

No. 65577-9-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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SEAWEST SERVICES ASSOCIATION,  
a Washington non-profit corporation,

Respondent,

vs.

JIM COPENHAVER and SUZANNE COPENHAVER,  
husband and wife, and the marital community composed thereof,

Appellants.

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APPEAL FROM THE SUPERIOR COURT  
FOR ISLAND COUNTY  
THE HONORABLE VICKIE I. CHURCHILL

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BRIEF OF RESPONDENT

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## I. INTRODUCTION

Appellant Copenhaver's predecessor in interest gave a water system easement to respondent Seawest Services Association's predecessor in interest in 1979, reserving shares in the water system that respondent now operates. After purchasing their property in 2001, Copenhaver received water services as a limited member of Seawest, paying without objection all assessments due. Copenhaver started this dispute in 2009 by blocking Seawest's access to the water system and preventing it from completing upgrades. Copenhaver also ceased paying assessments to Seawest, placing a financial burden on Seawest and its other members.

As a result of Copenhaver's actions, Seawest was forced to take legal action to ensure access to its easements and the water system located on the easement, and to require Copenhaver to pay assessments owed to Seawest. The trial court properly concluded that there was no genuine issue of material fact as to the validity and scope of Seawest's easements, or that Copenhaver as a water shareholder in Seawest's water system was a limited member of

Seawest and liable for assessments related to the water system.

This court should affirm and award Seawest its fees on appeal.

## II. RESTATEMENT OF FACTS

### A. **The Predecessor Owner Of The Copenhaver Property And The Predecessor To Seawest Services Association Established A Common Plan For Seawest To Establish A Water System To Service Both The Copenhaver Property And Seawest Development.**

Appellants Jim and Suzanne Copenhaver (“Copenhaver”) live on and own real property at 951 West Beach Road in Island County, Washington. (CP 2867) Respondent Seawest Services Association (“Seawest”) is a non-profit corporation that owns, operates, and manages a Class A water distribution system (“Seawest water system”) in Island County, Washington. (CP 2902, 3320) The Seawest water system is located on the Copenhaver real property. (CP 3320) The Seawest water system services 17 homes within the Seawest Development (the “Development”) as well as 11 homes outside of the Development that each own a water share connected to the Seawest water system. (CP 1920-21, 3350)

The homeowners within the Development are “full members” of Seawest. (CP 3370) The homeowners outside the Development are “limited members” of Seawest. (CP 3370) Copenhaver owns

one of the 11 properties outside of the Development that holds a water share connected to the Seawest water system; Copenhaver is a limited member of Seawest. (CP 1920-21, 3314, 3370) Each property serviced by the water system, including the Copenhaver property, is liable for assessments associated with the Seawest water system. (See CP 3314, 3350-51, 3409)

Two recorded easements on the Copenhaver real property grant Seawest “the right to draw water from the well on the Copenhaver real property, to use a portion of the property designated in the easements for ingress and egress to the well site, and to maintain all of the necessary buildings and equipment customarily associated with the operation of the water system.” (CP 3321; *see also* CP 3238, 3239) The Development, and the construction of the Seawest water system that services both the Development and certain properties outside of the Development, including the Copenhaver property, was part of a plan commenced over 30 years ago between the original owner of the Copenhaver property and the developer who incorporated Seawest.

**1. The Original Owner Of The Copenhaver Property Sold Neighboring Property That Would Eventually Become Sewest Development To A Developer.**

Frank and Marion Gaudin ("Gaudin") were the original owners of the Copenhaver property. (CP 3124-25) On July 15, 1978, Gaudin executed a real estate contract with John E. Grady, III ("Grady Sr.") to sell certain real property in Island County for purposes of development. (CP 3126-34) This real property eventually became the Development. (CP 3126, 3232, 3251) Gaudin retained ownership of the property that Copenhaver later purchased. (See CP 3411) On August 2, 1978, Grady Sr. assigned a one-half interest in the property acquired from Gaudin to his son, John E. Grady, Jr. ("Grady Jr."). (CP 3142) Grady Sr. assigned his entire interest in the property to Grady Jr. in 1984. (CP 3148)

**2. The Original Owner Granted Easements On The Copenhaver Property To The Developer For The Installation, Operation, And Maintenance Of A Water System, In Exchange For Water Shares For The Copenhaver Property.**

On August 8, 1979, a little over a year after the real estate contract was executed, and in order for the real property to be developed for re-sale, Gaudin conveyed a 20-foot "Well Site and Water System Utility Easement" on the Copenhaver property to

Grady Sr. (CP 3238, 3248) The easement was for an “easement and right of way for the installation, operation and maintenance of a well and water line.” (CP 3238) Gaudin also separately conveyed to Grady Sr. an “Easement for Construction and Maintenance of Well and Establishment of Pollution Control Setback” on the Copenhaver property. (CP 3239, 3250) This 100-foot circular easement was for the purposes of “constructing and maintaining a well, pump, treatment facility and storage tank and for the purpose of establishing a well pollution control set back.” (CP 3239) Both easements were granted in consideration for Grady Sr. providing Gaudin with the “right to six (6) water hook-ups or shares for six (6) individual dwellings” from the planned water system. (CP 3238, 3239) Gaudin also conveyed the easements so that the Gradys could “develop the real property for resale.” (CP 3251)

On September 7, 1979, Gaudin executed a Declaration of Covenant that any owner of the Copenhaver property would not, among other things, maintain cesspools, sewers, septic tanks, chicken houses, or rabbit hutches on the easements on the Copenhaver property, to prevent the contamination of the water system. (CP 3240) This covenant was to “run with the land and

shall be binding on all parties having or acquiring any right, title, or interest in the land.” (CP 3240)

A well was drilled on the Copenhaver parcel sometime in 1979. (CP 3326) In 1983, the 1979 easements were re-executed by Gaudin and re-recorded to make corrections to the legal descriptions in the earlier recorded easements. (CP 3248, 3250) The initial Sewest water system was completed sometime in 1984. (CP 3326)

**3. The Developer Incorporated Sewest Services Association To Maintain Both The Development And The Water System. The Members Of Sewest Included Both Property Owners Within The Development And Those Outside The Development Whose Property is Served By The Water System.**

Five months before Gaudin re-executed the utility easements, Grady Sr. incorporated Sewest, a non-profit corporation, on February 18, 1983. (CP 3367) One purpose of Sewest was to “acquire, construct, maintain, and operate a domestic water system and distribute water therefrom to the development and other real property which the Association may elect to serve.” (CP 3368) Sewest had authority to “impose water

and hookup changes and levy assessments to be collected for the operation of the water system.” (CP 3368)

The Articles established two classes of members of Seawest: “full members” who owned property within the Development, and “limited members” who receive utility services from Seawest, but whose property is outside of the Development. (CP 3370) The Articles of Incorporation were filed with the Secretary of State, but not recorded. (CP 3367, 3379, 3388)

**4. The Developer Transferred The Easements To Seawest “For And In Consideration Of An Inducement To Sell Real Property To Others,” With The Approval Of The Original Owner.**

On October 26, 1984, Grady Sr. assigned the recorded easements granted by Gaudin to the recently incorporated Seawest “for and in consideration of an inducement to sell real property to others,” (CP 3245) so that Seawest could provide water services to the Development and to certain property outside the Development, including the Copenhaver property. (See CP 3251) Gaudin “acknowledg[ed] and approv[ed]” the transfer of the easements to Seawest. (CP 3245)

Initially, the Washington Department of Social and Health would only approve six water hookups or shares for the water

system located on the Copenhaver property. (CP 3251, 3362) Grady Sr. had already lined up the sale of three lots in the Development, but the buyers would only agree to close if each lot was guaranteed a water share. (CP 3252) Gaudin, whose real estate contract with Grady Sr. would be paid in part from the development of the property, agreed to grant priority to these three buyers over Gaudin's right to six water shares per the earlier agreement with Grady Sr. (CP 3252) Gaudin executed an agreement with Grady Sr. providing that "Gaudin or his assignees shall have the right to hook up the remaining three (3) qualified water shares." (CP 3252)

Pursuant to deeds of trust, the Gradys closed on the sale of the three lots with the three buyers who took water shares. (CP 3279, 3289, 3301) Each buyer took deed subject to "restrictions, reservations, and easements of record." (CP 3279, 3289, 3301) The restrictions included those set out in the "Declaration of General Protective Covenants," which had been recorded less than two months earlier, and which included, among other things, that these lots "will participate and abide by Community Association agreements involving water, road maintenance, and other utilities

provided for the benefit” of the lot owners. (CP 3209-10) Grady then conveyed the deeds of trust on these properties to Gaudin, in partial fulfillment of the 1978 real estate contract. (CP 3284, 3286, 3296, 3298, 3307, 3310)

All of these transactions, including the conveyance of the easements to Seawest, Gaudin’s agreement to allow the buyers to take priority for three water shares<sup>1</sup>, the transfer of statutory warranty deeds to the buyers, the transfer of the deeds of trust to Gaudin, and the partial warranty fulfillment deeds to the Gradys, were recorded on November 8, 1984. (CP 3245, 3251-52, 3279, 3284, 3286, 3289, 3296, 3298, 3301, 3307, 3310)

**5. Upon Completion Of The Water System, The Copenhaver Property, A “Limited Member” Of Seawest, Was Serviced By The Water System, And Obligated To Pay Assessments Related To The Water System To Seawest.**

Gaudin sold the Copenhaver property to Patrick Shelley in January 1987. (CP 3411) Gaudin also conveyed to Shelley “one water hookup right in the well and water system of Seawest Services Association, a non-profit corporation.” (CP 3412) Shelley

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<sup>1</sup> The Agreement was originally recorded on November 8, 1984, but re-recorded on November 27, 1984 “to correct a Notary acknowledgment.” (CP 3251)

took the deed to the Copenhaver property “subject to any unpaid assessments as imposed by Seawest Services Association.” (CP 3411)

Shelley sold the Copenhaver property to Lawrence Gaines in April 1989. (CP 3413) Gaines also took title to the Copenhaver property “subject to any unpaid assessments or charges, and liability to further assessment or charges for which a lien may have arisen (or may arise) as imposed by Seawest Services Association.” (CP 3413)

By 1990, the Washington Department of Social and Health had approved 28 water shares for the Seawest water system. Gaudin had by this time conveyed all of the reserved six water shares, including one to Gaines, who then owned the Copenhaver property. (CP 3350) The Gradys owned five water shares. (CP 3350) The remaining 17 water shares were owned by lot owners within the Development. (CP 3350)

According to the “Seawest Water System Accounting of Water Shares,” each water share owner is obligated to pay “all assessments of the owners of the system, currently the developers, and in the future, the Association, for water use and maintenance of

the system.” (CP 3351) By virtue of ownership of a water share and use of water services from the Seawest water system, Gaines was a limited member of Seawest per the Articles of Incorporation. (CP 3370) Gaines actively participated in Seawest's affairs. (See CP 222, 3540, 3542, 3544) Through his membership in Seawest, Gaines assisted in drafting an agreement between Seawest and Grady Jr. for the conveyance of the water system located on the Copenhaver property to Seawest. (CP 3542, 3544)

Such an agreement had been contemplated since at least as early as July 1988. (See CP 837-47) There apparently was some confusion whether Seawest already owned the water system. Ultimately it was decided that Grady Jr. should convey clear title to the water system to Seawest. (CP 3313, 3544)

On April 2, 1991, Grady Jr. conveyed and quit claimed the water system to Seawest, “including easement rights and rights under any previously recorded certificate of ground water right, and including the pump, all existing water lines, and any other personal property and equipment which now exists and is used in connection with the water system.” (CP 3313) The conveyance was for the “benefit of the property owners of the tracts and lots which are

described in Exhibit "A" [the Development], and also, for the benefit of the holders of any water shares which are reserved herein, and which may be granted to any transferee, of rights in and to said water system, and is, also, for the benefit of such other properties as may be determined from time to time by the Association." (CP 3313)

As part of this conveyance, Grady reserved six water shares for the benefit of Gaudin "and their heirs, successors, and/or assigns," which included Gaines, who then owned the Copenhaver property and to whom Gaudin had previously transferred a water share. (CP 3314, 3350) The conveyance also provided that "when Grady, Gaudin, or any transferee of any such water share does elect to have service from the water system, the owners of the tract or lot so served will be limited members of the Association, subject to the obligation to pay dues and assessments related to operation and maintenance of the water system, in the same manner as the other properties served by the water system, pursuant to the terms and provisions of the Bylaws of the Association." (CP 3314)

Although this 1991 Agreement was not recorded against the Copenhaver property, it was recorded. (See CP 3313)

Copenhaver's claim that "Seawest produced no evidence that the Copenhavers or any prior owner of their property had actual or constructive notice of Seawest's articles of incorporation [and bylaws] or any purported application of those articles to the Copenhaver property" (App. Br. 10-11) is false. Gaines attended at least one Association "membership meeting," where he signed in as a "Limited Member." (CP 3540) Gaines also participated in the drafting and editing of the 1991 Agreement, which acknowledged that Gaines – as a successor to Gaudin – would be a limited member of Seawest, and subject to "the terms and provisions of the Bylaws of Seawest." (CP 3314, 3542, 3544)

**B. When Copenhaver Acquired The Property In 2001 He Was Notified Of The Easements, The Water Share In The Seawest Water System, And The Obligation To Pay Assessments To Seawest.**

Gaines sold the Copenhaver property to Eldon and Marcia Smith in 1992. (CP 3414) The Smiths sold the property to Copenhaver in February 2001. (See CP 3017, 3416, 3578, 3652) As part of the title report acquired by Copenhaver on January 5, 2001, prior to closing, he was notified of the various recorded easements held by Seawest against the Copenhaver property, including its placement of a water system on the Copenhaver

property. (See CP 3569-70) Copenhaver was also notified that the property was subject to assessments imposed by Seawest:

Assessments or charges and liability to further assessments or charges, including the terms, covenants, and provisions therefore, disclosed in instrument; Imposed by: Seawest Services Association.

(CP 3570) On January 22, 2001, Seawest also advised the title company that the Copenhaver property held a water share with Seawest, which imposes a minimum \$25 per month assessment that is billed quarterly. (CP 3605) When the sale closed, Copenhaver paid \$75 in assessments that were owed by his predecessor Smith to Seawest for use of the water system. (CP 3597, 3606)

As with his predecessors, Copenhaver was a limited member of Seawest by virtue of the water share and use of the water system. (CP 1920-21, 3314, 3370) Until the commencement of litigation between Copenhaver and Seawest, Copenhaver was regularly billed by, and paid assessments to, Seawest. (See CP 752-73)

**C. After Regularly Paying Assessments To Seawest For Use Of The Water System For Eight Years, Copenhaver Stopped Paying, And Interfered With Seawest's Ability To Maintain And Upgrade The Water System By Blocking Its Easement.**

Between 1979, when the well was first drilled, until shortly before this litigation was commenced, Seawest regularly entered the Copenhaver property in order to maintain the water system. (CP 3326) In 1991, Seawest installed a new filtration system in the pump house located within the easement on the Copenhaver property. (CP 3326) In 1993, Seawest installed a chain gate across the access road. (CP 3323) The combination for the gate lock was shared with Seawest and the owner of the Copenhaver property. (CP 3322) Seawest regularly maintained and repaired the access road to the water system. (CP 3323)

One year after Copenhaver purchased the property, he began to complain about water "backwashing" from the water system. (CP 2614) Along with complaining to Seawest, Copenhaver complained to the Island County Public Works. (CP 3660) Copenhaver complained that the existing filtration system allowed backwashing of water to occur on his property. (CP 2614,

3660) Copenhaver complained that “this has been the process for 5-10 years, long before I purchased the land.” (CP 3660)

In 2008, Seawest replaced the filter system that had been installed in 1991 with a more modern system that substantially reduced the amount of backwash water that flushed from the system. (CP 3327) Seawest also had plans to divert the backwash water to another location off of the Copenhaver property but despite earlier complaining that he did not want the backwash water on his property, Copenhaver objected to the plan. (CP 750, 2605-06)

Despite Seawest’s efforts to address the backwash water issue with Copenhaver, the relationship between the two deteriorated. In January 2009, Copenhaver unilaterally removed the shared combination lock on the chain gate across the access road to the water system, replacing it with a new lock that Seawest could not unlock. (CP 3322) This act effectively blocked Seawest’s access to the water system. (CP 3322)

In addition to changing the lock on the gate, Copenhaver destroyed or obstructed portions of the access road on the easement. The access road to the water system is a circle, allowing access to the water system by driving in and out without

the need to back out from the road. (CP 3222) Copenhaver blocked portions of the circular road by installing boulders, digging holes, planting trees, driving metal fence posts and running tape between the fence posts. (CP 3322, 3325)

Copenhaver also refused permission to install an electric generator that the Washington Department of Health had recommended because electrical service on Whidbey Island is routinely lost due to winter storms blowing down power lines. (CP 3327) Electricity is vital to the operation of the water filter system, and was also necessary for the system's booster pumps. (CP 3327)

Finally, despite paying all assessments and water bills from Seawest during the previous eight years, Copenhaver began refusing to pay billed charges from Seawest for use of the water system. (See CP 752-53, 1927, 2024)

**D. Procedural History.**

On April 8, 2009, Seawest sued Copenhaver for a declaratory judgment, injunctive relief, and prescriptive easement. (CP 2901) Among the relief requested, Seawest sought an order allowing Seawest to install an emergency generator on the

property; a declaratory judgment that Seawest may have unrestricted access to the property by way of their easement to provide “routine and emergency care, repairs and maintenance of the water system without defendants Copenhavers’ authorization or consent;” and a declaratory judgment that Copenhaver was a limited member of Seawest and liable to pay all required sums to be a member of Seawest. (CP 2024, 2901-14)

Copenhaver counter-claimed, claiming, among other things, that Seawest “caused backwash discharge waters and noxious substances to be deposited upon the land of the defendants.” (CP 2142) Copenhaver subsequently voluntarily dismissed his counterclaims on May 10, 2010. (CP 186-87)

On May 18, 2010, Island County Superior Court Judge Vickie Churchill granted partial summary judgment to Seawest, concluding that Copenhaver was a limited member of Seawest and has an obligation to pay Seawest the amounts owed for “(1) water furnished by the plaintiff to defendants, (2) excess water fees, (3) assessments, and (4) reasonable attorney’s fees and court costs involved with the collection of any unpaid amounts for water, excess water, and assessments.” (CP 89) The court concluded

that the undisputed evidence showed a “common scheme of development by which owners of water shares in what would become Seawest would be members, either limited or full, and that common scheme was not disregarded as all members are obligated to pay the assessment” (CP 101-02) and at the time Copenhaver purchased the property, he “had actual and constructive notice of the obligation to be a Limited Member of and to pay Assessments to Seawest.” (CP 85)

The court also concluded that the undisputed evidence showed that the easements allow Seawest “without any permission or consent from the Copenhaver real property, to own, install, manage, maintain and upgrade a water system on the Copenhaver real property, including, without limitation, all normal and customary uses pertaining to a Washington Class A water system, or its functional equivalent due to changes in subsequent law or classification.” (CP 147) In particular, the court concluded that the Association was entitled to “build, repair, maintain and/or install additional wells, buildings, facilities (including without limitation storage tanks and accessory equipment) within the two easement areas, including without limitation the right to have and operate

electrical generators and propane tanks on the Copenhaver real property within the two recorded easements.” (CP 147) The court also concluded that Seawest could “discharge its backwash water, which is part of the Seawest water system, (1) through the current existing backwash water pipe and onto the surface of the Copenhaver real property within the area of the two easements and (2) onto any surface and/or below surface area within the two easements.” (CP 147)

The court awarded attorney fees of \$91,567.05 to Seawest under its bylaws, which allow for an award of attorney fees if Seawest brings an action for unpaid assessments. (CP 87) The fees awarded were a fraction of those incurred by Seawest, solely related to the issue of Copenhaver’s status as a limited member and liability for assessments, and did not include fees related to the issues related to the easements. (See CP 299-300, 353-55) The court found that these fees were “both reasonable and essential to proving defendant’s status as a Limited Member of Seawest and neither duplicative nor unnecessary.” (CP 87) The court found that the “legal issues involved were complicated and required the assembly of numerous support documents.” (CP 87) The court

also found that attorney fees were warranted because “defendant Copenhavers’ intentional conduct has caused a substantial increase in the amount of attorney’s fees and costs incurred by Plaintiff Seawest.” (CP 87-88) The court ruled that its orders were final under CR 54(b). (CP 90, 125) Copenhaver appeals. (CP 50)

### III. ARGUMENT

#### A. **Standard Of Review.** (Response to App. Br. 17-18)

This court reviews summary judgment orders de novo, performing the same inquiry as the trial court. *Heg v. Alldredge*, 157 Wn.2d 154, 160, ¶ 12, 137 P.3d 9 (2006). While the court must look at the evidence with all reasonable inferences viewed in favor of the non-moving party, the court is also charged with considering *all* of the evidence – including evidence that is unfavorable to the non-moving party. See *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) (“An appellate court would not be properly accomplishing its charge if the appellate court did not examine *all* the evidence presented to the trial court . . .”). A plaintiff cannot point to “isolated excerpts” of the record to raise a “genuine issue of material fact” in order to avoid summary judgment. *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 379, 972 P.2d 475 (1999). Nor can a plaintiff rely on mere

speculation or argumentative assertions to avoid summary judgment. **Marshall**, 94 Wn. App. at 377.

Here, the trial court properly granted summary judgment because from all of the evidence presented, the trial court could reach only one conclusion on Copenhaver's liability to Seawest and the scope of the express easements. This court should affirm.

**B. By Virtue Of The Water Share And Use Of The Water System, Copenhaver Is A Limited Member Of Seawest, And Liable For Assessments To Seawest.**

**1. No Evidence Supports Copenhaver's Claim That Seawest Is Equitably Estopped From Claiming That Copenhaver Is A Limited Member Of Seawest, And Liable For Assessments.** (Response to App. Br. 19-22)

The trial court properly rejected Copenhaver's claim that Seawest should be equitably estopped from claiming that Copenhaver is a member of Seawest and thus bound by its Articles of Incorporation and bylaws, and liable for assessments associated with the water system. "There can be no genuine issues of fact precluding summary judgment if there is a complete failure of proof concerning an essential element of the nonmoving party's case." **Shows v. Pemberton**, 73 Wn. App. 107, 113, 868 P.2d 164, *rev. denied*, 124 Wn.2d 1019 (1994). The trial court properly granted summary judgment because Copenhaver could not prove any of

the elements of equitable estoppel, and all three elements must be proved with clear, cogent, and convincing evidence. **Wilhelm v. Beyersdorf**, 100 Wn. App. 836, 849, 999 P.2d 54 (2000).

Equitable estoppel is not favored. **Wilhelm**, 100 Wn. App. at 849; see also **Cornerstone Equipment Leasing, Inc. v. MacLeod**, \_\_\_ Wn. App. \_\_\_, ¶ 19, 247 P.3d 790 (Feb. 7, 2011). The party asserting estoppel must prove *each* of its elements by clear, cogent and convincing evidence. **Wilhelm**, 100 Wn. App. at 849. “These elements include (1) an admission, statement or act inconsistent with the claim asserted afterward; (2) action by the other party in reasonable reliance on that admission, statement or act; and (3) injury to that party when the first party is allowed to contradict or repudiate its admission, statement or act.” **Wilhelm**, 100 Wn. App. at 849.

To support a claim of equitable estoppel, Copenhaver relies entirely on a response provided by the former Association President in 2001 answering a “form” questionnaire from the title company regarding the previous owner Smith. (App. Br. 19, *citing* CP 848) This questionnaire asked only four questions: 1) whether there were any annual dues or assessments; 2) whether there were

any delinquent dues or assessments; 3) whether there were any additional charges; and 4) what is the fiscal year for charges. (CP 848) Seawest responded as follows: the property owner is “not a member of Seawest Home Assn. No annual dues. Has a water share – min. \$25.00 month billed quarterly – owes \$75 for 4<sup>th</sup> qt. ending 12/31/2000... [Fiscal year runs from] 1/1/2000 to 12/31/2001 [sic].” (CP 848)

Copenhaver cannot meet the first element for equitable estoppel because this statement is accurate, and is not “inconsistent with a claim afterward asserted.” It is not disputed that Copenhaver, whose property is outside of the Development, is not a member of a “home association,” and that he is not responsible for “annual dues.” RCW 64.38.010(1) defines a “homeowners' association” as a legal entity “each member of which is an owner of residential real property located within the association's jurisdiction.” Seawest never claimed that Copenhaver was a member of their, or any, “home association.” Instead, Seawest asserted that Copenhaver was a “limited member” of Seawest by virtue of a “water share” and use of the services provided by the Seawest water system.

Copenhaver also claims that after he purchased the property, the then president of Seawest (who is now dead), allegedly told Copenhaver that he was not a member of Seawest. (App. Br. 8) But this statement was stricken by the superior court as barred under RCW 5.60.030, the deadman statute (CP 3015, 3019), and Copenhaver does not challenge that ruling on appeal.

In any event, even if it can be claimed that the 2001 statement by the deceased president of Seawest is inconsistent with Seawest's position in 2010, Copenhaver failed to present evidence that he took any action "in reasonable reliance on that act, statement, or admission." Below, the only evidence that Copenhaver provided to support his claim that he relied on the 2001 statement from Seawest was his own declaration that he "would not have purchased property controlled financially in any way by a homeowner's association." (App. Br. 7, *citing* CP 4140) But Seawest is not a "homeowner's association" that financially "controls" the Copenhaver property. Seawest is, for Copenhaver's purposes, an association that maintains a water system that provides water to his property and levies assessments for the operation and maintenance of the water system. (CP 3390)

Further, Copenhaver provided no other evidence to support this self-serving statement of “reliance.” “In opposing summary judgment, a party may not rely merely upon allegations or self-serving statements, but must set forth specific facts showing that genuine issues of material fact exist.” *Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group, Inc.*, 114 Wn. App. 151, 157, 52 P.3d 30 (2002). The undisputed evidence simply does not support Copenhaver’s claim that he would not have purchased property if he was required to be a member of Seawest.

The form questionnaire on which Copenhaver relies entirely for his equitable estoppel argument did not specifically inquire whether Copenhaver was a “member” of Seawest. (CP 848) Thus, Copenhaver cannot reasonably claim that he looked to the answers to this questionnaire to determine whether he would purchase the property, based on whether he was required to be a Seawest member. *Shows*, 73 Wn. App. at 113 (rejecting use of equitable estoppel when the purported reliance was “unreasonable”). This is especially true since it is undisputed that Copenhaver regularly received mailings from Seawest addressed to him as a “member” or “shareholder.” (CP 727-28, 730-43) Further, prior to this

litigation, Copenhaver acknowledged that he was a member of Seawest entitled to notice of meetings, and referred to Seawest as "our association." (CP 750-51) Copenhaver also regularly paid, without objection, Seawest assessments, ranging from \$75 to \$4,000, with descriptions of the charges as "assessment base," "water maintenance," or "water use." (See CP 752-73)

Finally, Copenhaver presented no evidence on the third element of equitable estoppel, that he would be "injured" if the court allowed Seawest to repudiate an earlier statement that Copenhaver was not a member of the "Seawest Home Association." Copenhaver receives household water from the Seawest water system and benefits from its improvements. Copenhaver cannot show any injury because he is now being ordered to pay for services that he indisputably uses. See, e.g., **Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.**, 120 Wn. App. 246, 261, 84 P.3d 295 (2004) (property owner whose property is benefited by common facilities maintained by a homeowners' association required to pay association dues, otherwise he "would be unjustly enriched if it could retain that benefit without paying for it"). In any event, Seawest could not, as a matter of law, absolve Copenhaver

of paying assessments and charges for water services while requiring other members to do so. See RCW 80.28.090 (no water company shall grant unreasonable preference to any person); RCW 80.28.100 (no water company shall give preference in the amount it charges for its service to one person over another). “All persons are charged with knowledge of the provisions of statutes and must take notice thereof.” *Davidson v. State*, 116 Wn.2d 13, 26, 802 P.2d 1374 (1991) (quoting *Martin v. Seattle*, 111 Wn.2d 727, 735, 765 P.2d 257 (1988)).

Because Copenhaver's claim of equitable estoppel failed, the trial court did not err in concluding that Copenhaver was a limited member of Seawest by virtue of the water share and use of the water from the water system, and thus bound to pay assessments to Seawest.

**2. The Undisputed Evidence Showed That Copenhaver Had Both Actual And Constructive Notice That He Was A Member Of Seawest And Liable To Pay Assessments. (Response to App. Br. 23-28)**

Copenhaver claims that he cannot be a member of Seawest and liable to pay assessments because he alleges that no documents recorded against the property bind him to membership

in Seawest. (App. Br. 23-24) But Copenhaver concedes that even if there was no express covenant for Copenhaver to be a limited member of the Association and liable for assessments incorporated into a deed on his property, it may still be enforced as an equitable restriction if he had “actual or constructive notice.” (App. Br. 24, citing *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 691, 974 P.2d 836 (1999); *Pioneer Sand & Gravel Co. v. Seattle Const. & Dry Dock Co.*, 102 Wash. 608, 618, 173 P. 508 (1918)). The trial court properly concluded that based on the undisputed evidence in the record, Copenhaver had actual and constructive knowledge that he was a limited member of Seawest, and liable for assessments.

The documents that were recorded on the Copenhaver property showed that the property had a water share or hook up into the Seawest water system, for which the property owner must pay assessments: The 1979 and 1983 Easements from Gaudin to Grady stated that Gaudin would receive “water hook-ups or shares” from the water system located on the Copenhaver property in consideration for the easements. (CP 3238, 3239, 3242, 3244) These easements were conveyed to Seawest “for the purpose of the Association providing water service to all of the real properties

described herein, provided, however Gaudin having first reserved priority in the first six (6) water hookups or shares to the Association water system.” (CP 3245, 3251) The terms “water hook ups or shares” are synonymous with the term “memberships.” (CP 1925) When Gaudin conveyed the Copenhaver property to Shelley, the conveyance included “one water hookup right in the well and water system of Seawest Services Association,” and was taken “subject to any unpaid assessments as imposed by Seawest Services Association.” (CP 3411-12) ***Rodruck v. Sand Point Etc. Comm.***, 48 Wn.2d 565, 576-77, 580-81, 295 P.2d 714 (1956) (obligation to pay assessments to maintain streets “touch and concern” the land).

Copenhaver claims that the deed from Gaudin to Shelley proves that he is not liable for assessments to Seawest because it states that Seawest is “solely responsible for the construction, maintenance, financing and repair of said well and water easement.” (App. Br. 26-27) But Copenhaver fails to recite the remainder of that sentence: “and that the seller herein is not.” (CP 3412) The deed acknowledged that the “well and water system might not be complete at this time,” (CP 3412) and the language of

the deed merely acknowledged that it was Seawest, and not Gaudin, who was “responsible for completing a water line to said property.” (CP 3412) In any event, the 1989 deed from Shelley to Gaines, clearly recognized that the property was subject to assessments from Seawest:

Subject to any unpaid assessments or charges, liability to further assessments or charges for which a lien may have arisen (or may arise) as imposed by Seawest Services Assn.

(CP 3413)

Although the deeds for the Copenhaver property from Gaines to Smith, and Smith to Copenhaver, did not contain this same “subject to” language, it is undisputed that the title report that Copenhaver obtained prior to his purchase gave notice that he would be subject to assessments imposed by Seawest:

Assessments or charges and liability to further assessments or charges, including the terms, covenants, and provisions thereof, disclosed in instrument; Imposed by Seawest Services Association.”

(CP 3570; *also* CP 3553 (Smith Title Report)) Further, Copenhaver was also notified through the title company that the property had a “water share” through Seawest, which obligated the owner to pay assessments that were a *minimum* \$25 per month. (CP 3605)

Seawest presented unchallenged evidence that property owners are not allowed to obtain water from a non-profit corporation without being a member of the non-profit corporation. (CP 1925) A membership interest in a non-profit corporation that provides water services, such as Seawest, is commonly recognized by persons who receive water from the non-profit corporations as “memberships,’ ‘water hookups or shares,’ ‘water shares,’ and/or ‘water hookup rights.’ All these terms are synonymous with each other.” (CP 1925) That Copenhaver had a water share/hook up in the Seawest water system is the functional equivalent of the property having a “membership” in Seawest, requiring him to pay assessments for maintenance of the water system.

To the extent that Copenhaver had any question regarding his liability to Seawest for that water share, he was put on notice to make a proper inquiry. “A purchaser who has knowledge sufficient to cause a prudent person to make inquiry, where such inquiry would lead to the discovery of the equitable rights of others affecting the property, is charged with actual knowledge.” **Fossum Orchards v. Pugsley**, 77 Wn. App. 447, 452, 892 P.2d 1095, *rev. denied*, 127 Wn.2d 1011 (1995) (addressing a purchaser’s

knowledge regarding implied easements). Copenhaver thus had actual notice when he purchased his property that the water share with the Seawest water system gave him membership in Seawest, and made him liable for any assessments related to that water system. See *Jones v. Harris*, 63 Wn.2d 559, 562, 388 P.2d 539 (1964) (“when a term that has a generally accepted meaning is used, the parties are hard pressed afterwards to claim their intent was otherwise”).

There was also undisputed evidence that Copenhaver had notice that he was bound by Seawest’s Articles of Incorporation. Copenhaver paid an assessment to Seawest of \$4,000 for water system upgrades in April 2007 (CP 768), six months after he received a letter from Seawest stating that Copenhaver was governed by the Articles of Incorporation for Seawest and was warned that the assessments were to increase due to water system upgrades:

The Articles of Incorporation for Seawest Services allow the Board to assess for services provided and expenses. The increased maintenance fees we instituted a few years ago have just kept our system financially in the black. In order to make the improvements less painful to our shareholders we will be adding an assessment of \$50 per quarterly water bill to begin the engineering of the new system... By

no means does this mean that the assessments will only be \$50 per quarter – it could increase dramatically.”

(CP 742) By paying this assessment fee without objection, Copenhaver acknowledged that he was bound by Seawest’s Articles of Incorporation as a limited member.

Finally, the 1991 conveyance of the water system from Grady Jr. to Seawest was recorded. The 1991 conveyance recited that properties outside of the Development that used water services from the Seawest water system would be limited members of Seawest and liable to pay assessments “in the same manner as the other properties served by the water system pursuant to the terms and provisions of the Bylaws of the Association:”

When Grady, Gaudin, or any transferee of any such water share does elect to have water service from the water system, the owners of the tract or lot so served will be limited members of the Association, subject to the obligation to pay dues and assessments related to operation and maintenance of the water system, in the same manner as the other properties served by the water system, pursuant to the terms and provisions of the Bylaws of the Association.

(CP 3314) Gaines, the predecessor owner of the Copenhaver property, had actual notice of this conveyance, as he assisted in preparing it. (CP 3542, 3544)

Because Copenhaver had actual and constructive knowledge that he was a limited member of Seawest, he is liable for assessments charged by Seawest and bound by its Articles of Incorporation and bylaws.

**3. Copenhaver And Seawest Had An Implied Contract In Law That Copenhaver Is Bound To Pay Assessments As A Member Of Seawest.**  
(Response to App. Br. 28-31)

Copenhaver and his predecessors in interest have utilized the Seawest water system and have paid without objection (at least until shortly before this litigation started) all “water use,” “water maintenance,” and “assessment base” charges to Seawest. Therefore, there is a contract implied in law that Copenhaver should be required to continue to pay all assessments imposed by Seawest while Copenhaver uses the water system.

Copenhaver claims that he should not be bound by an implied contract “in fact” on summary judgment. (App. Br. 28-31) However, under the undisputed facts of this case he should be bound by an implied contract in law. A contract implied in law is based not on “facts and circumstances showing a mutual consent and intention to contract,” but rather on “the fundamental principle of justice that no one should be unjustly enriched at the expense of

another.” *Lake Limerick Country Club v. Hunt Mfg. Homes, Inc.*, 120 Wn. App. 246, 261, 84 P.3d 295 (2004) (citations omitted). In this case, Copenhaver has been benefited by the water system since he has owned the property, and “would be unjustly enriched if it could retain that benefit without paying for it, and thus the law will imply a contract to pay dues imposed” according to the Articles and bylaws of Seawest. *Lake Limerick Country Club*, 120 Wn. App. at 261.

**4. Copenhaver Is Bound By Covenants Within The Common Plan As A Limited Member In Seawest And To Pay Assessments.** (Response to App. Br. 31-34, 37-38)

The trial court also properly held Copenhaver bound to membership in Seawest, and liable for assessments, after concluding that “there was a common scheme of development by which owners of water shares in what would become Seawest would become members, either limited or full, and that common scheme was not [ ] disregarded as all members are obligated to pay the assessment. The Copenhavers paid those assessments, and only stopped paying when this litigation was started.” (CP 102)

Our courts have recognized that there may be a right in equity to enforce covenants when it appears that there was a

“common scheme or plan.” *Mt. Baker Park Club, Inc. v. Colcock*, 45 Wn.2d 467, 471, 275 P.2d 733 (1954). A court may imply the benefit and burden of restrictions imposed by a common grantor/developer, and under this equitable theory, a property owner in a development may enforce a restriction against another property owner not expressly subject to the restriction. *Johnson v. Mt. Baker Park Presbyterian Church*, 113 Wash. 458, 464-65, 194 P. 536 (1920); see also 1 *Restatement (Third) of Property: Servitude* §2.14 (2)(b) (“a conveyance by a developer that imposes a servitude on the land conveyed to implement a general plan creates an implied reciprocal servitude burdening all the developer’s remaining land included in the general plan, if injustice can be avoided only by implying the reciprocal servitude”).

Gaudin was the original owner of the Copenhaver property and of the property within the Development. As evidenced by all of the transactions between Gaudin, the Gradys, and later, Seawest, the common plan was that the developers would construct a water system that would service both properties within the Development and properties outside the Development chosen by Gaudin to be serviced by his reserved six water shares, including the

Copenhaver property. (*supra* II.A) As evidenced by the Articles of Incorporation, which were filed just one year prior to Gaudin agreeing that the easements would be conveyed to Seawest, the property owners accepting water service would become either full or limited members of Seawest and liable for assessments relating to the maintenance of the water system. (See CP 3245, 3370) ***Turner v. Wexler***, 14 Wn. App. 143, 146, 538 P.2d 877 (1975) (“Instruments which are part of the same transaction, relate to the same subject matter and are executed at the same time should be read and construed together as one contract, even though they do not refer to one another”).

This common plan has been followed by each owner of the Copenhaver property, as evidenced by the fact that each owner, including Copenhaver, has paid billed assessments to Seawest. (See CP 3422-3539) There is also evidence that at least one predecessor owner, Gaines, was actively involved in Seawest as a limited member. (CP 3540, 3542, 3544) It would be inequitable to allow Copenhaver to avoid this responsibility now.

Because the trial court concluded that Copenhaver was liable to pay assessments to Seawest as a limited member and

through use of the water system, the trial court did not err in ordering Copenhaver to pay “any and all future amounts levied by the plaintiff in the ordinary course of business for water, excess water, and assessments.” (CP 125) Even if this was an “injunction,” as Copenhaver claims, it was not error. As Copenhaver concedes, an injunction is appropriate if “tailored to remedy the specific harms shown rather than to enjoin all possible breaches of the law.” (App. Br. 38, *citing Kitsap County v. Kev, Inc.*, 106 Wn.2d 135, 143, 720 P.2d 818 (1986)). Here, one of the specific issues before the court was whether Copenhaver was liable to Seawest for any assessments related to the water system. The trial court concluded that he was, and appropriately entered an order requiring Copenhaver to pay any future assessments.

**5. As A Limited Member, Copenhaver Was Liable For Attorney Fees Incurred To Collect Unpaid Assessments.** (Response to App. Br. 34-36)

Copenhaver does not challenge the reasonableness of the attorney fees awarded to Seawest. The trial court properly ordered Copenhaver to pay attorney fees to Seawest for fees incurred by Seawest to collect unpaid assessments. (CP 86-87) The Articles of Incorporation provided one of the “purposes” of Seawest is “to

impose water and hook-up charges and levy assessments to be collected for the operation of the water system.” (CP 3368) One of its “powers” is “to fix, levy, collect, and enforce payment by any lawful means, all charges or assessments for services provided.” (CP 3369) The Articles also provide for two classes of members: full members and limited members. (CP 3370)

Copenhaver claims that under the bylaws only an “owner of a tract within Seawest” is obligated to pay assessments and attorney fees to collect unpaid assessments. (App. Br. 35) But the bylaws state that “‘owners’ and ‘members’ as used herein shall be synonymous.” (CP 430) Thus, any provision referencing an owner also means “member,” which under the Articles of Incorporation includes “limited members.” (CP 3370)

The bylaws provide that each owner (i.e. member) agrees to pay assessments to Seawest “whether or not it shall be so expressed” in a recorded covenant, contract to purchase, or deed. (CP 434; ¶ 5.2 Duration of Lien and Personal Obligation of Assessment) The bylaws also provide that “dues and assessments not paid within thirty (30) days after the due date shall bear interest from the due date at the rate of twelve percent (12%) per annum.

The Association may bring an action at law or in equity against the owner [i.e. member] personally obligated to pay the same, or foreclose the lien against the tract, and interest, costs, and reasonable attorney fees of such any such action shall be added to the amount of the assessment.” (CP 435; ¶ 5.5 Effect of Nonpayment of Assessment: Remedies of the Association)

Even if the bylaws allowing for the award of attorney fees to Seawest did not apply to Copenhaver, he would not be entitled to attorney fees under RCW 4.84.330. This statute allows for an award of fees to the prevailing party in an action to enforce a contract “whether he is specified in the contract or lease or not.” RCW 4.84.330. Copenhaver’s position below and on appeal is that he never intended to enter into a contract to pay assessments to Seawest. Where the party seeking fees under a contract provision did not intend to form a contract, an award of attorney fees is not appropriate. **Wallace v. Kuehner**, 111 Wn. App. 809, 820, 46 P.3d 823 (2002).

In **Wallace**, the court distinguished **Herzog Aluminum, Inc. v. General American Window Corp.**, 39 Wn. App. 188, 692 P.2d 867 (1984), cited by Copenhaver. The **Wallace** court held that in

**Herzog**, and other cases that allowed for an award of attorney fees, the “parties *intended* to form a contract, but for some reason, whether due to a lack of a meeting of the minds (*Herzog*), mutual mistake (*Stryken*), or statute of limitations (*Yuan*), the contract was not enforceable.” 111 Wn. App. at 822. The court recognized that the distinction between those cases and **Wallace**, where, as here, the party who seeks attorney fees claims he had no intention of forming a contract, and thus could not rely on a purported contract to demand fees. 111 Wn. App. at 822. As in **Wallace**, if Copenhaver prevails, it will be on a ground that forecloses an award of fees.

Finally, the trial court awarded attorney fees not only based on the bylaws, but also because “defendant Copenhavers’ intentional conduct has caused a substantial increase in the amount of attorney’s fees and costs incurred by Plaintiff Seawest.” (CP 88) Copenhaver did not assign error to this finding of fact and it is a verity on appeal. **Marriage of Possinger**, 105 Wn. App. 326, 338, 19 P.3d 1109, *rev. denied*, 145 Wn.2d 1008 (2001) (unchallenged findings are verities). There is substantial evidence to support the trial court’s finding that attorney fees were warranted

based on Copenhaver's "intentional conduct." There was no basis for Copenhaver to resist paying assessments to Association for use of the water system. There was no basis for Copenhaver to obstruct Seawest's access to its easements to maintain and upgrade the water system. These actions forced Seawest to bring suit and incur attorney fees. Further, throughout the litigation, Copenhaver filed pleadings and declarations without basis or containing hearsay, causing Seawest increased attorney fees to have these pleadings stricken. (See e.g. CP 164, 167, 171, 614, 923, 3015 (orders striking Copenhaver pleadings)); CR 11 (allowing for attorney fees if pleadings are not well grounded in fact or warranted by existing law).

The trial court properly awarded attorney fees to Seawest based on Copenhaver's obligation under the bylaws, and because Copenhaver increased Seawest's attorney fees unnecessarily.

**C. The Easement On The Copenhaver Property Includes The Right To Install Additional Facilities As Necessary For The Proper Operation Of The Water System.**  
(Response to App. Br. 38-45)

In determining the scope of an easement, the court looks "to the deed's language, the intention of the parties connected with the original easement, the circumstances surrounding the deed's

execution, and the manner in which the easement has been used. The law assumes parties to an easement contemplated changes in the use of the easement that may have not existed at the time of the grant.” **810 Properties v. Jump**, 141 Wn. App. 688, 696-97, ¶ 20, 170 P.3d 1209 (2007) (citations omitted). “It can be assumed the parties had in mind the natural development of the dominant estate. Accordingly, the degree of use may be affected by development of the dominant estate. The law assumes parties to an easement contemplated a normal development under conditions which may be different from those existing at the time of the grant. Normal changes in the manner of use and resulting needs will not, without adequate showing, constitute an unreasonable deviation from the original grant of the easement.” **Logan v. Brodrick**, 29 Wn. App. 796, 799-800, 631 P.2d 429 (1981).

Here, Gaudin granted a 20-foot “well site and water system utility easement” for the “installation, operation and maintenance of a well and water line.” (CP 3238, 3242) Gaudin granted a 100-foot circular easement for the “purpose of constructing and maintaining a well, pump, treatment facility and storage tank and for the purpose of establishing a well pollution control setback. (CP 3239,

3244) The Agreement between Gaudin and Grady acknowledged that the easements were for a “water system.” (CP 3251)

RCW 80.04.010 broadly defines a water system to include “all real estate, easements, fixtures, personal property, dams, dikes, head gates, weirs, canals, reservoirs, flumes or other structures or appliances operated, owned, used or to be used for or in connection with or to facilitate the supply, storage, distribution, sale, furnishing, diversion, carriage, apportionment or measurement of water for power, irrigation, reclamation, manufacturing, municipal, domestic or other beneficial uses for hire.” Since the establishment of these easements, Seawest has regularly upgraded the water system as necessary without objection from any owner of the Copenhaver property. (*See supra* II.C) The trial court properly concluded that these easements allowed Seawest to upgrade the water system as necessary, including the installation of an electric generator, propane tank, and a fence to secure either the easement areas or the facilities. (CP 151-52)

Copenhaver complains that the trial court erred in allowing the installation of any new facilities, including a generator and propane tanks, claiming that the 100-foot circular easement could

only be used for a “pollution control setback.” (App. Br. 41) But the easement is not so limited. The easement is titled “Easement For Construction And Maintenance Of Well And Establishment Of Pollution Control Set Back.” (CP 3239) The stated purpose for the easement is for “constructing and maintaining a well, pump, treatment facility and storage tank *and* for the purpose of establishing a well pollution control setback.” (CP 3239, *emphasis added*) There was undisputed evidence that the installation of an electrical generator and a propane fuel source, which was recommended by the Washington Department of Health, was part of maintaining the treatment facility. (CP 2621) The installation of both was necessary to upgrade the water system, as Copenhaver was notified in October 2006. (CP 742)

An electrical generator is needed for a backup system in the event that the water system loses electrical power – a common occurrence on Whidbey Island. (CP 2607, 3327) Electricity is “vital to the operation of [the water] filter system” and is necessary to run the booster pumps. (CP 3327) “The purpose of the emergency generator is to maintain the pressure of the water system to meet water customer expectations and to maintain the integrity of the

water distribution lines and prevent potential contamination due to loss of pressure in the lines.” (CP 2608, 2621) This upgrade was necessary to meet the requirements of WAC 246-290-420 (4), which requires a water provider to “address abnormal operating conditions, such as those associated with fires, floods, unscheduled power outages, facility failures, and system maintenance, by using measures consistent with applicable regulations and industry standards to ensure the system is constructed, maintained, and operated to protect against the risk of contamination by cross-connections as a result of loss of system pressure.” (*See also* CP 2621)

The trial court properly concluded that the easements allowed Seawest to upgrade the water system as necessary, including the installation of an electric generator, propane tank. (CP 151-52)

**D. There Is No Evidence That The Backwash From The Water System “Pollutes” The Copenhaver Property.**  
(Response to App. Br. 45-48)

This court should reject Copenhaver’s unsupported claim that Seawest is “polluting” his property. (App. Br. 45) There was absolutely no evidence to support his claim below, and now on

appeal, that the backwash water from Seawest water system is polluted. The issue of whether the backwash water was polluted was not before the trial court in its consideration of Seawest's summary judgment motions. Instead, Copenhaver raised this issue *after* the court orally ruled on the motions for partially summary judgment (CP 472), in a motion that was then abandoned, as Copenhaver voluntarily dismissed his counter-claim against Seawest asserting that this backwash water was "noxious." (CP 186-87, 1828-29)

The only evidence of "pollution" before the trial court on summary judgment that Copenhaver cites is his own description of the backwash to Island County Public Works in 2002 as "rusty purplish water," and Seawest's acknowledgement that the discharge contains "potassium permanganate" that causes the purplish color. (App. Br. 47, CP 3598) But there is no evidence that the water itself is harmful. In fact, there is evidence from the Department of Health, which provided a sanitary survey of the water system and found no "acute health concerns" with regard to the water system. (CP 2617; *see also* CP 2633-46) The only concern raised about the backwash water was the Department's

recommendation that Seawest consider “installation of a backwash meter to track backwash water used and unaccounted for water as part of a efficiency program.” (CP 2622)

The water system's filter units require backwashing, and have for decades. (CP 3327, 3598) Copenhaver acknowledged that backwash of water has occurred on his property for at least 8-10 years prior to owning the property. (CP 3598) The trial court properly concluded that this backwash water could continue to be discharged from water system onto the Copenhaver property so long as it remains within the easements. (CP 151-52)

**E. This Court Should Award Attorney Fees To Seawest Pursuant To Its Bylaws.**

Seawest's bylaws provide for an award of attorney fees incurred to collect unpaid assessments:

The Association may bring an action at law or in equity against the owner personally obligated to pay [assessments], or foreclose the lien against the tract, and interests, costs, and reasonable attorney's fees of any such action shall be added to the amount of such assessment.

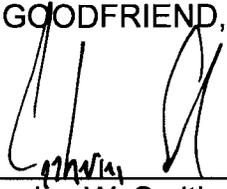
(CP 435) This court should award attorney fees to Seawest for having to defend Copenhaver's appeal.

**IV. CONCLUSION**

Copenhaver is liable as member of Seawest for assessments and attorney fees incurred to collect unpaid assessments. The scope of the easements allows Seawest to install any equipment or facilities related to its water system. This court should affirm and award attorney fees to Seawest.

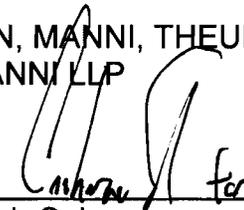
Dated this 30<sup>th</sup> day of March, 2011.

SMITH GOODFRIEND, P.S.

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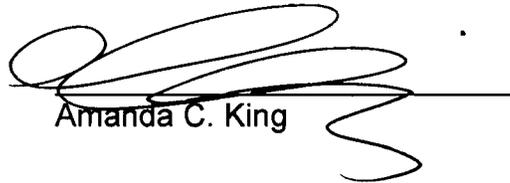
**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on March 30, 2011, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
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Jacob Cohen Cohen, Manni & Theune P.O. Box 889 Oak Harbor, WA 98277	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail

**DATED** at Seattle, Washington this 30th day of March, 2011.

  
Amanda C. King

2011 MAR 31 10:16:09

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March 30, 2011

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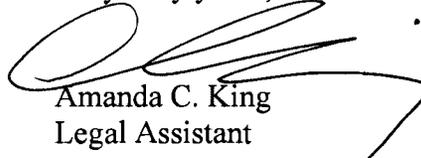
*Re: Seawest v. Copenhaver, Cause No. 65577-9*

Dear Clerk:

Enclosed for filing is the original and one copy of the Brief of Respondent, in the above referenced matter. Please copy receive the corresponding face page and return it to this office in the enclosed, self-addressed, stamped envelope.

Thank you for your courtesy.

Very truly yours,

  
Amanda C. King  
Legal Assistant

/ack  
enclosures

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