it failed to do

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so. Not one of these viable options were pursued so the indispensable plaintiffs were never joined.

Moreover, Riverview lacks actual standing. Riverview lacks organizational standing and it has no right or ability to pursue this appeal. For the foregoing reasons, GSL requests this court affirm both of the trial court's orders, entered January 31, 2012 and February 13, 2012 respectively, and dismiss this case with prejudice.

DATED this 15th day of June, 2012.

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By: _____

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be served a true and correct copy of Respondent George T. and Sheila Livingston's Brief on the 15th day of June, 2012, addressed to the following:

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