

FILED

JUN 18 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 306810-III

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

RIVERVIEW COMMUNITY GROUP, a Washington nonprofit
corporation,

Appellant,

v.

SPENCER & LIVINGSTON, a Washington partnership, and/or its
successors-in-interest; 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

Respondents

BRIEF OF RESPONDENT, S.O.S. LLC

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I. INTRODUCTION

Appellant Riverview Community Group (“Riverview”) filed suit in Lincoln County Superior Court seeking an order that establishes a servitude to operate and maintain a golf course to benefit property owners that purchased lots in one of two subdivisions in Davenport, Washington: Deer Meadows and Deer Heights. Respondent S.O.S. LLC (“SOS”) platted and subdivided the Deer Heights subdivision. Following dispositive motions brought by SOS and respondents George T. and Sheila Livingston (“Livingstons”), Riverview’s claims were dismissed by the trial court. This Court should affirm on procedural and substantive grounds.

As a procedural matter, Riverview does not have standing to enforce its members’ property rights. Without the actual property owners’ participation in the lawsuit, Riverview has neither included the real parties in interest pursuant to CR 17 nor joined necessary parties pursuant to CR 19.

Riverview’s suit seeks injunctive relief that includes an order compelling SOS to operate and maintain a golf course. The golf course is located adjacent to the Deer Meadows subdivision. Deer Meadows is a different subdivision from SOS’s subdivision: Deer Meadows was platted

by a different entity, sold by a different entity, and located in a different area. Fatal to Riverview's case is its inability to produce a single writing that establishes an operation and maintenance servitude against SOS. Riverview instead asks this Court to craft new law holding that an operation and maintenance servitude can be established *without* a writing. This Court should reject Riverview's invitation because it is contrary to well-established Washington law.

Finally, even if this Court determines a servitude *could* be established without a writing, SOS should nonetheless be dismissed from the case because Riverview cannot establish an operation and maintenance servitude against SOS without relying upon inadmissible evidence that either is contrary to the written word or barred by the dead man's statute.

II. RESTATEMENT OF THE CASE

A. Deer Meadows

This case concerns two subdivisions located in Lincoln County: Deer Meadows and Deer Heights. CP 2. Deer Meadows is located south of the Deer Heights subdivision and is adjacent to an 18-hole golf course

commonly known as the “Deer Meadows Golf Course Complex.” *Id.* at 4, 8, and 33; *see also*, CP 291.¹

The Deer Meadows subdivision consists of three plats. The first plat was finalized and recorded on October 16, 1990 and then re-platted and recorded on November 2, 1992. CP 4-5. The second plat was finalized and recorded on November 2, 1992 and the third was finalized and recorded on July 17, 1995. *Id.* 6-7. The golf course is bordered in all directions by the Deer Meadows plats. CP 33, 291. Deer Meadows was developed by a now inactive partnership, respondent Spencer & Livingston. *Id.* at 2. Spencer and Livingston’s interest in the golf course was succeeded by respondent George T. and Sheila Livingston, Deer Meadow Development, Inc., and/or Deer Meadows, Inc. *Id.* at 2-3. Riverview’s complaint made no allegation that respondent SOS has – or ever had – any ownership interest in the golf course. *See* CP 1-39.

¹ SOS submitted a Google Earth map of the Deer Meadows and Deer Heights subdivisions. CP 291. The subject golf course is located south of and adjacent to the Deer Meadows subdivision. *Id.* Deer Heights is located north of Deer Meadows and does not border the golf course in any respect. *Id.* Riverview’s claim that the court found that all defendants developed and sold lots in the Deer Meadows Community, Opening Brief of Appellant at 5, flagrantly misrepresents both Riverview’s complaint, CP 11, and undisputed facts submitted by SOS establishing that separate and distinct entities filed plats for each of the two subdivisions and then sold lots from the subdivision that each entity owned and developed. *See* CP 378-382 (Deer Heights plats); 383-402 (Deer Heights Public Offering Statements); 403-29 (Deer Heights declarations).

According to the complaint, over the course of marketing and selling lots in Deer Meadows, the Spencer & Livingston partnership, successors-in-interest, and agents thereof, represented to purchasers of lots in Deer Meadows that a golf course would be constructed and operated adjacent to the Deer Meadows subdivision. CP 5. The golf course was partially opened in 1994 by either the Spencer & Livingston partnership or Deer Meadows, Inc. *Id.* at 3, 7. Deer Meadows Golf, Inc. assumed ownership of the golf course in 1995 and remains the current owner. *Id.*

By 1998, the golf course was completed and fully operational. CP 8. The completed course included 18 fairways, greens, and tee-boxes, sand traps, trees, shrubs, ponds, cart paths, an irrigation system, driving range, meeting rooms, pro shop, service buildings, a motel, restaurant, lounge, and bar. *Id.* The golf course operated for nearly a decade, but began falling into disrepair in 2007, and ceased to operate in 2009. *Id.* at 11-12.

B. Deer Heights

The Deer Heights subdivision consists of three plats that are located north of the Deer Heights subdivision. *See* CP 291. None of the Deer Heights plats border the golf course. *Id.*; 378-382. The first plat of the Deer Heights subdivision was finalized and recorded by SOS on

September 17, 1998. CP 9. The second and third plats were finalized and recorded by SOS on August 21, 2000 and September 19, 2003, respectively. *Id.* at 10; *see also*, CP 378-382.

To encourage potential purchasers, SOS offered to give free one-year memberships to the golf course when a lot was purchased in one of the Deer Heights subdivisions. CP 9. Marketing materials utilized by real estate agents, such as Turf Realty, state “One Yr. Family Golf Membership With Purchase[.]” CP 293. A one-year free membership was also purportedly “written into the purchase and sale agreement of a Deer Heights purchaser.” CP 301. Riverview makes no claim that SOS failed to fulfill any promise to provide a purchaser with a free membership to the golf course. CP 1-39.

While Riverview claims that SOS represented to purchasers that the golf course would continue to operate as a permanent fixture of the community, CP 10, no writing exists to support Riverview’s claim that SOS agreed or even offered to assume responsibility for perpetually operating and maintaining the golf course.² None of the three Deer Heights plats contain any reference to a golf course operation or

² Riverview’s complaint does not even allege that any writing exists memorializing an agreement to operate and maintain the golf course. CP 1-39.

maintenance servitude. CP 378, 380, 382. The Deer Heights plats do not even mention a golf course. *Id.* None of the deeds or real estate contracts executed between SOS and a Deer Heights purchaser make any reference to the golf course. CP 313-375. To the contrary, the real estate contracts and warranty deeds expressly *disclaim* the existence and applicability of any other agreements beyond what the parties memorialized in writing. *Id.*

All of the real estate contracts in SOS's possession include a provision stating that there were no verbal or other agreements modifying the contract unless attached to the real estate contract. CP 312-376. One common provision, a "Merger Clause," states expressly: "[t]here are no verbal or other agreements which modify or affect this agreement unless attached hereto." CP 330-31, 347, 356, and 374. Contracts without a "Merger Clause" state: "This Contract constitutes the entire agreement of the parties and supersedes all prior agreements and understandings, written or oral." CP 337 and 363.

There is no mention of the golf course in any of the Declarations of Covenants, Conditions, and Restrictions ("CC&Rs") recorded along with each of the three Deer Heights plats. CP 403-29. The public offering statements associated with the Deer Heights plats references the CC&Rs,

including several provisions related to road access and maintenance, water, power, and sewage disposal. CP 383-402. The offering statements make no reference to any golf course. *Id.* Significantly – and consistent with the real estate contracts between SOS and lot purchasers – the offering statements expressly disclaim the existence of any “other promised, advertised or county-required amenities, improvements or structures, not already noted elsewhere in this statement.” CP 387, 397.

Neither the Deer Heights plats, nor Deer Heights CC&Rs established a homeowners’ association. CP 378-382; 403-429. Instead, enforcement of the CC&Rs was left to individual lot owners: “NOTICE TO PURCHASERS: THE ENFORCEMENT OF COVENANTS OF A SUBDIVISION IS THE RESPONSIBILITY OF ALL THE LOT OWNERS.” CP 386, 396; *see also*, 408, 417, 425. In September, 2010, more than a decade after the Deer Heights CC&Rs were recorded, appellant formed Riverview as a Washington nonprofit corporation. CP 111. Riverview claims its members own lots within both the Deer Meadows and Deer Heights subdivisions.

C. Trial Court’s Dismissal of Riverview’s Case

Despite a total lack of written evidence supporting the claim of an equitable servitude, Riverview filed suit in March 2011 naming six

defendants, including SOS, and seeking relief that includes establishment of an equitable servitude and a permanent injunction compelling the named defendants to re-establish, operate and maintain the golf course. CP 20-24. Respondent Livingstons moved to dismiss for Riverview's failure to join indispensable parties, CP 263-65, and respondent SOS moved for summary judgment. CP 271-86. The Honorable Judge Frazier granted SOS's motion for summary judgment, CP 247-49, and Livingstons' motion to dismiss. CP 245-46. This appeal followed. CP 250-57.

III. ARGUMENT IN RESPONSE

A. Standard of Review

This Court's review for a trial court's dismissal under CR 12(b)(7) is an abuse of discretion. *Gildon v. Simon Property Group, Inc.*, 158 Wn.2d 483, 493, 145 P.3d 1196 (2006). An abuse of discretion occurs where the court's "decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons." 158 Wn.2d at 494.

Review of an order granting summary judgment is de novo.³ *International Broth. Of Elec. Workers, Local Union No. 46 v TRIG Elec. Const. Co.*, 142 Wn.2d 431, 435, 13 P.3d 622 (2000). The Court may affirm the trial court's order granting SOS summary judgment on any basis supported by the record. *Id.* (internal citation omitted). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* (internal citation omitted).

The purpose of a summary judgment is to avoid a useless trial when there is no genuine dispute of any material fact. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 12-13, 721 P.2d 1 (1986). The party opposing a motion for summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having affidavits considered at face value. *Id.* at 13. The nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions. *Id.* The facts required to defeat a summary

³ Riverview's brief fundamentally confuses the applicable standard of review. Relying on *Veith v. Xterra Wetsuits, L.L.C.*, 144 Wn. App. 362, 365, 183 P.3d 334 (2008), Riverview claims that the trial court's findings are "verities" on appeal. *Veith* is wholly unrelated and inapplicable: that matter concerned a proceeding where a trial court "decides a motion to enforce [judgment] after taking evidence and testimony at a hearing[.]" 144 Wn. App. at 365.

judgment motion are evidentiary in nature; ultimate facts, conclusion of fact, and conclusory statements of fact will not suffice. *Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 359-60, 753 P.2d 517 (1988).

The trial court did not abuse its discretion and properly entered summary judgment in favor of SOS. Riverview's factual allegations – even assuming them to be true – are insufficient to establish liability against SOS. This Court should affirm both of the trial court's orders.

B. Riverview Lacks Standing to Enforce an Equitable Servitude

Riverview relies chiefly on the decision, *International Ass'n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 45 P.3d 186 (2002) to support its claim that the individual landowners “are not necessary parties” to this action. App. Br. at 10. But *International Ass'n of Firefighters* does not apply and Riverview confuses standing with Civil Rules 17 and 19.

The doctrine of standing prohibits a party from asserting another person's legal right. *Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 138, 744 P.2d 1032 (1987) (internal quotes omitted). Absent *express* authority, an organization does not have standing to enforce its members' property rights. *Timberlane Homeowners Ass'n, Inc. v. Brame*, 79 Wn. App. 303, 309, 901 P.2d 1074

(1995). *Timberlane* refused to allow a homeowners association to enforce a covenant in the association's declaration because no provision in the declaration expressly authorized the association's right to enforce the covenant. 79 Wn. App. at 308-09. Riverview is not even a homeowners association under Chapter 64.38 RCW, it is a nonprofit corporation formed "pursuant to Chapter 24.03 RCW." Appellant's Opening Brief ("App. Br.") at 6 *citing* CP 111. There is no evidence in the record establishing that the property owners have expressly authorized Riverview to enforce their property rights.

Riverview's reliance upon *International Ass'n of Firefighters, Local 1789 v. Spokane Airports*, *supra*, is mistaken. *International Ass'n of Firefighters* did not concern the enforcement of property rights. That matter involved the unrelated issue of whether a union had organizational standing to sue for monetary relief on behalf of its members. While *Timberlane*, *supra*, is dispositive, Riverview cannot even meet the standards for organizational standing which are outlined in the case upon which Riverview erroneously relies. *International Ass'n of Firefighters* concluded that a union was entitled to bring suit on behalf of its members. The court was directed by the following criteria: (1) the members of the organization would otherwise have standing to sue in their own right; (2)

the interests the organization seeks to protect are germane to its purpose; and (3) neither claim asserted nor relief requested requires the participation of the organization's individual members. 146 Wn.2d at 213-14. Riverview cannot establish application of the third prong necessary to establish organizational standing. A claim to enforce another property owner's rights requires express authority from the property owners. *Timberlane*, 79 Wn. App. at 308-09. Riverview does not have standing to litigate this matter on behalf of its members.

Riverview also cannot establish the application of CR 17 and CR 19. Riverview curtly references CR 17(a), App. Br. at 10, but does not even *attempt* to apply the rule to the facts here. CR 17(a) states that “[e]very action shall be prosecuted in the name of the real party in interest.” CR 17 expressly restricts the circumstances under which one party may bring an action on behalf of another:

An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought.

CR 17(a). Riverview is not an executor, administrator, guardian, bailee, trustee of an express trust, or a party with whom or in whose name a

contract has been made. *See* App. Br. at 6, 10-13; CP 1-39. Nor is Riverview a homeowners association authorized under RCW 64.38.020(4) and its organizational bylaws to bring an action on behalf of its members. Riverview is not a real party in interest under CR 17.⁴

Riverview does not look to CR 19 – or any other authority – to support its claim that individual landowners “are not necessary” to a proceeding which seeks to create a property interest on the landowners’ behalf. *See* App. Br. at 10-13. Under CR 19(a)(1) joinder is required when, in the absence of an interested person, “complete relief cannot be accorded among those already parties[.]” Complete relief cannot be obtained when Riverview, the only party bringing this action, has no property interest at stake. *Veradale Valley Citizens’ Planning Committee v. Board of County Com’rs of Spokane County*, 22 Wn. App. 229, 234, 588 P.2d 750 (1978) (holding CR 19(a)(1) requires joinder where a party has no property interest in a case concerning property interests). Moreover, any judgment rendered by a court would be ineffectual to all of

⁴ CR 17(a) prevents an action from dismissal “until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest.” The trial court ordered Riverview to join the Deer Meadows landowners or obtain an assignment of their interest “within a reasonable period of time.” CP 247-49. Riverview ignored the order and instead filed a Notice of Appeal. CP 250-57.

the property owners, none of which have been named and served. *Id.* Joinder of the property owners is required under CR 19(a)(1) and Riverview's failure to do so, despite the express invitation of the trial court, warrants dismissal under CR 19(b).

Joinder is also required under CR 19(a)(2) where a person "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." The property owners have an undeniable interest in the proceeding because Riverview is seeking a property interest – an equitable servitude – for the benefit not of itself, but to benefit the *property owners*. *Veradale Valley Citizens' Planning Committee*, 22 Wn. App. at 234-35. Riverview's failure to join the property owners under CR 19(a)(2) also supports dismissal under CR 19(b). The trial court properly exercised its discretion dismissing Riverview.

C. Riverview Cannot Establish an Equitable Servitude Against SOS as a Matter of Law

1. An equitable servitude requires a writing

An equitable servitude is "a legal device that creates a right or obligation that runs with the land." *Lake Limerick Country Club v. Hunt*

Mfg. Homes, Inc., 120 Wn. App. 246, 253, 84 P.3d 295 (2004). An equitable servitude may also be described as an “equitable restriction” or an “equitable covenant,” but any claimant asserting the existence of the servitude or covenant must nonetheless demonstrate that the right or obligation is memorialized in writing. 120 Wn. App. at 253. Riverview does not seek a mere restriction on the use of the golf course as a golf course, but an *affirmative* obligation requiring SOS to step in to perpetually operate and maintain the golf course. CP 20-24; App. Br. at 6.

Riverview asks this Court to turn Washington law on its head and dispense with the requirement that a servitude or covenant be memorialized in *some* writing. App. Br at 14. Riverview is able to muster no governing authority to support its request. Analogizing servitudes to other areas of property law, Riverview urges adoption of the Restatement, which authorizes the establishment of servitudes by implication and estoppel. *Id.* at 19-25. This Court should reject Riverview’s invitation because it is contrary to well-established Washington law requiring servitudes to be written. *Hollis v. Garwall*, 137 Wn.2d 683, 974 P.2d 836 (1999) and its progeny control resolution of this dispute.

Hollis v. Garwall recently recited the elements necessary to establish an equitable servitude:

1) a promise, in writing, which is enforceable between the original parties; 2) which touches and concerns the land or which the parties intend to bind successors; and 3) which is sought to be enforced by an original party or a successor, against an original party or successor in possession; 4) who has notice of the covenant.

137 Wn.2d at 691.

Hollis concerned the existence and validity of a use restriction in a property development. In *Hollis*, the court found that a residential use restriction prevented the establishment of a mining and crushing operation on a tract within the subdivision. The restriction was written unequivocally on the subdivision plat: “This plat is approved as a residential subdivision and no tract is to have more than one single family residential unity.” 137 Wn.2d at 692. Consistent with the developers’ representation appearing on the plat, each of the 10 owners also executed an “owner’s certificate” on the plat, providing clear acknowledgement that the owners intended to limit the development to residential use. 137 Wn.2d at 686-87.

A servitude may alternatively be established by the claimant proving the covenant was memorialized in other writings related to the subdivision or transfer of property. For instance, a restriction may be included in a declaration of covenants arising out of the plat or may be

written into a purchaser's deed. *Hollis*, 137 Wn.2d at 691-92. Critically, however, *Hollis* offered no exception to the requirement that the servitude derive from *some* writing because a court's primary objective is to determine: "the intent of the parties as evidenced by clear and unambiguous language *in the document*." *Id.* at 694 quoting *Mountain Park Homeowner's Ass'n, Inc. v. Tydings*, 125 Wn.2d 337, 344, 883 P.2d 1383 (1994) (emphasis added). Accordingly, where the scope and existence of a servitude are at issue, courts look to the written language of a deed, a declaration of covenants, or on the plat itself. The grantor's written language controls.⁵

The requirement that a use restriction be clearly written and enforceable between the original parties is consistent with the statute of frauds. RCW 64.04.010 states that "[e]very conveyance of real estate, or

⁵ See *Mountain Park Homeowners Ass'n, Inc. v. Tydings*, 125 Wn.2d 337, 883 P.2d 1383 (1994) (enforcing covenant contained in declaration of restrictions prohibiting antennas unless approved by architectural control committee); *Lake Arrowhead Community Club, Inc. v. Looney*, 112 Wn.2d 288, 770 P.2d 1046 (1989) (enforcing covenant included in declaration of covenants authorizing charges and assessments for maintenance of facilities); *Brown v. Charlton*, 90 Wn.2d 362, 583 P.2d 1188 (1978) (enforcing covenants contained on plat providing for domestic water to be supplied to lots prior to their sale); *Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.*, 120 Wn. App. at 259 (citing *Hollis* and concluding that a restriction contained within a recorded declaration of restrictions met the writing requirement for creating a servitude); *Leighton v. Leonard*, 22 Wn. App. 136, 589 P.2d 279 (1978) (enforcing height restriction that was clearly stated in an agreement which was signed by both parties and recorded, along with supporting affidavit).

any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed[.]” RCW 64.04.020 requires every deed to be in writing.⁶ The purpose of the statute is patent: to prevent fraud arising from uncertainty inherent in oral contractual undertakings. *Miller v. McCamish*, 78 Wn.2d 821, 829, 479 P.2d 919 (1971).

2. No writing exists establishing an equitable servitude against SOS

SOS filed three plats in connection with each of the three Deer Heights developments. CP 378-82. None of the plats make any reference whatsoever to the golf course. *Id.* As in *Hollis*, where the court refused to veer from the plain language in the plat, the Deer Heights plats provide no support for Riverview’s claim that an operation and maintenance servitude exists. None of the Deer Heights plats contain any language or reference any map that could be construed as a representation that SOS would continue to operate and maintain the golf course. CP 378, 380, 382. There is no accompanying “owner’s certificate” or any other document

⁶ See also, *Wilhelm v. Beyersdorf*, 100 Wn. App. 836, 842, 999 P.2d 54 (2000) (every interest or encumbrance on real estate must be by written deed, signed and acknowledged); *Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.*, 120 Wn. App. at 259 (finding declaration of restrictions in writing and signed by grantor satisfied requirements of the statute of frauds).

affixed to the plats expressing SOS's intent to operate and maintain a golf course. *Hollis*, 137 Wn.2d at 692-93; *see also*, *Brown v. Charlton*, 90 Wn.2d 362, 583 P.2d 1188 (1978) (enforcing covenant based on plain language of plat).

A declaration of covenants, conditions and restrictions may alternatively form the basis of an equitable servitude, but courts enforcing these servitudes look to whether the servitude is clearly stated. *See*, *Mountain Park*, 125 Wn.2d at 344 (“court must construe restrictive covenants by discerning the intent of the parties as evidenced by clear and unambiguous language in the document”); *Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.*, 120 Wn. App. at 259 (“Declaration of Restrictions was in writing and signed by grantor”). While CC&Rs were recorded along with each of the Deer Heights plats, there is no reference to the golf course in any of them. CP 403-429. Each recorded document describes in considerable detail the various building restrictions, land use restrictions, road easements, provisions related to the water system, fees, and other covenants and restrictions connected to each plat. *Id.* But none of the CC&Rs make any provision relating in any way to operating or maintaining the golf course. *Id.*

The public offering statements associated with each of the plats are consistent with the plats and CC&Rs: they reference the water system, road easements, and other covenants, but make no reference to any golf course.⁷ Nor do any of the deeds or real estate contracts. A representative statutory warranty deed from SOS to Kenneth G Henderson includes an exhibit containing several covenants, conditions, and restrictions described in the plat which relate to road easements, rights of ingress and egress, and road care and maintenance obligations. CP 320-322. But neither the deed nor the exhibit attached to the deed reference the golf course. *Id.* The real estate contract between SOS and Henderson also provides for road easements, rights of ingress and egress, and road care and maintenance obligations, but similarly makes no mention of the golf course. CP 313-319. Riverview has no claim for an operation and maintenance servitude against SOS.

While Riverview now claims that “[t]here is a writing that supports imposition of the servitude Riverview seeks[,]” App. Br. at 28, Riverview did not raise this argument to the trial court. *See* CP 167-182. The

⁷ CP 383-402. To the contrary, these statements expressly disclaim the existence of any other “promised, advertised or county- required amenities, improvements or structures, not already noted elsewhere in this statement.” CP 387, 397. The legal implications of this disclaimer are discussed below.

appellate courts “will not consider a theory as ground for reversal unless we can ascertain from the record that the issue was first presented to the trial court.” *Talps v. Arreola*, 83 Wn.2d 655, 658, 521 P.2d 206 (1974) (internal citations omitted). Riverview did not claim that a writing exists because Riverview argued a contrary position: “[n]o writing is required in this case.” CP 175 and 181.

Even if this court accepts Riverview’s argument, Riverview’s claim is based exclusively *on the plat that is adjacent to the golf course*.⁸ The plat cited by Riverview states clearly that the plat is not one of the three SOS plats in Deer Heights but a separate and distinct entity: the plat states it is for “Deer Meadow Tracts Plat No. 3.” CP 34. Riverview’s argument has no relevance to the Deer Heights plats filed by SOS.

3. Washington law does not support establishing a servitude by implication or estoppel

Dismissing controlling authority and the statute of frauds, Riverview urges this Court to fashion a new rule inspired by the Restatement that allows servitudes to be created by implication and/or

⁸ Riverview attached a copy of the recorded plat to its Opening Brief. See App. Br. at 26 and attached “Deer Meadows” plat.

estoppel.⁹ Riverview cites several decisions which it claims support the establishment of an operation and maintenance servitude without a writing. But none of the cases Riverview relies upon support burdening SOS with an operation and maintenance servitude without a writing. Most cases relied on by Riverview are distinguishable simply because they relate to other areas of property law that constitute well-established exceptions to the writing requirement, including the establishment of an easement,¹⁰ revocation of a license,¹¹ resolution of a boundary dispute,¹² adverse possession¹³ or otherwise did not concern a property interest.¹⁴ Unlike these cases, Riverview pleaded six causes of action based on an

⁹ Riverview asks this Court to rule servitudes may be created in any of three circumstances by implication: 1) prior use; 2) implied from a map or boundary references; 3) servitudes implied from a general plan. App. Br. at 20. Riverview also asks this Court to rule that servitudes may be created by estoppel “to prevent or avoid an injustice when a party has changed his position in reliance on another’s admissions, acts, statements, etc.” *Id.* at 21.

¹⁰ *Finch v. Matthews*, 74 Wn.2d 161, 443 P.2d 833 (1968) (validity of conveying easement); *Adams v. Cullen*, 44 Wn.2d 502, 268 P.2d 451 (1954) (easement based on necessity); *Kirk v. Tomulty*, 66 Wn. App. 231, 831 P.2d 792 (1992) (establishing easement based on written agreement and part performance). See App. Br. at 17-18 (cited cases discussing easement by implication).

¹¹ *Rhoades v. Barnes*, 54 Wash. 145, 102 P. 884 (1909) (concluding oral license to use water revoked)

¹² App. Br. at 18-19 citing *Lamm v. McTighe*, 72 Wn.2d 587, 434 P.2d 565 (1967); *Thomas v. Harlan*, 27 Wn.2d 512, 178 P.2d 965 (1947); *Winan v. Ross*, 35 Wn. App. 238, 666 P.2d 908 (1983); *Johnston v. Monahan*, 2 Wn. App. 452, 469 P.2d 930 (1970); see also *Burkey v. Baker*, 6 Wn. App. 243, 492 P.2d 563 (1971) (cited in App. Br. at 21 in support of estoppel argument).

¹³ *Chaplin v. Sanders*, 100 Wn.2d 853, 676 P.2d 431 (1984).

¹⁴ *Merlin v. Rodine*, 32 Wn.2d 757, 203 P.2d 683 (1949) (Action concerning provision in earnest money agreement).

“equitable servitude.” CP 12-16 (Causes of Action I-VI). It is irrelevant, for instance, that a writing is not required to establish adverse possession are modify a boundary where there is mutual acquiescence. A writing is required to create an equitable servitude. *Hollis*, supra at 691; *Lake Limerick*, supra at 258.

Riverview offers no other authority from Washington supporting the establishment of a servitude by implication. Referring generally to the Restatement, App. Br. at 20, Riverview claims Washington “has long recognized” implied servitudes, but cites *only* to decisions which either relate to establishing an easement¹⁵ or are based on some written representation of the grantor’s intent and arose out of a developer’s common ownership of property upon which a public park was developed. *See Johnston v. Mt. Baker Park Church*, 113 Wash. 458, 194 P. 536 (1920) (court enforced residential use restriction was expressly referenced in a written agreement between grantor and grantee and in deeds to 645 of 650 lots); *Shertzer v. Hillman Inv. Co.*, 52 Wash. 492, 100 P. 982 (1909) (developer included park in subdivision plat, on a map, on walls of office and subsequently dedicated, developed, and maintained park).

¹⁵ *Adams v. Cullen*, 44 Wn.2d 502, 268 P.2d 451 (1954).

Riverview cites two cases to support the claim that a servitude can be established by estoppel. App. Br. at 21. But again, Riverview relies on unrelated cases concerning the validity of conveying an easement¹⁶ and the adjustment of a boundary line.¹⁷ Neither case supports Riverview's request to adopt a rule that allows an operation and maintenance servitude to be created by estoppel. While the *purpose* of estoppel may indeed be to "prevent or avoid an injustice[,]"¹⁸ this policy justification supports a strict writing requirement to glean the grantor's intent, not Riverview's urging that the Court dispense with one. *Miller v. McCamish*, 78 Wn.2d 821, 829, 479 P.2d 919 (1971) (statute of frauds prevents fraud arising from the uncertainty inherent in oral contractual undertakings).

Riverview entreats the Court to adopt the reasoning from decisions in Oregon and New Mexico holding that an equitable servitude may be created by estoppel but neither case has any bearing on Riverview's claim against SOS: they are both distinguishable on their facts and contrary to Washington law. In *Mountain High Homeowners Ass'n v. Ward Co.*, 228

¹⁶ *Finch v. Matthews*, 74 Wn.2d 161, 443 P.2d 833 (1968)

¹⁷ *Burkey v. Baker*, 6 Wn. App. 243, 492 P.2d 563 (1971).

¹⁸ App. Br. at 21. Riverview's cite to *Chemical Bank v. Washington Public Power Supply System*, 102 Wn.2d 874, 691 P.2d 524 (1984) is odd since that matter concerned not a property interest, but a dispute among bondholders.

Or. App. 424 (2009) an Oregon court of appeals held that a developer was equitably estopped from changing the use of property utilized as a community golf course. The developer held obligated by the servitude in *Mountain High* constructed the golf course *within* the subdivision and “remained the owner of the golf course and was responsible for it both financially and operationally.” 228 Or. App. at 427. Riverview, by contrast, does not even allege that SOS has an ownership interest in the golf course, CP 1-24, and there is no dispute that the golf course is located within the Deer Meadows subdivision, *not* Deer Heights. *See* CP 291.

In *Ute Park Summer Homes Ass’n v. Maxwell Land Grant Co.*, 77 N.M. 730, 735 (1967), the court ruled that purchasers adjacent to a golf course acquired an easement so as to enjoin a transfer of land that would allow development of the property reserved for the golf course. As with *Mountain High*, *supra*, the golf course was within a subdivision that was owned by the same entity. *Ute Park* has no bearing on SOS and its development of Deer Heights.

Moreover, the reasoning in both *Mountain High* and *Ute Park* is contrary to Washington law. Washington requires a servitude in writing. *See*, Resp. Br. at 14-18. Also, while the *Mountain High* court ruled that a developer was equitably estopped from operating the golf course,

Washington courts do not allow plaintiffs to rely on equitable estoppel. Equitable estoppel is available “only as a shield or defense” not as a “sword” for offensive use by plaintiffs. *Mudarri v. State*, 147 Wn. App. 590, 619, 196 P.3d 153 (2008) quoting *Greaves v. Medical Imaging Systems, Inc.*, 124 Wn.2d 389, 397-98, 879 P.2d 276 (1994). Equitable estoppel is not available for Riverview here. Nor is an easement. Absent a writing, an easement may arise in Washington by implication due to prior use between adjoining parcels¹⁹ or by necessity when an adjoining parcels are landlocked.²⁰ The golf course does not adjoin any property owned and sold by SOS and there is no claim by Riverview that an operation and maintenance servitude is a necessity for a landlocked parcel. Neither *Mountain High* nor *Ute Park* apply here.

4. SOS has no possessory interest in the golf course and thus has no authority to grant Riverview the relief sought

To establish an equitable servitude, the promise must be enforced by “an original party or successor, against an original party or successor in possession[.]” *Hollis*, 137 Wn.2d at 691 (emphasis added); *Lake Limerick*, 120 Wn. App. at 254 (emphasis added); *see also*, 17 Wash. Prac.

¹⁹ *Adams v. Cullen*, 44 Wn.2d 502, 268 P.2d 451 (1954).

²⁰ *Hellberg v. Coffin Sheep Co.*, 66 Wn.2d 664, 404 P.2d 770 (1965); *Roberts v. Smith*, 41 Wn. App. 861, 707 P.2d 143 (1985).

Real Estate § 3.3 (2d ed.) (“For the covenantor’s side of a covenant to run, the burden of whatever he undertakes must touch and concern an estate in land he owns”) (emphasis added); 17 Wash. Prac., Real Estate § 3.12 (2d ed.) (“There should be, and probably is, no difference between how the touch-and-concern requirement applies to real covenants and how it applies to equitable restrictions. Section 3.3, *supra*, may simply be incorporated at this point.”).

SOS has no possessory interest in the golf course. Riverview makes no allegations that SOS *ever* had a possessory interest in the golf course. CP 1-24. Riverview’s own complaint concedes that the golf course was originally owned by separate entity, either “defendant partnership Spencer & Livingston and/or defendant Deer Meadows, Inc.” and was succeeded by the current owner “[d]efendant Deer Meadows Golf, Inc.” CP 3.

Without an ownership interest – or any other property interest – in the golf course, SOS was without authority or ability to promise that the golf course would be operated and maintained in the future. Riverview’s relief, to the extent any is available, is limited to “an original party or successor in possession.” *Hollis*, 137 Wn.2d at 691 (emphasis added). SOS is neither.

5. Riverview intends to rely exclusively on inadmissible extrinsic evidence

Even if this Court decides a servitude may be established by implication or estoppel, neither doctrine would apply to burden SOS because Riverview will rely exclusively upon extrinsic evidence to vary, contradict or modify the written word. Extrinsic evidence that varies, contradicts or modifies that written word is not admissible. *Hollis*, 137 Wn.2d at 695; *Wimberly v. Caravello*, 136 Wn. App. 327, 336-37, 149 P.3d 402 (2006); *Bloome v. Haverly*, 154 Wn. App. 129, 138, 225 P.3d 330 (2010); *Ross v. Bennett*, 148 Wn. App. 40, 46, 203 P.3d 383 (2008); *Save Sea Lawn Acres Ass'n v. Mercer*, 140 Wn. App. 411, 418-19, 166 P.3d 770 (2007); *Bort v. Parker*, 110 Wn. App. 561, 574-75, 42 P.3d 980 (2002).

The Deer Heights plats, deeds, real estate contracts, CC&Rs and public offering statements do not merely fail to reference a golf course operation or maintenance servitude, but also, several documents expressly *disclaim* the existence of any other obligation which was not written. All of the real estate contracts in SOS's possession include a provision stating there were no verbal or other agreements modifying the contract unless

attached to the contract. CP 313-375. Some contracts contain a merger clause stating “[t]here are no verbal or other agreements which modify or affect this agreement unless attached hereto.” CP 330-31, 347, 356, and 374. The contracts which do not contain a merger clause state that “[t]his contract constitutes the entire agreement of the parties and supersedes all prior agreements written or oral.” CP 337 and 363. There were no related attachments to any of the contracts in SOS’s possession. The public offering statements expressly disclaim the existence of “any other promised, advertised or county-required amenities, improvements or structures, not already noted elsewhere in this statement.” CP 387, 397.

Riverview makes little attempt to offer specific facts supporting the establishment of a servitude in its brief, App. Br. at 5, but Riverview argued to the trial court that SOS made oral statements to purchasers and the press relating to the golf course. CP 168-69. It is improper to look to extrinsic evidence that would vary, contradict or modify the written word. *Hollis*, 137 Wn.2d at 695; *Wimberly v. Caravello*, 136 Wn. App. 327, 336-37, 149 P.3d 402 (2006); *Bloome v. Haverly*, 154 Wn. App. 129, 138, 225 P.3d 330 (2010); *Ross v. Bennett*, 148 Wn. App. 40, 46, 203 P.3d 383 (2008); *Save Sea Lawn Acres Ass’n v. Mercer*, 140 Wn. App. 411, 418-19, 166 P.3d 770 (2007); *Bort v. Parker*, 110 Wn. App. 561, 574-75, 42 P.3d

980 (2002). Riverview cannot rely on extrinsic evidence to prove the existence of an agreement contrary to written documents.

Even if the court were to read any ambiguity into the conveyance documents to justify the admission of extrinsic evidence, Riverview relied on the purported representations of deceased declarants.²¹ The dead man statute, RCW 5.60.030, prevents interested parties from giving self-serving testimony about conversations or transactions with a dead person. *See also, In re Estate of Miller*, 134 Wn. App. 885, 890-91, 143 P.3d 315 (2006). Any evidence submitted by Riverview related to the deceased will be stricken. *Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wn. App. 787, 792, 150 P.3d 1163 (2007) (approving trial court order striking inadmissible extrinsic evidence in violation of the dead man's statute). Riverview's appeal should be dismissed.

²¹ CP 168-170. Charlie and Gloria Spencer were former members of SOS. Mr. Spencer died on or around January 22, 2005 and Mrs. Spencer died on or around October 2005. CP 200.

IV. CONCLUSION

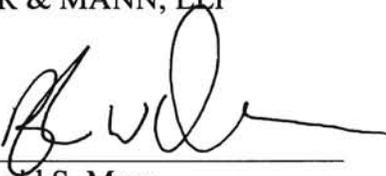
This Court should affirm the trial court's orders dismissing SOS from the lawsuit.

DATED this 15th day of June, 2012.

Respectfully submitted,

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