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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

CHEWELAH GOLF AND COUNTRY CLUB
ASSOCIATION
Respondent

V.

WILBUR "WOODY" WILLIAMS,
Appellant

NO. 317480

APPELLANT'S REPLY BRIEF
and CROSS-RESPONDENT'S BRIEF

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II. INTRODUCTION AND RELIEF REQUESTED

As Appellant and Cross- Respondent Woody Williams stated in his opening brief, this case involved a private golf course asserting a right to use private property, which it had no right, title, easement, or any other legal entitlement to use. In addition, the golf course claimed a right to force these private property owners to pay assessments to the golf course without legal justification. Respondent and Cross-Appellant, Chewelah Golf and Country Club Association (CGCC or golf course) has failed to rebut Mr. Williams' clear demonstration of legal and factual errors by the trial court in the trial court's ruling on summary judgment as to CGCC's purported right to use Mr. Williams' property.

CGCC has not pointed to any legal or factual errors by the trial court which would justify reversing the trial court's granting of summary judgment to Mr. Williams on the issue of assessments. For these reasons, Mr. Williams' requests that this Court reverse the trial court's summary judgment order granting CGCC the right to use his property and remand for a trial before a different judge.

He also requests that Court affirm the trial court's summary judgment as to CGCC's claim for Money Due on Account .

**III. REPLY TO CGCC'S ARGUMENT ON THE USE OF
MR. WILLIAMS' LAND**

A. CGCC failed to justify the trial court's erroneous ruling that the covenants or an equitable servitude grant it easement rights.

As Mr. Williams pointed out in his opening brief, the passage in the covenants which CGCC relies on for its alleged golf play and maintenance easement or equitable servitude is so vague as to be unenforceable. The passage does not define the boundaries of the golf play area. It does specify who will do the marking of any golf play area. And it says nothing about allowing maintenance activities.

In its responsive brief, CGCC repeated the factually mistaken and legally inaccurate argument of the trial court that somehow Mr. Williams acquired knowledge of the parameters of the alleged golf play and maintenance area, and therefore, Mr. Williams should be bound by it. Prior to 2010, there was no notice to Mr. Williams, actual or constructive, that the golf course was asserting a right to use 35 feet of his property for golf play and

maintenance. The covenants do not provide this notice and no one from the golf course ever informed Mr. Williams of this asserted right.

CGCC makes much of Mr. Williams' supposed admission that one can sight an out-of-bounds area by looking at markers on adjacent lots. *See e.g.*, Respondent's Brief at 25, 29. However, a careful reading of the deposition transcript will inform the Court, that this sighting is describing the out-of-bounds markers where they are today, not where they were at the time Mr. Williams purchased the property. CP at 95. CGCC does not dispute that the current markers on the adjacent lots today were installed in 2008; well after the lots were first sold and well after Mr. Williams first purchased the property. They also do not dispute that these new markers were considerably taller and more durable than the older markers. The time periods which are relevant for describing any legal right CGCC may have based upon the markers is 1996, when Mr. Williams' lots were first transferred from CGCC to a third party and in 2003 when Mr. Williams purchased the lots. There is nothing in the record which definitively locates the markers during these years. As the party asserting a covenant, equitable, or

prescriptive right, based upon the markers, it was CGCC's burden to prove the existence and location of the markers as they related to Mr. Williams property. CGCC failed to meet its burden on summary judgment to establish that no reasonable trier of fact could dispute the existence or location of the markers.

CGCC's officer testified that CGCC put markers down by 1982. Mr. Williams testified he saw no markers on his lots in 2003. CP at 175. Multiple people testified that markers were decayed or missing sometime before 2008. CP at 166, 171. It is a reasonable inference, not speculation, to assume that markers near Mr. Williams' property were not there in 1996 or 2003. Contrary to CGCC's claims, the location or existence of these markers is very much a material fact because it is through these markers that CGCC sought to establish its right to use Mr. Williams' property. At the very least, Mr. Williams was entitled to a trial to determine the location of any markers.

Even if CGCC could prove where the markers were in 1996 or 2003, which it did not and could not, the location of the markers would not have mattered if the trial court had properly construed

the ambiguity in the covenant regarding who would do the marking of the golf play area against the drafter of the covenants: CGCC.

B. There were numerous disputes of material fact related to CGCC'S claims for a prescriptive easement case.

Despite CGCC's repeated assertions, it is very much disputed whether or not the golf course made continuous uninterrupted use of a 35 foot golf play area across Mr. Williams' lots or other lots since 1976. In fact, Mr. Williams specifically testified that on one of his lots there has been no golf play to this day. CP at 176. It was not until years after Mr. Williams built his home and improved his lot in a manner which permitted golf play and then had a dispute with the golf course over assessments that the golf course asserted its alleged 35 foot golf play area. In addition, the golf course moved boundaries and stopped maintenance activities on the instruction of homeowners.

C. CGCC failed to demonstrate 10 years of adverse use.

Before 1996, the golf course owned all the lots at issue in this matter, so any use of these lots could not have been adverse to the golf course. CGCC admitted as much in its reply to Mr. Williams' motion for reconsideration. CP at 299 ("the Golf

Association has only adversely used the play area since 1996 when the lot was first sold. This is not a disputed fact.”) CGCC filed its suit in 2010. CP 1. Thus, in order to demonstrate 10 years of adverse use, CGCC was required to show that its use was adverse to owners since 2000. Mr. Williams bought his first lot in 2003. The golf course failed to present any evidence regarding use adverse to Mr. Williams’ predecessors in interest beyond conclusory statements of “continuous use.” Mr. Williams presented evidence that alleged the 35 foot use was not continuous; in fact it does not happen consistently to this day.

To grant CGCC’s motion for summary judgment on the issue of prescription, the trial court had to incorrectly conclude that CGCC had presented sufficient evidence CGCC had adversely used the property for the statutory period such that no reasonable trier of fact could dispute that evidence. The trial court was simply wrong on this point.

The golf course produced no evidence that Mr. Williams’ predecessors’ in interest were aware of that golf course was asserting a right to use their land. Mr. Williams' main lot was bare land before he purchased it, so CGCC would have to show actual

notice to these predecessors in interest to establish the tacking required for a prescriptive right. *See Nw. Cities Gas Co. v. W. Fuel Co.*, 13 Wn.2d 75, 85-86, 123 P.2d 771 (1942).

CGCC basically failed to address this argument when Mr. Williams made it to the trial court, *See* CP at 153, 262-263 and CP at 182-86, 299. CGCC made only a half-hearted attempt at addressing the argument in its brief to this Court. Resp. Br. at 21-22. CGCC incorrectly cited the date the properties were transferred from CGCC to third parties: it was in 1996 not 1986. *See* CP at 195-200. CGCC then repeated its legally irrelevant statement that golf play has occurred since 1976 on the course, again, only the period from 1996 forward is relevant. Finally, CGCC cited RCW 7.28.070 for the proposition that with color of title, only a 7 year time period is required to establish prescriptive rights. But RCW 7.28.070 applies to adverse possession, not prescription; requires payment of taxes, which CGCC did not demonstrate; and requires actual color of title, which CGCC did not have in this case.

D. CGCC failed to rebut the presumption that any use of Mr. Williams' land was permissive.

By CGCC's own admission, there is more than one reasonable interpretation of the material fact that CGCC modified boundaries and maintenance activities at the direction or request of homeowners. Summary judgment was thus inappropriate on this issue. CGCC claims that evidence that it inconsistently applied its alleged right to maintain out of bounds markers and mow and irrigate property was not material to permissive use because "it is just as easily be inferred" that homeowners were somehow recognizing the golf course's right to use the land when they told the golf course to move boundaries or stop maintenance activities. Resp. Br. at 27-28. If this were an appeal after a trial, the golf course's position might have some merit. But at summary judgment, the trial court is required to weigh all the facts and reasonable inferences in the light most favorable to the non-moving party: Mr. Williams. The trial court failed to do this when it came to facts related to permissive use. It is absolutely a reasonable inference that if one changes one's behavior in response to command or suggestion, one is not asserting an absolute right to

that behavior. The trial court erred when it concluded this evidence was not relevant. This legal error requires reversal of the trial court's granting of summary judgment.

**IV. STATEMENT OF THE CASE RELATED TO CLAIM
FOR MONEY DUE ON ACCOUNT**

Mr. Williams purchased three lots from the CGCC between 2003 and 2005. CP at 321. These lots were and are subject to restrictive covenants. CP at 16-25. Paragraph 12 of the covenants provides "Membership in the Chewelah Golf and Country Club Association shall be required prior to ownership of any lot in the Chewelah Golf & Country Club Subdivision." CP at 23. The covenants are silent as to any requirement to maintain a membership in the Association. The covenants are also silent as to any requirement to pay any dues or other assessments related to membership in the Association. Finally, the covenants are silent as to whether the By-Laws of the Association are binding upon the homeowners.

The 2003 By-Laws of the Association which were in effect at the time Mr. Williams purchased his property are silent as to the

ability of the Association to assess its members. CP at 326-331. The 2007 By-Laws which the Association attached to its complaint purport to authorize the Association to assess members an amount up to the “cost of a single person’s season pass,” provided the member has not otherwise purchased a pass. CP at 30. (Exhibit B to Plaintiff’s Complaint at 1). These By-Laws also contain the following language: “All unpaid dues assessment shall constitute a lien against the membership”. CP at 30. The 2007 By-Laws further provide that if dues are not paid for three years, the result is a “revocation of the membership.” *Id.* at 31. The 2007 By-Laws are silent as to any other remedy for non-payment of dues. Mr. Williams has never paid any dues assessment.

On September 2, 2010, CGCC filed a complaint against Mr. Williams seeking among things “Money Due on Account.” CP at 10 (Complaint at 8 (¶ 20-21)). In July 2012, Kay Smith, President of the CGCC Board sent a letter to CGCC members in which she stated that the Board recognized that it had no legal authority under the covenants to monetarily assess Division I landowners (Mr. Williams’ Division). CP at 333. This letter recognized that many of the Division I landowners were pilots and

not golfers. The letter also stated that the only ability the Association had to assess Division I landowners was to “assess memberships.” *Id.* (emphasis in original). Finally, the letter acknowledges that many landowners “appear to be willing to let their membership be revoked for non-payment of the assessment.” *Id.*

**V. RESPONSE TO CGCC’S ARGUMENT RELATED TO
CLAIM FOR MONEY DUE ON ACCOUNT**

Summary judgment is appropriate if “there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” CR 56(c). “A material fact is one that affects the outcome of the litigation.” *Owen v. Burlington N. & Santa Fe R.R.*, 153 Wn.2d 780,789, 108 P.3d 1220 (2005). “Questions of fact may be determined as a matter of law ‘when reasonable minds could reach but one conclusion.’” *Id.* at 788 (citation omitted). When considering a summary judgment motion, the Court must construe all facts and reasonable inferences in the light most favorable to the non-moving party. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). Once a moving party has made a showing that no material facts are in

dispute, the party opposing summary judgment must come forward with specific facts in dispute; it cannot rely on conclusory statements or speculation to defeat summary judgment. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

A. There were no material facts in dispute as to the claim for Money Due on Account

Both parties agree that CGCC has attempted to assess Mr. Williams for money related to his prior membership in the golf course. Both parties agree that Mr. Williams has never paid any of these assessments. What was left is a pure question of law about the authority to collect for non-payment.

There is no dispute that there is no authority within the covenants for CGCC to charge property owners assessments either as property owners or as members of the homeowner's association. The fact the covenants may be ambiguous as to whether property owners are required to be a member of an homeowner's association during the duration of time they own property along the golf course is not a material fact as to whether Mr. Williams owes CGCC money for assessments. As Washington cases make clear,

to legally collect assessments under a covenant right, an association must put the homeowners on notice that they may be subject to assessments. *See e.g. Rodruck v. Sand Point Maintenance Comm'n*, 48 Wn.2d 565, 573-574, 295 P.2d 714 (1956); *Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.*, 120 Wn. App. 246, 249-250, 84 P.3d 395. (2004). There was no such notice in this case. Instead, more than four years after Mr. Williams first purchased property on the golf course, CGCC attempted to boot-strap an assessment obligation onto Mr. Williams and the other homeowners' through a clause in the covenants which makes its requirement to have a membership in the association *at the time of sale*. Nowhere in the covenants does it state this membership must be maintained or that the membership also comes with a money-paying obligation. Indeed, CGCC's own documents and admissions make it clear that the only remedy available to CGCC for non-payment of the dues, which they assessed, beginning in 2007, is to place a lien on a membership certificate and then at some point revoke the membership.

While CGCC now asserts that its founders intended to grant themselves the authority to monetarily assess property owners in Division I (Mr. Williams' Division), their intent is irrelevant; the fact is CGCC has no legal authority to collect a money judgment on the assessments. Therefore, the trial court correctly granted summary judgment to Mr. Williams on this issue.

B. CGCC has no legal authority to obtain a money judgment against Mr. Williams

It was unclear from CGCC's complaint what legal authority it was asserting which gave it the right to obtain a money judgment against Mr. Williams for unpaid assessments. Because the complaint talks about Mr. Williams being "obligated" to pay assessments, he assumed it meant either an obligation under the covenants to his property or an obligation under a separate contract. Neither of these theories support CGCC's requests for a money judgment. Thus, summary judgment in favor of Mr. Williams was required.

1. There was no authority in the covenants for assessing Mr. Williams

In order to establish an obligation under a real covenant, the person asserting the covenant must show that (1) the covenant

was enforceable between the original parties; (2) the covenant must “touch and concern the land”; (3) the covenanting parties must have intended to bind their successors in interest; (4) there must vertical privity of estate; and (5) there must be horizontal privity between the original parties. *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229, 257, 215 P.3d 990 (2009).

The covenants in this case purport to require membership in the Association at the time of the purchase of the land. As an initial matter the bare requirement to be a member of an Association does not touch and concern the land. This is because there is no information within the covenants on how the Association’s activities relate to the land. The membership requirement is thus unenforceable. Even if the requirement to be a member of the Association did touch and concern the land, the covenants say nothing about a requirement to pay assessments or that failure to pay dues or assessments to the Association may result in a collection activity. In cases where courts have upheld the ability of a homeowner’s association to lien, foreclose, or otherwise collect for non-payment of dues or assessments, there has been express language in the covenants alerting the home

buyer that the association's activities concern the land, that the buyers are incurring a dues-paying obligation, and that the association has the ability to collect for non-payment. *See e.g. Rodruck v. Sand Point Maintenance Comm'n*, 48 Wn.2d 565, 573-574, 295 P.2d 714 (1956); *Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.*, 120 Wn. App. 246, 249-250, 84 P.3d 395 (2004). Perhaps recognizing all this, CGCC, through its President, admitted that it does not possess the authority under the covenants to assess landowners in Division I.

2. There was and is no contract between the parties for payment of dues

To establish a contractual obligation, a party must show that there was a meeting of the minds regarding a promise(s) made between the parties and that consideration accompanied the promise(s). *See Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 178, 94 P.3d 945 (2004)(requirement for mutual assent necessary to prevent surprise).

In the present case, Mr. Williams never made a promise to pay dues or assessments. Until 2007, no one at CGCC even asserted that such dues and assessments were required. Mr.

Williams received nothing in return for CGCC's 2007, newly asserted requirement to pay assessments. The first assertion of this requirement was four years after Mr. Williams made his initial purchase of land from CGCC. Even if one were to accept the Association's argument that the 2007 By-Laws create an obligation to pay assessments, by its own terms the By-Laws only create an obligation to pay dues and assessments to maintain the membership. *See* CP at 31 (2007 By-Laws at 1-2). The By-Laws specify the only remedy available for non-payment: forfeiture of membership. *Id.* Again, in 2012, CGCC, through its President, acknowledged that this was the only remedy available to CGCC. *See* CP at 333 (July 10, 2012 letter from Kay Frank to CGCC Members at 2). Summary judgment on the assessment issue was properly granted.

VI. CONCLUSION

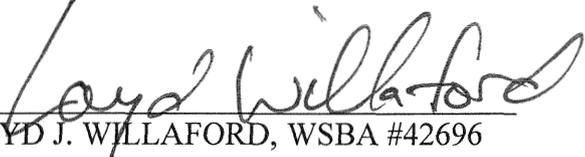
In its summary judgment ruling on CGCC's right to use Mr. Williams' property, the trial court misapplied the law on real covenants, prescriptive rights, and equitable servitudes. The covenant regarding the so-called "golf-play area" is so defective on its face as to be unenforceable. There were also numerous factual

disputes with regard to the scope of the purported right to use Mr. Williams' property. There was a factual dispute as to whether the intent was for the homeowners to mark the golf play area or whether the golf course would mark it. There was a factual dispute as to whether there were out-of-bounds markers visible in 1996 at the time Mr. Williams' property was first sold by CGCC or in 2003 when Mr. Williams purchased the property. There was a factual dispute as to whether the golf course has regularly maintained a 35 foot boundary of out-of-bounds markers across Mr. Williams' property. And there was a factual dispute as to whether the golf course's alleged maintenance activities on Mr. Williams' property were sufficient to support a claim of a prescriptive easement. The legal errors by the trial court and the material factual disputes meant that summary judgment was inappropriate on this claim. Mr. Williams should be allowed a trial where he can cross-examine the golf course's witnesses and prove that the golf course is not entitled to use his property. Mr. Williams requests that this Court reverse the trial court's order granting summary judgment to CGCC on the issue of a right to use Mr. Williams' property. Given the trial court's comment about

“there being no doubt in his mind” and a trial being a “waste of resources,” CP at 247. Mr. Williams further requests that this matter be remanded for trial before a different judge.

The trial court correctly ruled that CGCC had no legal authority to assess Mr. Williams or other property owners for money due on account. Thus, Mr. Williams asks this Court to affirm the trial court’s granting of summary judgment on this issue.

Submitted this 14th of November, 2013.



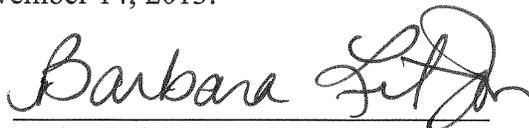
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CERTIFICATE OF SERVICE

I declare under penalty of perjury of the laws of the state of Washington that on November 14, 2013 I provided a true and correct copy of Appellant's Brief, served by the method indicated below, and addressed to the following:

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