

No. 67714-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BUCK MOUNTAIN OWNERS' ASSOCIATION,
a Washington Non-Profit Corporation,

Respondents,

v.

GLENN PRESTWICH and BARBARA BENTLEY,

Appellants,

J. MICHAEL STARR and RICHARD U. STARR, TRUSTEES,
and JACK M. STARR CREDIT SHELTER TRUST,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR SAN JUAN COUNTY
THE HONORABLE VICKIE CHURCHILL

REPLY BRIEF OF APPELLANTS

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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 JUN -7 AM 11:45

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I. REPLY STATEMENT OF FACTS

The trial court imposed a “binding covenant” on the Bentley-Prestwich property that requires its owners and their successors-in-interest to pay past and future assessments for road maintenance to a homeowners association to which the property owners do not belong. The following facts are not disputed by respondent Buck Mountain Owner’s Association:

- The Bentley-Prestwich property is outside of the jurisdiction of the Association, and is not bound by the Bylaws or Covenants for the Association. (RP 405, 450; Ex. 79, 82)

- Neither the Bylaws nor the Covenants for the Association gives the Association power to impose assessments against non-members. (Ex. 15, 33)

- Nothing in the chain of title to the Bentley-Prestwich property evidences an encumbrance or a promise obligating its owners to pay assessments to the Association for road maintenance. (See Ex. 10, 11, 26, 193)

- The Declaration of Easement, which created the easement that benefits the Bentley-Prestwich property, was executed before the Association existed. (See Ex. 10) No subsequent deed conveys this easement to the Association.

- The Association maintains 10 miles of private roads for its members. (See Ex. 79; RP 1054) Association members are obligated under the Association's Covenants, to pay a "uniform rate" for road maintenance regardless of each member's actual usage of the roads. (See Ex. 15)

- The Association's road maintenance budget is approved by a vote of the membership. (See Ex. 15; Association Resp. Br. 40) Bentley-Prestwich are not members of the Association and are not entitled to vote. (RP 476; Ex. 261)

- Bentley-Prestwich are only entitled to use the road described in their deed. (See Ex. 10, 26) That road comprises less than one mile of the ten miles of private road that the Association maintains. (RP 911, 1054) The 0.7 mile of road used by Bentley-Prestwich starts at the entrance to Buck Mountain and leads directly to the Bentley-Prestwich property. (See Ex. 10, 26, 432 at 17, 35; RP 1054)

- Bentley-Prestwich offered and tendered payment of 7% of the full assessment paid by the Association's members as a contribution to maintenance of that portion of the road that Bentley-Prestwich use in common with the Association's members. (Ex. 81)

- The Association rejected Bentley-Prestwich's tender and sued Bentley-Prestwich. (Ex. 82, 83; CP 4)

The trial court found that Bentley-Prestwich failed to tender defense of the Association's lawsuit to respondent Starr, their predecessor-in-interest and grantor under the statutory warranty deed, and that in any event, the encumbrance was adequately disclosed on the Bentley-Prestwich closing statement, which reflected a charge of \$600 as "dues" to an unnamed "association." (Ex. 29) Starr, however, does not dispute the following facts:

- Starr conveyed the property to Bentley-Prestwich via statutory warranty deed. (Ex. 26) Neither the deed nor title report disclosed any encumbrance on the property requiring the property owners to pay assessments to the Association. (Ex. 26, 193)

- Starr's past payments to the Association for road maintenance were a "mistake." (RP 1123)

- After the Association filed its lawsuit, Bentley-Prestwich filed and served a Third Party Complaint on Starr. (CP 64-71) The Third-Party Complaint tendered the defense of the Association's lawsuit to Starr, and sought indemnity from Starr for the Association's claim that Bentley-Prestwich were obligated to pay assessments to the Association for road maintenance. (CP 70-

71; RP 1143 (Starr Testimony): “I don’t remember the exact language [of the complaint]. There was – I do remember there was a mention of tender, yes.”)

- Starr never assumed the defense against the Association’s claims though he had adequate opportunity to do so before trial. (RP 1144)

II. REPLY ARGUMENT

A. **The Trial Court Erred In Enforcing A Non-Existent Covenant Requiring Bentley-Prestwich To Pay Road Maintenance Assessments To The Association.**

1. **No Writing Imposes An Express Or Equitable Covenant On The Bentley-Prestwich Property To Pay The Association’s Maintenance Assessments.**

The trial court erred in establishing and enforcing a covenant against the Bentley-Prestwich property that requires its owners to pay assessments to the Association for road maintenance, including “construction impact fees.” (CP 323, 327-28, 332-37) A covenant, express or equitable, that requires a property owner to contribute towards maintenance expenses must be in writing. See *Lake Arrowhead Community Club, Inc. v. Looney*, 112 Wn.2d 288, 293, 770 P.2d 1046 (1989) (an obligation “to contribute one’s share of the neighborhood’s maintenance expenses generally is characterized as an affirmative covenant”) (App. Br. 28); *Dickson*

v. Kates, 132 Wn. App. 724, 732, 733, ¶¶ 17, 21, 133 P.3d 498 (2006) (in order for a covenant to be enforceable it must “satisfy the statute of frauds;” in the case of an equitable restriction there must be “a promise, in writing”) (App. Br. 28, 30-32); **Rodruck v. Sand Point Maintenance Comm.**, 48 Wn.2d 565, 573, 295 P.2d 714 (1956) (to be binding, a covenant requiring owners of property to contribute to the maintenance of roads or other common property, must be set forth by deed) (App. Br. 29-30).

The Association concedes that there are no “writings” imposing an obligation to pay assessments on the Bentley-Prestwich property. (Association Resp. Br. 32: “The Respondents did not allege that the Appellants’ real property is somehow described in or expressly included in the writings that constitute the association’s covenants, plat maps, legal descriptions, etc.”) (emphasis in original). In the absence of a writing evidencing this obligation, the trial court could not enforce a covenant against the Bentley-Prestwich property requiring its owners and their successors-in-interest to pay past and future assessments to the Association, and could not enter a judgment against Bentley-Prestwich for prior assessments.

2. The Trial Court Created A Covenant Where One Did Not Exist Based On The Subjective Intent Of One Of The Original Developers.

Recognizing that there was no written covenant, the trial court erred by creating and then encumbering the Bentley-Prestwich property with a “binding covenant” requiring present and future owners to pay assessments to the Association based solely on the unexpressed subjective intent of a grantor.¹ (See CP 327-28, 332-37) The trial court based its judgment on the unilateral intent of one of the nine original developers, finding that the road users “would all share in the Buck Mountain Road Maintenance Association,’ and that it was always the intent that everybody would share equal[ly] in road maintenance.” (See FF 18, 34, CP 321, 324) The trial court could not “redraft or add to the language” of the easement benefitting the Bentley-Prestwich property to impose an obligation to pay the Association’s maintenance expenses based on the unexpressed intent of one of the original developers. **Hollis**

¹ The Association now asserts that “it did not ask the trial court to create [a] covenant between the parties *where none exists*.” (See Association Resp. Br. 29) (emphasis added) However, the Association’s Complaint sought a declaration and judgment that the Bentley-Prestwich property is “subject to 100% of the road maintenance assessments levied by the [Association].” (CP 7)

v. Garwall, Inc., 137 Wn.2d 683, 697, 974 P.2d 836 (1999) (App. Br. 33-34).

The Association cannot disregard the trial court's express reliance on "extrinsic evidence of [one of] the original signors' intent" to find that the "parties' predecessors-in-interest intended for all road users to pay a share of road maintenance fees." (FF 18, 34, CP 321, 324) One developer's subjective intent to "share equal[ly] in road maintenance," is not a legitimate ground to "add to the language" of the easement an obligation "independent of the instrument." *Hollis*, 137 Wn.2d at 697.

Bentley-Prestwich were not required to object to the admission of the deposition testimony in order to challenge the trial court's judgment encumbering the property with a covenant on appeal, as the Association argues. (Association Resp. Br. 37) Bentley-Prestwich does not challenge the admissibility of this testimony under the rules of evidence,² but the sufficiency of the evidence to support the trial court's decision. The trial court erred

² For example, in *State v. Robinson*, 4 Wn. App. 515, 483 P.2d 144 (1971) (Association Resp. Br. 37), appellant challenged the admission of a form filled out by a complaining witness because it was hearsay. This court held that appellant's failure to object to the form's admission at the time of trial waived his error on appeal. *Robinson*, 4 Wn. App. at 516.

in relying on this one developer's deposition testimony as a basis for interpreting the easement to include a covenant obligating the owners to pay assessments to the Association.

3. The Trial Court Created A Covenant That Goes Beyond Apportioning Responsibility For The Actual Cost of Maintaining The Easement And Burdens The Bentley-Prestwich Property With The Obligations Of Membership In The Association Without Any Of The Benefits.

The trial court erred in encumbering the Bentley-Prestwich property with a "binding covenant" that imposes on the owners all of the burdens of Association membership (assessments and restrictions on use of their property), without any of the benefits (voting rights and decision-making). The trial court imposed a servitude on the Bentley-Prestwich property that goes beyond simply requiring its owners to contribute to the cost of maintaining an easement road that they use to access their property. The covenant allows for unpaid assessments to "become a lien upon the land [that] may be foreclosed in the same manner as a mortgage." (CP 333) The covenant also restricts Bentley-Prestwich from the free use of their property by restraining them from using it for "commercial purposes," such as a vacation rental, under the penalty of an increased assessment. (See CP 333) This

encumbrance, which does not appear in Bentley-Prestwich's chain of title, is not even imposed upon Association members under its Covenants. (*Compare* Ex. 15, §§ III, VI *with* CP 333, Ex. 26, 193)

This covenant also allows the Association to impose road maintenance assessments against Bentley-Prestwich in amounts determined by the Association without allowing Bentley-Prestwich any participation or voice in the process.³ (*See* CP 333, RP 476) This court should reverse and vacate the trial court's order, and direct the trial court on remand to clear title to the Bentley-Prestwich of the trial court's "binding covenant."

³ While the sweeping powers of homeowners associations are frequently analogized to local governments, Bentley-Prestwich do not claim, as the Association mischaracterizes, that there has been "a violation of Appellants' rights as citizens to the free governmental exercise of the public taxing authority." (Association Resp. Br. 43) *See e.g. Cohen v. Kite Hill Cmty. Assn.*, 142 Cal. App. 3d 642, 651, 191 Cal. Rptr. 209, 214 (1983) (noting that homeowners' association act as "mini-governments" that provide services such as road maintenance, which are financed through assessments or taxes levied upon the members of association).

B. The Trial Court Erred By Requiring Bentley-Prestwich To Pay An Equal Share Of The Cost Of Maintaining Ten Miles Of Road When They Have The Limited Right To Use 7% Of Those Roads.

1. Washington State Authorities Cited By The Association Do Not Support A “Rule” Burdening A Property With An Obligation To Contribute To Maintenance Of An Easement Absent A Covenant.

Under Washington law, any obligation to contribute toward maintenance of an easement is an “affirmative covenant” that must be in writing to be binding. (See Reply Argument, § A.1; see also App. Br. 26-32) The Association relies on out-of-state authorities, and a section of the Restatement (Third) of Property: Servitudes § 4.13 (2000) that has never been adopted in Washington,⁴ to argue that a property may be burdened with an obligation to contribute to the cost of maintaining a shared roadway in the absence of a written easement or covenant. (Association Resp. Br. 20-25) The limited Washington authority that the Association relies upon to claim that Washington is in “accord,” does not in fact support the rule it urges:

⁴ Washington does not always follow the Restatement of the Law. See e.g. *Crisp v. VanLaecken*, 130 Wn. App. 320, 321, ¶ 1, 122 P.3d 926 (2005) (“We decline to adopt a rule proposed in Restatement (Third) of Property (Servitudes) § 4.8(3) (2000)”).

Standing Rock Homeowners Association v. Misich, 106 Wn. App. 231, 23 P.3d 520, *rev. denied*, 145 Wn.2d 1008 (2001) (Association Resp. Br. 24-25) held that when the servient estate is being subjected to a greater burden than originally contemplated, the servient estate has the authority to restrict use of the easement for its protection as long as it does not unreasonably interfere with the dominant estate. 106 Wn. App. at 241 (servient estate could erect an unlocked gate to discourage unauthorized use, so long as easement holders were still provided “free passage” over the easement).

Here, unlike the homeowners association in ***Standing Rock***, the Association is not the “servient estate” – the Association was neither the grantor nor the beneficiary of the Declaration of Easement that established the easement used by Bentley-Prestwich. (Ex. 10) The Association's rights are limited to the easements that it maintains for its members, within the geographic bounds of the Buck Mountain Development, which does not include the easement used by Bentley-Prestwich. (See Ex. 15, 200) (See App. Br. 9-14, 26-27) The Association itself has no rights in the easement and cannot under any authority “restrict” Bentley-

Prestwich's use of the easement, including by imposing assessments against them.

Bushy v. Weldon, 30 Wn.2d 266, 191 P.2d 302 (1948) (Association Resp. Br. 25) affirmed the trial court's order establishing an easement by implication, and ordering both parties to equally contribute to the driveway's future maintenance. 30 Wn.2d at 271-72. This case is distinct from ***Bushy*** because there, the trial court created the easement and its accompanying burden by quieting title. Here, the easement was already established in a writing that gave the Association no rights and was silent on maintenance. (Ex. 10) ***Bushy*** does not authorize a trial court to impose an obligation for past and future maintenance on users of an existing easement that does not itself impose such a maintenance obligation.

2. Bentley-Prestwich Are In No Event Obligated To Contribute More Than Their Proportionate Share For Maintaining The Roads Used "In Common" With Association Members.

Bentley-Prestwich were not seeking a "free ride" to use a small portion of the roads also used by Association members to access their property. (See FF 18, CP 321) To the contrary, Bentley-Prestwich offered and tendered a contribution equal to 7%

of the full assessment paid by the Association's members based on Bentley-Prestwich's use of 7% of the roads "in common" with Association members. (Ex. 81) Even though Washington courts have never adopted it, Bentley-Prestwich's offer was consistent with the "rule" urged by the Association on appeal, that "when an easement is silent on road maintenance, and both the benefitted and burdened parcels share use of the easement, each is obligated to contribute to maintenance for *the portion of the roadway used in common.*" (Association Resp. Br. 22) (emphasis added)

Even if this court were to adopt the principle urged by the Association in this case, it could not affirm the trial court's judgment, requiring Bentley-Prestwich to contribute to the Association's maintenance of ten miles of road when the portion of the "roadway used in common" with Association members is no more than 7%. (Ex. 10, 26) The trial court's assessment of the Bentley-Prestwich property at 62.5% of the fee paid by Association members forces Bentley-Prestwich to pay for maintenance of roads that they do not use, and have no right to use.

Under the Restatement, joint use of an easement "gives rise to an obligation to contribute jointly to the costs reasonably incurred for repair and maintenance of the *portion of the servient estate or*

improvements used in common.” Restatement (Third) of Property: Servitudes § 4.13 (3) (2000), (emphasis added) (Association Resp. Br. 22); *see also comment d* (“frequency and intensity of use” by each user should be considered in establishing share of maintenance for easement). When there is “evidence of the location of each parties’ property with respect to the easement and of their use of the easement,” maintenance “should be distributed among all users *in proportions that closely approximate the usage of the parties.*” **Lindhorst v. Wright**, 616 P.2d 450, 455 (Ok. Civ. App. 1980) (Association Resp. Br. 23) (emphasis added); *see Marsh v. Pullen*, 50 Or. App. 405, 623 P.2d 1078, 1080, *rev. denied*, 290 Or. 853 (1981) (Association Resp. Br. 23) (cost to maintain easement should be apportioned between users pro rata); **Drolsum v. Luzuriaga**, 93 Md. App. 1, 611 A.2d 116, 126 (Association Resp. Br. 23) (“the cost of maintenance should be distributed among all users in proportions that closely approximate their usage”), *cert. denied*, 328 Md. 237 (1992).

The Association claims that the trial court’s 62.5% assessment obligates Bentley-Prestwich to pay only a “fraction” of the Association’s uniform assessment and that it would be “impractical” to prorate for Bentley-Prestwich’s use because of the

“numerous entries and exits from the entire road system.” (Association Resp. Br. 40) But there was no evidence that Bentley-Prestwich use, or are entitled to use, any of these “numerous entries and exits” that would make proration “impractical.” Bentley-Prestwich are only entitled to use the 0.7 mile easement directly leading to their home, from which there is only one entry/exit point. (See Ex. 10, 26, 432)

While proration for its individual members might be impractical, the Association is not required to assess its members on a prorated basis because Association members are bound by Covenants establishing their obligation to pay a “uniform rate” for maintenance of the ten-mile road system regardless of usage. (Ex. 15) Bentley-Prestwich are not similarly bound under the Covenants to a “uniform rate” because they are not members, and have no right to use all of the Association’s roads. (See Ex. 26, RP 405)

Under these circumstances where the “trip distance” between the entry point and the Bentley-Prestwich property can be measured, proration is “appropriate,” as the Association’s expert conceded:

I would expect that a model for proration would work on a road that was, as I’ve said linear in that it has one exit and entry point. The distances to each

residence could be measured so that we could determine how much of the road each lot owner is expected to utilize...

(RP 590) Establishing Bentley-Prestwich's use of the road system at 7% (0.7 mile of the ten miles of road) is a matter of simple arithmetic. Their contribution, if any, should have been limited to 7% of the full assessment paid by the Association's members,⁵ or less, in proportion to Bentley-Prestwich's "frequency and intensity of use" of the portion of the road maintained by the Association. Restatement (Third) of Property: Servitudes § 4.13 (3), *comment d*.

The out-of-state authority cited by the Association does not support this disproportionate burden on real property. See ***Droslum***, 611 A.2d at 126 (Association Resp. Br. 23) (reversing order requiring parties to be "equally responsible for maintenance" when there was no evidence that one party would use the easement in the same proportion as the other users). At a minimum, this court should reverse and remand to the trial court with instructions to limit Bentley-Prestwich's contribution based upon their limited right to use the Association's roads.

⁵ Even then, a 7% prorated assessment would not be equitable since the assessments paid by members include the cost of insurance and administration for the Association from which Bentley-Prestwich derive no benefit. (See e.g. Ex. 50, 51, 52, 53, 54)

C. Starr Was Obligated By The Statutory Warranty Deed To Provide A Defense To Bentley-Prestwich Against The Association's Lawsuit.

1. Bentley-Prestwich Effectively Tendered Defense To Starr.

Bentley-Prestwich tendered their defense to Starr by filing and serving their Third Party Complaint, seeking his defense and indemnity from the Association's action to impose a previously undisclosed servitude against their title. *Broten v. May*, 49 Wn. App. 564, 572, fn. 4, 744 P.2d 1085 (1987) ("a tender by way of cross claim is timely and valid"), *rev. denied*, 110 Wn.2d 1003 (1988). At trial, Starr conceded that the Third Party Complaint served on him included a tender for defense. (RP 1143) (Starr Resp. Br. 15) Starr never assumed defense of the Association's lawsuit and did nothing for the three years until trial because he thought it "would be useless and [Bentley-Prestwich] were represented by counsel." (RP 1144)

There was nothing "casual [and] ambiguous" about the tender of defense in the Third Party Complaint as Starr now argues. (See Starr Resp. Br. 15) In their very first demand under "Request for Relief," Bentley-Prestwich asked that Starr be ordered to "defend Bentley-Prestwich's title to the B-P Property free of any

encumbrance, claim, lien or easement as may be claimed by the Association.” (CP 70) Furthermore, Bentley-Prestwich stated not once, but four times in the Third Party Complaint that they joined Starr as a defendant pursuant to the warranties contained in RCW 64.04.030. (See CP 68, 69, 70, 71) Starr, a licensed attorney, was able to discern from the complaint that he was being asked to defend Bentley-Prestwich.

Starr provides no authority for his argument that Bentley-Prestwich should have made an *additional* “formal tender” of defense beyond the Third Party Complaint before he was required to assume their defense, and his contention that the Third Party Complaint was “ineffective” is also unsupported by authority. (See Starr Resp. Br. 14-15) An effective tender notifies the grantor that: (1) there is a pending action; (2) if liability is found, the grantee will look to the grantor for indemnity; (3) the notice constitutes formal tender of the right to defend the action; and (4) if the grantor refuses to defend, it will be bound to factual determinations in the original action in subsequent litigation between the grantee and grantor. ***Mastro v. Kumakichi Corp.***, 90 Wn. App. 157, 164-65, 951 P.2d 817, *rev. denied*, 136 Wn.2d 1015 (1998) (*citations omitted*).

Here, the Third Party Complaint: (1) notified Starr that the Association commenced an action against Bentley-Prestwich related to the property conveyed by Starr to them (CP 65, ¶ 5); (2) notified Starr that Bentley-Prestwich would look to Starr for indemnity if they are found liable (CP 68-72, ¶¶ 13, 14, 20A, 20B, 20C, 20D); and (3) stated that “pursuant to the warranties contained [in] the Statutory Warranty Deed [and] under RCW 64.04.030,” Starr is asked “to defend Bentley-Prestwich’s title” [and] “to indemnify and hold Bentley-Prestwich harmless from and against any and all claims made by the Association.” (CP 68-69, ¶ 13)

The Third Party Complaint satisfies the fourth ***Mastro*** element because it contains language “sufficient to convey the consequences of refusing to defend.” 90 Wn. App. at 165. Bentley-Prestwich notified Starr that they would seek indemnity for “all losses, costs, expenses and damages including, without limitation and in such amounts as may be proven at trial, diminution in value of the B-P Property, any amounts which may be awarded to the Association, and for the sum of all reasonable attorneys fees and costs incurred by Bentley-Prestwich in connection with the claims made by the Association against them.” (CP 71, ¶ 20D)

The trial court erred in holding that the Third Party Complaint was not an effective tender.

2. Under RCW 64.04.030, Starr Was Required To Defend Bentley-Prestwich Against The Association's Claim That The Property Was Encumbered With An Obligation To Pay Assessments.

Under RCW 64.04.030, Bentley-Prestwich were entitled to an unencumbered title from Starr when he conveyed the property by warranty deed. An obligation requiring property owners to contribute towards maintenance of the road is an undisclosed "encumbrance" on the property for purposes of RCW 64.04.030. See *Lake Arrowhead Community Club, Inc. v. Looney*, 112 Wn.2d 288, 293, 770 P.2d 1046 (1989); *Williams v. Hewitt*, 57 Wash. 62, 63-64, 106 P. 496 (1910) (App. Br. 43). Bentley-Prestwich were entitled to a defense and indemnity from Starr against the Association's claim that the property was encumbered with an unstated obligation requiring its owners to pay assessments.

Starr makes no contrary argument, claiming only that he was not "the proximate cause of any damages Bentley and Prestwich have sustained." (Starr Resp. Br. 18) But, the Association's claim arose largely because of Starr's admitted "mistake" in paying prior

assessments. (CP 6; RP 1123) Starr's failure to provide an unencumbered title and a defense for Bentley-Prestwich against the Association caused Bentley-Prestwich's damages, which include, "both damages for lost property or diminution in property value and attorney's fees incurred in defending title." **Edmonson v. Popchoi**, 172 Wn.2d 272, 279, ¶ 13, 256 P.3d 1223 (2011) (*citations omitted*).

Starr's claim that Bentley and Prestwich "were notified before and at closing that \$600.00 'Association Dues' were owed to Buck Mountain for road maintenance" (Starr Resp. Br. 18) does not establish a defense to Starr's breach of the duty to defend. First, the purported "notice" provided to Bentley-Prestwich did not expressly state that "Association Dues" were owed to "Buck Mountain" or that it was for "road maintenance." (See Ex. 29; RP 900) Second, Bentley-Prestwich's purported knowledge of "Association Dues," is irrelevant because as purchasers they are entitled to rely on the public title record to conclude that the property was not bound by any covenants related to the Association. (Ex. 193, RP 880, 1088-89) See **Edmonson**, 172 Wn.2d at 283-84, ¶ 22 (App. Br. 46); **Dickson v. Kates**, 132 Wn. App. 724, 737, ¶ 32, 133 P.3d 498 (2006) (reversing the trial court's

determination that the plaintiffs had “constructive notice” of a restrictive covenant when “Stewart Title professionally searched the chain of title on [the plaintiff’s property] and did not find any reference to a covenant burdening them.”). Starr’s deed warranties under RCW 64.04.030 “warrant against known as well as unknown defects, and grantees with knowledge of an encumbrance have the right to rely on the covenants in the deed for their protection.” **Edmonson**, 172 Wn.2d at 283-84, ¶ 22.

Starr attempts to distinguish **Edmonson** by claiming that there, the party “did not know the legal effect” of the encumbrance, whereas here, “Bentley and Prestwich knew \$600.00 was due to an Association that it was either to Buck Mountain or to some other unnamed, local association.” (Starr Resp. Br. 19) But Starr fails to explain how Bentley-Prestwich would know the “legal effect” of that notation, or how they would know: (1) there would be continuing “dues” to the “unnamed, local association;” (2) those dues would be related to road maintenance, for which they would have no vote in the type or cost of the maintenance; and (3) a \$600 charge was the functional equivalent of a “binding covenant” against their property, which in addition to imposing assessments, restricts their use of property.

This court should reverse the dismissal of Bentley-Prestwich's Third Party Complaint and remand for a determination of damages for breach of the warranty of title, and for an award of Bentley-Prestwich's attorney fees in superior court.

D. Starr Is Not Entitled To Attorney Fees Under The Purchase And Sale Agreement Because It Merged With The Statutory Warranty Deed When Title Was Conveyed.

Even if this court affirms, Starr is under no circumstances entitled to an award of fees on appeal.⁶ The original purchase and sale agreement, under which Starr seeks attorney fees on appeal, merged with the deed when title was conveyed to Bentley-Prestwich. Starr is not entitled to attorney fees under an agreement that has no continuing legal effect.

In *Barber v. Peringer*, 75 Wn. App. 248, 877 P.2d 223 (1994) (Starr Resp. Br. 20), this court reversed an award of attorney fees under a purchase and sale agreement for an action that was commenced after the property was already conveyed by statutory warranty deed. This court held that the attorney fee provision of the purchase and sale agreement "merged into the statutory warranty deed, [thus] there were no contractual rights for

⁶ Starr did not make any claim for fees in the trial court and failed to cross-appeal.

either party to enforce.” *Barber*, 75 Wn. App. at 253-54. “The attorney fees provision was restricted to enforcing rights under the REPSA. Accordingly, it is not collateral to the deed. We conclude that the attorney fees provision of the REPSA therefore also merged into the deed and that the parties' right to attorney fees for an action under the REPSA ended when the deed was executed and accepted.” *Barber*, 75 Wn. App. at 254; see also *South Kitsap Family Worship Ctr. v. Weir*, 135 Wn. App. 900, 914, ¶ 32, 146 P.3d 935 (2006) (attorney fee provision of purchase and sale agreement merged with deed barring a fee award).

Starr is not entitled to attorney fees on appeal. Instead, Bentley-Prestwich are entitled to an award of attorney fees against Starr under the warranties under RCW 64.04.030. (App. Br. 48)

III. CONCLUSION

This court should reverse and vacate the trial court's order encumbering the Bentley-Prestwich property with a “binding covenant” that obligates Bentley-Prestwich and their successors to pay assessments for road maintenance to the Association. This court should also vacate the trial court's judgment against Bentley-Prestwich for prior assessments, penalties, and interest. This court should direct the trial court to enter judgment on Bentley-

Prestwich's third party claim because Bentley-Prestwich properly tendered the defense to Starr, and were entitled to a defense and indemnity from Starr against the Association's lawsuit. Starr should pay Bentley-Prestwich's attorney fees incurred below and in this court to pursue reversal of the trial court's order entered in the Association's action against Bentley-Prestwich.

Dated this 6th day of June, 2012.

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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 June 6, 2012, I arranged for service of the foregoing Reply Brief of Appellants, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 6th day of June, 2012.



Victoria K. Isaksen