

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

BRIEF OF APPELLANTS

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I. INTRODUCTION

Appellants Barbara Bentley and Glenn Prestwich, a married couple, own a home outside of the jurisdiction of the respondent Buck Mountain Owners Association, which maintains a 10-mile road system for the benefit of its members. Bentley and Prestwich are not members of the Association. Nothing within the appellants' chain of title, and no provision of the Association's covenants, obligates non-members to pay assessments to the Association for road maintenance costs determined unilaterally by the Association. Nevertheless, the trial court ordered Bentley and Prestwich to execute a "binding covenant" with the Association that authorizes the Association to levy and collect assessments from appellants and their successors-in-interest and allows the Association to impose a lien on the appellants' property for unpaid assessments. This court should reverse and vacate the encumbrance imposed on the Bentley-Prestwich property.

Bentley and Prestwich tendered defense of the Association's action to their predecessor-in-interest, from whom they obtained the property by statutory warranty deed. The trial court dismissed the third party complaint holding that service of the third party complaint was not an effective tender of defense and that the undisclosed

claim by the Association for assessments, which resulted in the establishment of a “binding covenant” against the Bentley-Prestwich property, was not an encumbrance under RCW 64.04.030. This court should reverse that decision as well, remand for a determination of damages for breach of the warranty of title, and award attorney fees to Bentley and Prestwich for breach of the statutory duty to defend.

II. ASSIGNMENT OF ERRORS

A. Judgment In Favor Of Buck Mountain Owners Association.

1. The trial court erred in entering its Findings of Fact, Conclusions of Law, and Judgment and Order, directing appellants to execute a “binding covenant” subjecting the property and its present and future owners to pay assessments levied in the sole discretion of an Association, in which the appellant property owners are not members and have no voting rights. (CP 317-338) (Appendix A)

2. The trial court erred in entering a money judgment against the appellants for past due assessments, bookkeeping fees, late fees, and interest. (CP 329)

3. The trial court erred in entering its Order Denying Defendant's Motion for Reconsideration. (CP 349-350)

4. The trial court erred in entering its letter ruling, filed on July 6, 2011. (CP 260-270)

5. The trial court erred in entering those findings of fact and conclusions of law underlined in the attached Appendix A.

B. Judgment In Favor Of Third Party Defendant Starr.

1. The trial court erred in entering its Findings of Fact, Conclusions of Law, and Judgment and Order dismissing appellants' third party claim against their predecessor-in-interest for breach of the warranty deed under RCW 64.04.030. (CP 341-343) (Appendix B)

2. The trial court erred in entering those findings of fact and conclusions of law underlined in the attached Appendix B.

III. STATEMENT OF ISSUES

1. The Association is only granted authority to collect and levy assessments from its members under its Articles of Incorporation, Bylaws, and Covenants, Conditions, and Restrictions. Bentley and Prestwich are not members of the Association, and their property was not encumbered with any covenants for the benefit of the Association. Did the trial court err

in establishing and enforcing a covenant on the Bentley-Prestwich property requiring them and their successors-in-interest to pay past and future assessments levied by an Association in which they are not members and have no voting rights?

2. Can a court impose a covenant in favor of an Association for road maintenance assessments against the beneficiaries of an easement, who are not members of the Association, and where the Association has no recorded interest in the easement used by the non-members, based on the unexpressed subjective intent of one of several drafting parties that all users of the road system maintained by the Association share in the cost of maintenance?

3. Did the trial court err in ordering Bentley and Prestwich to enter into a binding covenant to pay 62.5% of the full assessment paid by members of the Association to maintain a 10-mile road system of which Bentley and Prestwich are allowed to use less than one mile to reach their property?

4. The Association filed an action to establish on Bentley and Prestwich's title a previously undisclosed and unstated obligation to pay assessments to the Association. Bentley and Prestwich sought defense of the action by their grantor under the

statutory warranties contained in their deed. Did the trial court err in dismissing Bentley and Prestwich's third party action against their predecessor-in-interest based on the trial court's determination that a third party complaint is not an effective tender of defense, that an affirmative covenant to pay assessments is not an encumbrance under RCW 64.04.030, and that Bentley and Prestwich "should have known" they would be subject to the Association's assessments?

5. Because this appeal is a continuation of the Bentley and Prestwich's defense of title against the Association, is their predecessor-in-interest obligated to pay their attorney fees under the statutory warranty deed?

IV. STATEMENT OF FACTS

A. Identity Of The Parties.

Appellants are Dr. Barbara Bentley and Dr. Glenn Prestwich ("Bentley-Prestwich"), trustees of the Bentley-Prestwich Living Trust, which owns real property on Buck Mountain on Orcas Island. (RP 191) Bentley-Prestwich were sued by respondent Buck Mountain Owners Association (the "Association"), a non-profit homeowners association, in San Juan County Superior Court for a declaratory judgment subjecting the Bentley-Prestwich property to

road maintenance assessments under the Association's Covenants, Conditions, and Restrictions. (CP 4-8) The Association's members are parcel-owners in a private subdivision on Buck Mountain. (CP 5) Although located on Buck Mountain, the Bentley-Prestwich property is located outside of the subdivision boundaries and is beyond the jurisdiction of the Association. (RP 405, 450) To reach their property, Bentley-Prestwich travel less than one mile on the 10-mile road system maintained by the Association. (RP 911) Under their deed, Bentley-Prestwich are only entitled to use that portion of the road system that leads to their property. (See Ex. 26)

Respondent J. Michael Starr ("Starr") is Bentley-Prestwich's seller from whom Bentley-Prestwich sought a defense of the Association's action against their title pursuant to their statutory warranty deed. (CP 64-71) Starr is the trustee of the Jack M. Starr Credit Shelter Trust, which was created by Starr's father, Jack M. Starr. (RP 187) This trust sold the Buck Mountain property to Bentley-Prestwich in May 2005. (RP 699; Ex. 26)

B. History Of The Property Located On Buck Mountain And The Association.

1. Starr & Guynup Sold Property On Buck Mountain To Developers, Retaining For Themselves An L-Shaped Parcel And Easement.

In 1977, Jack M. Starr and Mary M. Starr and Victor B. Guynup and Dorethea B. Guynup (“Starr & Guynup”) sold approximately 1,200 acres of land on Buck Mountain to William H. Carlson, David A. MacBryer, Barbara MacBryer, Donald S. Gerard, and M. Arlene Gerard (the “Developers”). (Ex. 9; Carlson Dep. 35, CP 222)¹ In the deed conveying the property, Starr & Guynup retained a 30-acre L-shaped parcel on lower Buck Mountain. (RP 78; Ex. 9) Starr & Guynup also retained a 50-foot wide easement “from the Stonegate north to the property retained by [Starr & Guynup].” (Ex. 9) Stonegate is at the County Road, and is the west entry point to the Buck Mountain property acquired by the Developers. (RP 578) It is approximately one-half mile from Stonegate to the L-shaped parcel retained by Starr & Guynup. (See Ex. 195) The location of the L-shaped parcel in relation to the Buck Mountain development, and the location of the easement are reflected on Appendix C, a reproduction of Trial Ex. 432 at 15, 17.

¹ As noted in the Clerk’s Papers, the deposition of William H. Carlson has been submitted to this court under separate cover.

The Developers executed a Deed of Trust in favor of Starr & Guynup to secure \$1.4 million of the \$1.8 million purchase price for the Buck Mountain property. (Ex. 11; Gerard Dep. 42, CP 221)² As part of the Deed of Trust, the Developers agreed to “construct a serviceable rock roadbed twenty (20) feet in width and at least six (6) inches in depth within two years after July 8, 1977 over the existing roadbed and fifty (50) foot easement held by [Starr and Guynup] from the Stonegate North to the property retained by [Starr and Guynup].” (Ex. 11) The Developers also agreed “to keep the property in good condition and repair, to permit no waste thereof, to complete any [] improvement being built or about to be built thereon, to restore promptly any [] improvement thereon which may be damaged or destroyed, and to comply with all laws, ordinances, regulations, covenants, conditions, and restrictions affecting the property.” (Ex. 11)

² As noted in the Clerk’s Papers, the deposition of Donald S. Gerard has been submitted to this court under separate cover.

2. The Developers Quit Claimed Certain Property Back To Starr & Guynup In Lieu Of Foreclosure Of The Deed Of Trust, And Expanded The Starr & Guynup Easement.

On March 30, 1981, the Developers quit claimed certain Buck Mountain property back to Starr & Guynup in lieu of foreclosure on the 1977 Deed of Trust due to the Developers' default. (Carlson Dep. 8-9) Starr & Guynup each received a 5-acre lot. (RP 698) These lots were located south of the retained L-shaped parcel. (Marked "GL 3" in Appendix C)

On the same day these quit claim deeds were executed, the Developers and Starr & Guynup executed a Declaration of Easement, which "modif[ied]" the easement retained by Starr & Guynup in the original 1977 deed. (Ex. 10) The modified easement and the quit claim deeds in lieu of foreclosure were "all tied together." (Carlson Dep. 9) The parties agreed that the easement road was to be "expanded in width to sixty (60) feet and is extended over and across [Starr & Guynup]'s remaining adjacent property for the benefit of [the Developers]." (Ex. 10; RP 70)

The widening of the easement was necessary if Starr & Guynup were to subdivide their retained L-shaped parcel. (Carlson Dep. 11) Even though the easement was not part of the original

1977 conveyance to the Developers, (See Ex. 9), the easement was lengthened in part to provide access to a lot that the Developers had acquired from Starr & Guynup. (Carlson Dep. 11-12; Gerard Dep. 10; Ex. 10) The easement would terminate at this lot. (See Ex. 19)

While the Declaration of Easement apparently granted use of the Starr & Guynup easement to one of the lots acquired by the Developers, it did not grant Starr & Guynup use of any of the easements conveyed to the Developers under the 1977 Deed. (See Ex. 10, 200) Like the easement created by the 1977 purchase deed that it replaced, the 1981 Declaration of Easement was silent on the issue of road maintenance for the Starr & Guynup easement. (See Ex. 10)

3. The Developers Formed A Homeowners Association. Members Of The Association Are Owners Of The Subdivided Property Acquired From Starr & Guynup. Starr & Guynup's L-Shaped Parcel Is Outside Of The Jurisdiction Of The Association.

The Developers decided to subdivide the property acquired from Starr & Guynup and sell the lots. (Carlson Dep. 36-37) Near the end of 1981, the Developers formed Buck Mountain Owners Association (the "Association"), a non-profit corporation. (See Ex.

14, 18, 32)³ The purchasers of these lots would become members of the Association governed by its Bylaws and Covenants, Conditions, and Restrictions (CCR's). (See Ex. 14, 15, 32, 33)

One stated purpose of the Association is to "acquire, own, and/or maintain and manage a system of roadways and other commonly held property for the benefit of the said owners present and future entitled to membership in the Association." (Ex. 32, Art. III, § 2) Under its bylaws, members of the Association "are obligated to pay assessments imposed by the Association to meet common expenses," including maintenance of roads. (Ex. 33, Art. 7, § 7.1)

The two 5-acre lots quitclaimed to Starr & Guynup in lieu of foreclosure of their Deed of Trust were part of the property to be governed by the Association. (See RP 698-99) It is undisputed, however, that the L-shaped parcel retained by Starr & Guynup as part of the original 1977 conveyance is outside of the jurisdiction of the Association. (RP 405, 450; See Ex. 15, 79)

³ The Developers originally subdivided the property in violation of County Land Division Ordinances. To become compliant, the Developers entered into an agreement with San Juan County, which required the Developers to, among other things, form a property owners' association. (Ex. 14)

4. The Association Maintains Roads For Its Members. The Association Has No Ownership Interest In The Starr & Guynup Easement, But Nevertheless Maintains The Easement.

In 1983, the Association recorded a "Master Road Easement" with the San Juan County Auditor's Office, which set forth those easements under the control of the Association. (Ex. 200) That same year, the Association also recorded the "Assessor's Plat No. 1 of Buck Mountain Tracts." (Ex. 13)⁴ The "Master Road Easement" is the only easement described in the "Dedication" on the face of the Assessor's Plat. (Ex. 13) Consistent with the fact that the easement retained by Starr & Guynup (Sucia View Lane)⁵ was not part of the property conveyed to the Developers in the 1977 deed, this easement is not described or referenced in either the Master Road Easement or the Assessor's Plat. (RP 755; see Ex. 13, 200, 427, ¶¶ 7.9, 7.10) "Sucia View" is mentioned in the Association's CCR's as a "common area" that the Association is obligated to maintain, but no legal description identifies "Sucia View." (Ex. 15, Art. III, § 2; RP 304)

⁴ The Assessor's Plat No. 1 of Buck Mountain Tracts includes three parcels ("A", "C," and "F"), which were only part of the 1,200 acres conveyed by the 1977 Deed to the Developers. (Ex. 13)

⁵ Sucia View Lane is now known as Parker Reef Road, the road leading to the property retained by Starr & Guynup. (RP 70)

In 1984, Barbara MacBryer, the former wife of one of the Developers, recorded the "Sucia View Short Plat" comprised of two lots that she had acquired – "Lot 1" and "Lot 2" both located northeast of Starr & Guynup's L-shaped parcel. (Ex. 19; Gerard Dep. 12; see "GL 2" in Appendix C) "Lot 1" is the lot benefitted by the easement described in the 1981 Declaration of Easement. (Carlson Dep. 11-13; Gerard Dep. 12) Although these two lots were part of the original property acquired by the Developers in 1977, the property was not included in the "Assessor's Plat No. 1 of Buck Mountain Tracts." (Gerard Dep. 13-14; See Ex. 13) The Association was not a party to the Sucia View Short Plat. (See Ex. 19)

Among the restrictions for the Sucia View Short Plat was a requirement that the owner of Lot 1 "enter into a reasonable agreement for sharing the costs of maintaining the roads shown hereon as Buck Mountain Road and Sucia View Lane together with other users of record *until such time as the Buck Mountain Homeowners' Association assumes responsibility for said roadway maintenance.*" (Ex. 19, emphasis added) Although not included in the Assessors Plat No. 1 for Buck Mountain, the owners of the lots in the Sucia View Short Plat were required to "become members of

the Buck Mountain Homeowners' Association." (Ex. 19) As a member of the Association, the owners of the two lots within the Sucia View Short Plat would be bound under the CCR's to pay assessments for maintenance of these roads once the Association assumed responsibility for its maintenance. (Ex. 15, 33) Starr & Guynup, the owners of the reserved L-shaped parcel, were never bound to become members of the Association.

C. Starr & Guynup And Bentley-Prestwich's Grantor Owned Both Member And Non-Member Lots And Paid Invoices To The Association For Road Maintenance Assessments That Did Not Distinguish Between Member and Non-Member Lots.

Starr & Guynup subsequently divided the reserved 30-acre L-shaped parcel, each receiving 15 acres. (RP 187-88, 697) In addition to these lots, the Starr family and Guynup family each held a member 5-acre lot south of the L-shaped parcel as a result of the 1981 quit claim deeds in lieu of foreclosure. (RP 697-98) Only the 5-acre lots were within the Association's jurisdiction. (RP 697-98)

After Jack M. Starr died in 1987, his son, J. Michael Starr ("Starr") became trustee of the Jack M. Starr Credit Shelter Trust, which held the non-member property from the L-shaped parcel. (RP 187-88, 695) This parcel was subsequently divided into two lots. (RP 697) Because the Starr family owned a member lot, Starr

paid assessments for road maintenance to the Association. (RP 188-89, 706, 1123) The Association's invoices to Starr for road assessments did not distinguish between the non-member lots and the member lot. (RP 188-89)

After Starr sold the member lot in 1999, the Association continued to send invoices to Starr, along with minutes and annual reports. (RP 1123) The Association never informed Starr that the non-member lots were not governed by the Association. (RP 702) Starr continued to pay the assessments, which he later acknowledged was a "mistake," because the remaining two lots were not in fact governed by the Association. (RP 1123) Starr paid every invoice that he received from the Association until he sold the property to Bentley-Prestwich in 2005. (RP 189)⁶

On May 7, 2004, Starr entered into a "Road and Utility Easement and Maintenance Agreement" between the two non-member lots and Lot 1 of the Sucia View Short Plat. (Ex. 193; RP

⁶ Starr testified that he had no responsibility for the non-member lots in the trust until 1989. (RP 697) The Association began levying road assessments in 1986. (See Ex. 65) It is not clear from the record who managed the trust from the time Starr's father, Jack M. Starr, died in 1987 until Starr took over the trust in 1989.

202)⁷ It is undisputed that the Association is not a party to this agreement. These three lots are located at the end of Parker Reef Road (formerly known as Sucia View Lane, the easement retained by Starr & Guynup). (RP 202) This agreement allocates responsibility for maintenance of the last 100 yards of Parker Reef Road, which leads to the driveways of these three lots. (RP 202; Ex. 193) The agreement requires the three lot owners to share in the cost of maintaining this portion of the road. (RP 202, Ex. 193)

D. After Confirming That The Property Was Not Governed By The Association, Bentley-Prestwich Purchased A Portion Of The L-Shaped Parcel From Starr.

Between approximately 2002 and 2006, Bentley-Prestwich owned property on Klakamish Lane, which is under the jurisdiction of the Association, and were, therefore, members of the Association. (RP 191-92, 876, 1080-81) Sometime in late-2004 or early-2005, Bentley-Prestwich decided to look for new property on Orcas Island. (RP 1083-84) Bentley-Prestwich wanted property that was closer to town. (RP 211, 893, 1084) Bentley-Prestwich “weren’t happy with being members of the Association.” (RP 211-

⁷ Lot 1 of the Sucia View Short Plat is now owned by Kobrin-Berreth. This lot is located north of Prestwich-Bentley property and the West-Dalnoky property – the two non-member lots that were previously held in the Jack Starr Shelter Credit Trust. (See “GL 2” in Appendix C)

12) They did not like being bound by assessments and rules over which they had little influence or control. (See RP 210-12, 216) Bentley-Prestwich disapproved of a “special assessment” as a result of a lawsuit in which the Association was a party. (RP 210) The lawsuit and the special assessment caused Bentley-Prestwich to “question what was going on and how things were being run” by the Association. (RP 210)

Bentley-Prestwich located raw land at the end of Parker Reef Road on Buck Mountain where they intended to build a home. (RP 192) This property was the southernmost non-member lot located in the portion of the 30-acre L-shaped parcel held in the Jack Starr Credit Shelter Trust. (RP 298-99; See Appendix C) Because this property was located on Buck Mountain, Bentley-Prestwich specifically inquired of their realtor whether the property was under the jurisdiction of the Association and covered by its CCR’s. (RP 1119) Bentley-Prestwich confirmed that the property was not subject to or governed by the Association. (RP 1119)

Bentley-Prestwich carefully reviewed the title report and concluded that the property was not governed by the Association or its CCR’s. (RP 880, 1088-89; Ex. 193) The “special exceptions” in the title report included the 1981 Declaration of Easement and the

2004 "Road and Utility Easement and Maintenance Agreement." (Ex. 193) None of the "special exceptions" included a covenant with, or for the benefit of, the Association. (See Ex. 193) Confidential that the property was not governed by or obligated to the Association, Bentley-Prestwich purchased the property in May 2005 from Starr for \$430,000 through the Bentley-Prestwich Living Trust. (RP 893-94; Ex. 26, 187, 414)

Prior to closing, Bentley-Prestwich signed an estimated Buyer/Borrower Statement that referenced pro-rated "Association Dues" in the amount of \$399.44. (RP 194; Ex. 29) The statement did not mention "Buck Mountain Owners Association" by name. (RP 900, Ex. 29) Because their earlier inquiries confirmed that the property was not a member lot, Bentley-Prestwich believed that the dues could have been related to the 2004 "Road and Utility Easement and Maintenance Agreement," which created an "association" between the three lots at the end of Parker Reef Road. (RP 195, 213-14)

E. The Association Confirmed That Bentley-Prestwich Were Not Members Of The Association, But Nonetheless Claimed That Their Property Was Subject To Annual Road Assessments.

Shortly after purchasing the property from Starr, Bentley-Prestwich received a letter from the Association “welcoming” them. (Ex. 79) The letter confirmed that the Bentley-Prestwich property was not governed by the Association, stating that their property is “one of only a tiny handful of lots that are not encumbered with our CCR’s and are not officially members in the Buck Mountain Owners’ Association.” (Ex. 79) Nevertheless, the Association claimed that the Bentley-Prestwich property was still subject to road assessments levied by the Association: “While you are not members, you have access to your property over roads maintained by us, and therefore are subject to a road assessment.” (Ex. 79) The Association warned that it would “automatically file a ‘Claim of Lien’ against the property” 60 days after any delinquent assessment is due. (Ex. 79)

The Association stated that it had reached agreements with other non-member lot owners to pay 62.5% of the road assessment charged to Association members: “Some years ago several owners of lots also not subject to our CCR’s negotiated with us for a road

assessment that was less than that charged our members. That reduced rate (62.5%) was conditional on the lot owners agreeing that they would not use their property for short-term vacation rentals.” (Ex. 79)

Bentley-Prestwich were “baffled” by the letter, and thought it was “odd” that the Association had sent it. (RP 901-02) Bentley-Prestwich disregarded the letter because they knew there was no agreement with the Association in their chain of title. (RP 902)

Bentley-Prestwich subsequently learned that in 2002, the Association had entered into written agreements with two owners (Dameron and Bramblet) who acquired their lots from the portion of the L-shaped parcel reserved by Victor Guynup. (RP 945-50) These agreements were recorded in the San Juan County Auditor’s office. (Ex. 21, 22) It is undisputed that the Association had not entered into similar agreements with Starr for the two lots from the L-shaped parcel held in the Jack Starr Credit Shelter Trust, one of which was the Bentley-Prestwich property.⁸ (RP 190) Starr was never approached about an agreement to encumber these lots with a covenant to pay assessments to the Association. (RP 1124)

⁸ While this litigation was pending, West-Dalnoky, the owner of the second lot, entered into a written agreement, similar to the ones reached with Dameron and Bramblet. (See Ex. 23)

In April 2006, Bentley-Prestwich received their first invoice from the Association. (RP 904, Ex. 367) The invoice stated that “the assessment for 2006 was set by *contractual agreement* based on full assessment of \$700.” (RP 904, Ex. 367, emphasis added) Shortly after receiving this first invoice, Bentley-Prestwich received a second invoice for a “special” road assessment for new construction.⁹ (RP 908, Ex. 425)

Bentley-Prestwich immediately objected to paying any assessments to the Association, pointing out that there was no “contractual agreement.” (RP 909, Ex. 81) They nevertheless offered to make a reasonable contribution for their use of the road. (Ex. 81) The Association maintains 10 miles of road. (RP 911) Because their property is outside of the Buck Mountain subdivision, the easement in Bentley-Prestwich’s deed entitles them to use only 0.7 miles of the road system maintained by the Association to reach their property. (See Ex. 26; RP 911) Accordingly, Bentley-Prestwich tendered 7% of the road assessment paid by members

⁹ According to a letter from the Association, the Association charged both members and non-members one-third of the fee for a building permit from San Juan County for any construction. (Ex. 79) During this period, Bentley-Prestwich were constructing a home on the property. (RP 192-93) After this letter was sent, the Board voted to increase the assessment for construction to one-half of the County’s fee for a building permit. (Ex. 80)

of the Association. (Ex. 81) The Association rejected this tender, and threatened to file a "Claim of Lien [against the Bentley-Prestwich property] then to promptly take legal action to perfect this claim." (Ex. 82, 83) Bentley-Prestwich made another offer to pay some portion of the road assessment less than 62.5% of the full assessment, which the Association rejected. (Ex. 85, 86)

F. The Association Sued Bentley-Prestwich For A Judgment Subjecting Their Property To Road Assessments. Bentley-Prestwich Tendered Defense Of The Association's Action To Starr.

On December 27, 2006, the Association filed a complaint seeking a determination that Bentley-Prestwich's property was obligated to pay assessments and that the Association was entitled to "levy[] and collect[] road maintenance assessments upon the Defendants' real property [] as set forth in the Plaintiff Homeowners Association's Covenants." (CP 7)

When they were unable to resolve the complaint, on November 7, 2007, less than a year after the Association filed its action and 3½ years before trial, Bentley-Prestwich filed a third party complaint against Starr asking the court to enter judgment against Starr to "[d]efend 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 64, 70) Bentley-Prestwich asked the court to order Starr to “indemnify Bentley-Prestwich, under the warranties of the [] Statutory Warranty Deed and RCW 64.04.030.” (CP 69) Bentley-Prestwich also asked the court to “quiet title to the B-P property in Bentley-Prestwich free of any encumbrance, claim, lien or easement of the Association.” (CP 71)

In 2010, nearly four years after filing its original complaint, the Association amended its complaint to claim that the “parties’ method of levying and collecting road maintenance assessments upon the Defendants’ real property” should be based on Bentley-Prestwich’s predecessor-in-interest’s historic payment of assessments to the Association. (CP 153)¹⁰

G. The Trial Court Ordered Bentley-Prestwich To Enter Into A Binding Covenant With The Association Requiring Bentley-Prestwich And Their Successors To Pay Road Maintenance Costs, And Dismissed Bentley-Prestwich’s Third Party Claim Against Starr.

The Association’s claims and Bentley-Prestwich’s third party claims were tried over six days beginning on March 29, 2011, before San Juan County Superior Court Judge Vickie Churchill

¹⁰ The Association had originally claimed that the 1983 Master Road Easement included the easement to the Bentley-Prestwich property, thus obligating the owners to pay a pro-rata share of the maintenance for the entire road system (Ex. 83), but later abandoned this claim. (See CP 85-86)

("the trial court"). The trial court issued its letter ruling on July 2, 2011 and its Findings of Fact and Conclusions of Law on August 4, 2011. (CP 260, 317)

The trial court acknowledged that the deeds in the Bentley-Prestwich chain of title were "silent" on the issue of road maintenance. (FF 13, 23, CP 320, 322) Nevertheless, the trial court found that "based on extrinsic evidence," including the deposition testimony of one of the original Developers and Starr's history of paying assessments to the Association, that "there was no free ride for anybody" and that "it was always the intent that everybody would share equal in road maintenance." (FF 18, 26, 27, CP 321, 322-23) The trial court found it was "well within the evidence presented and the court's discretion to require the defendants' parcel to pay 100% of the share paid by all members of the plaintiff association, [but it] finds that the exceptions [] carved out for other owners in the L-shaped area are also reasonable, and will order that defendants pay according to such exceptions." (FF 31, CP 323) The trial court entered a money judgment of \$11,132.44 against Bentley-Prestwich representing unpaid road maintenance assessments and construction impact fees, plus interest, late fees, and bookkeeping fees. (CL 8, 9, CP 328)

The trial court also ordered Bentley-Prestwich to enter into a “binding covenant,” “requiring the owners of the defendants’ parcel to contribute a share of the sums for road maintenance regularly assessed by the plaintiff association on its members.” (CL 7, CP 331-37) (Appendix A) This “binding covenant” confirmed that Bentley-Prestwich were not members of the Association (CP 333), thus had no vote in Association matters. Nevertheless, the covenant allowed the Association to unilaterally determine, levy and collect assessments from Bentley-Prestwich in the amount of 62.5% of the full assessment charged to members. (See CP 333)

The Association could increase the assessment to the full amount assessed to its members were Bentley-Prestwich to ever rent their property or use it for other “commercial purposes,” a use prohibited by the Association’s CCR’s. (CP 333; Ex. 15, 79) The covenant made unpaid assessments a “lien upon the land” and allowed the Association to “foreclose [] [on the lien] in the same manner as a mortgage.” (CP 333) The covenant ran with the land and “shall be binding upon all parties having or acquiring any right, title, or interest in and to the described property.” (CP 333)

The trial court dismissed Bentley-Prestwich’s third party complaint against Starr for breach of warranty of title. (CP 343)

The trial court concluded that the covenant and judgment for road maintenance fees and costs in favor of the Association “did not constitute an encumbrance violating RCW 64.04.030(2).” (Third Party CL 3, CP 343) The trial court found that by virtue of their former membership and the closing statement, Bentley-Prestwich “knew or should have known” that they would have to pay road assessments to the Association.” (Third Party FF 5, 6, CP 342) Finally, the trial court found that Bentley-Prestwich “never tendered the defense of BMOA’s complaint for declaratory judgment to the Starr Trust.” (Third Party FF 8, CP 342)

The trial court denied Bentley-Prestwich’s Motion for Reconsideration on August 15, 2011. (CP 344-45) Bentley-Prestwich appeal. (CP 346)

V. ARGUMENT

A. The Trial Court Erred In Establishing And Enforcing A Non-Existent Covenant Against The Bentley-Prestwich Property.

The Association and the trial court framed the issue at trial as a determination of “road maintenance obligations between two users of a common access easement.” (FF 1, CP 318; CP 181) But the Association is not a “user” of the easement, and has no right, title or interest in the easement that benefits the Bentley-

Prestwich property. Its rights are limited to the easements that it maintains for its members, within the geographic bounds of the Buck Mountain Development. (See Ex. 15, 33, 200)

Further, the trial court's judgment went well beyond determining the parties' respective financial obligations related to road maintenance. The trial court formally encumbered the Bentley-Prestwich property with a "binding covenant" requiring the property's present and future owners to pay assessments in an amount established in the sole discretion of an Association in which the property owners are not members and have no voting rights. (CL 7, CP 327-28; CP 332-37) Under the terms of the binding covenant, unpaid assessments become a lien on the property, on which the Association could foreclose. (CP 333)

The Association's Articles of Incorporation, Bylaws, and CCR's, and RCW ch. 64.38 do not vest the Association with any authority over the Bentley-Prestwich property to levy or collect assessments from its non-member owner because it is undisputed that the property lies outside of the Association's jurisdiction. Further, unlike the non-member owners who consented to placing an encumbrance on their title, there is no agreement between the Association and Bentley-Prestwich or their predecessor-in-interest

subjecting the property to the Association's assessments. The trial court erred in entering a judgment against Bentley-Prestwich for past due assessments and imposing upon them and their successors a covenant requiring them to pay future assessments in an amount established by an Association in which they have no rights or vote.

1. There Was No Covenant Requiring The Bentley-Prestwich Property Owners To Pay Assessments To The Association.

The Bentley-Prestwich property is not subject to a covenant or any recorded obligation to contribute to the Association's maintenance expenses. An obligation "to contribute one's share of the neighborhood's maintenance expenses generally is characterized as an affirmative covenant." ***Lake Arrowhead Community Club, Inc. v. Looney***, 112 Wn.2d 288, 293, 770 P.2d 1046 (1989). "A covenant is: an agreement or promise of two or more parties that something is done, will be done, or will not be done. In modern usage, the term covenant generally describes promises relating to real property *that are created in conveyances or other instruments.*" ***Dickson v. Kates***, 132 Wn. App. 724, 731, ¶ 15, 133 P.3d 498 (2006) (*quoting Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 690, 974 P.2d 836 (1999) (emphasis added)). In order

for a covenant to be enforceable it must “satisfy the statute of frauds.” **Dickson**, 132 Wn. App. at 733, ¶ 21 (homeowners were not bound to a restrictive view covenant when the deed lacked a sufficient legal description, thus violating the statute of frauds).

“RCW 64.04.010 requires that every conveyance or encumbrance of real property shall be by deed, and RCW 64.04.020 requires that every deed shall be in writing.” **Dickson**, 132 Wn. App. at 733, ¶ 22 (*citations omitted*). To be binding, a covenant requiring owners of property (and their successors-in-interest) to contribute to the maintenance of roads or other common property, must be set forth by deed. See *e.g. Rodruck v. Sand Point Maintenance Comm.*, 48 Wn.2d 565, 295 P.2d 714 (1956).

In **Rodruck**, the Supreme Court affirmed a judgment for unpaid assessments against homeowners in favor of an association. The Court held that the association, “under its articles of incorporation and bylaws had the right to assess its members for maintenance work and improvements to the streets, and the deeds [] to appellants' predecessors in interest embodied a covenant running with the land in that respect, which is binding upon the appellants as subsequent grantees. Each of the certificates of title held by the appellants recites that it is subject to restrictions and

reservations contained in the deed [] to their predecessors in interests.” 48 Wn.2d at 573.

Here, there was no covenant requiring payment of assessments to the Association in the deed conveying the property to Bentley-Prestwich. Unlike in *Rodruck*, it is undisputed that the property here was conveyed to Bentley-Prestwich free of any restrictions with regard to the authority of the Association. The trial court erred in entering a judgment against Bentley-Prestwich for unpaid assessments when the Association had no authority under its Articles of Incorporation to impose assessments against non-members, and no covenant in their deed requires Bentley-Prestwich to pay assessments to the Association.

2. The Bentley-Prestwich Property Is Not Subject To An Equitable Covenant To Pay Assessments To The Association.

The trial court could not enforce as an “equitable restriction” a covenant on the Bentley-Prestwich property subjecting it to assessments by the Association. “Where enforceability of a covenant is based, in part, on actual or constructive notice of a restriction, rather than on an incorporation of the restriction in a deed, the covenant is generally considered an equitable restriction.” *Hollis v. Garwall, Inc.*, 137 Wn.2d at 691. To be enforced, an equitable

restriction must be: “(1) a promise, in writing, which is enforceable between the original parties; (2) which touches and concerns the land or which the parties intend to bind successors; and (3) which is sought to be enforced by an original party or a successor, against an original party or successor in possession; (4) who has notice of the covenant.” *Dickson*, 132 Wn. App. at 732, ¶ 17 (reversing imposition of an equitable restriction when property owner had no actual or constructive notice of a restrictive view covenant).

Here, there is no written promise “enforceable between the original parties.” *Dickson*, 132 Wn. App. at 732, ¶ 17. In the many transactions between the Developers and Starr & Guynup, Bentley-Prestwich’s predecessor-in-interest, there is no writing requiring owners of any portion of the reserved L-shaped parcel to contribute to the maintenance of the reserved easement. The only authority for the Association to levy and collect road maintenance assessments is through its Articles of Incorporation, Bylaws, and CCR’s. But there is no dispute that Bentley-Prestwich’s grantors were never bound by these writings because their property was never included in the Assessor’s Plat of the Buck Mountain Tracts.

Further, Bentley-Prestwich had no notice that the property was burdened by a covenant to pay assessments to the Association because there was nothing within their chain of title providing notice of such a covenant. In *Dickson*, Division Two reversed the trial court's determination that the plaintiffs had "constructive notice" of a restrictive covenant burdening their property. The court noted that "Stewart Title professionally searched the chain of title on [the plaintiff's property] and did not find any reference to a covenant burdening them. Therefore, a reasonable search of the chain of title on [the property] did not give notice that these lots were burdened." *Dickson*, 132 Wn. App. at 737, ¶ 32. Likewise here, Bentley-Prestwich obtained a title report from San Juan Title Company and there was nothing in the chain of title that would provide notice that the Bentley-Prestwich property was subject to assessments by the Association. (See Ex. 193)

Because there was no enforceable covenant on the Bentley-Prestwich property requiring its owner to pay assessments to the Association, the trial court erred in entering judgment against Bentley-Prestwich for unpaid assessments, interest, and late fees.

B. The Trial Court Erred In Interpreting The Deed Conveying The Property To Bentley-Prestwich To Include A Covenant Subjecting It To Assessments Levied By The Association.

The trial court properly acknowledged that the chain of title for the Bentley-Prestwich property was “silent” on the issue of responsibility for road maintenance. (FF 13, 23, CP 320, 322) In the absence of any writing that would create a road maintenance obligation upon the owners of the Bentley-Prestwich property, the trial court erred in imposing a covenant to share the cost of road maintenance based on evidence of the Developers’ unilateral or subjective intent. (See FF 18, 34, 35, CP 321, 324) See *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 696, 974 P.2d 836 (1999).

In *Hollis*, the Supreme Court held that extrinsic evidence, contained in the affidavit of one of the developers that “the developers of the subdivision intended the restrictions to apply only to the smaller parcels of land included in the survey” was not admissible because it “is the unilateral and subjective intent of 1 of 10 of the original contracting parties.” *Hollis*, 137 Wn.2d at 696. The Court refused to “redraft or add to the language of the covenant” based on the unexpressed “intent” of one of the drafting parties. *Hollis*, 137 Wn.2d at 697.

The trial court here erred in relying on the unexpressed subjective intent of one of the nine original contracting parties to find “the parties’ predecessors-in-interest intended for all road users to pay a share of road maintenance fees” determined unilaterally by the Association. (FF 34, CP 324; see also FF 18, CP 321) This unexpressed subjective intent conflicted with the only objective evidence – that the issue of road maintenance was “never discussed” at the time the original parties signed either the 1977 Deed or the 1981 Declaration of Easement, explaining the “silence” in the written records on the issue of road maintenance. (Gerard Dep. 6, 13; Ex. 9, 10) See *Hollis*, 137 Wn.2d at 697 (“Extrinsic evidence is used to illuminate what was written, not what was intended to be written.”). The trial court erred in relying on subjective intent for purposes of “show[ing] an intention independent of the instrument.” *Hollis*, 137 Wn.2d at 695.

Moreover, the trial court erred in concluding that a “pattern of conduct” by Bentley-Prestwich’s predecessors-in-interest in paying assessments to the Association established an intent, contrary to the written deeds, that non-member lots were subject to assessments. (FF 26, 34, CP 322, 324) It was undisputed that Bentley-Prestwich’s predecessor Starr paid assessments to the

Association under the “mistaken” assumption that the two non-member lots were governed by the Association. (RP 1123) The Association’s invoices did not distinguish between the member lot and the two non-member lots. (RP 188-89) Thus, Starr testified that he believed that he was being invoiced for assessments for those lots actually governed by the Association. (RP 702, 1123) The trial court’s finding that the payments reflected an intent that the non-member lots were bound to pay assessments to the Association is not supported by substantial evidence.

C. The Trial Court Erred In Ordering Bentley-Prestwich To Enter Into A Binding Covenant To Pay Assessments To An Association, In Which They Have No Voting Rights.

The trial court erred in ordering Bentley-Prestwich to enter into a binding covenant with an Association, in which they are not members and have no voting rights. That covenant provides that the “Association establishes Maintenance Assessments each year which are levied on the owners (“Members”) [] comprising the Association. Prestwich-Bentley, Trustees, are not members of the Association and nothing in this Agreement shall change that

relationship.” (CP 333)¹¹ Bentley-Prestwich may not vote on whether “to modify or change the annual assessment as fixed by the board of directors,” as members may, and are not even entitled to notice of the annual meeting where the Association directors announce the new annual assessment. (See Ex. 15, Art. IV, §3) Bentley-Prestwich are powerless to resist or challenge the assessment unless the Association fails to provide any road maintenance at all. (CP 333)

The covenant also purports to restrict the manner in which Bentley-Prestwich can use their property, penalizing them for renting their property, even though they are not members of the Association. If Bentley-Prestwich used their property for such “commercial purposes,” the assessment levied by the Association would increase by 37.5% – the full assessment charged to its members. (See CP 333)

The trial court’s ruling subjects Bentley-Prestwich to taxation without representation, an affront to the “principle upon which our government is founded.” *Malim v. Benthien*, 114 Wash. 533, 539,

¹¹ The Legislature in 2011 amended RCW 64.38.010 to confirm that only “owners” of “lots” “within an association’s jurisdiction” may be charged “assessments” by a homeowners association. See Laws 2011, ch. 189, § 7; RCW 64.38.010(1), (12), (13).

196 P. 7 (1921). In *Malim*, the Court asked, “what fairness or equality can there be in permitting the electors of the district proper to have the sole power to elect its officers, dictate its policy, and determine what money shall be spent and how, in the maintenance of the system, [], while those without the district proper and subject to its taxing power, having no voice whatever in the selection of its officers or determining its policy, shall be called upon to pay their pro rata of the maintenance year after year without any limitation of time?” *Malim*, 114 Wash. at 539.

Here, the Association and its members unilaterally dictate the amount of the assessment and the manner in which it is spent on maintenance of a “private” 10-mile road system, of which Bentley-Prestwich are only entitled to use less than a mile. (See Exs. 15, 26) The trial court’s imposition of a covenant subjecting non-members Bentley-Prestwich to the Association’s assessments and its restrictions on the use of their property was error.

D. The Trial Court Erred In Ordering Bentley-Prestwich To Pay 62.5% Of The Full Assessment When Bentley-Prestwich Are Only Entitled To Use Less Than One Mile Of The 10-Mile Road System.

The trial court erred in ordering Bentley-Prestwich to pay 62.5% of the full assessment paid by members for the Association’s

road maintenance when there was no evidence that this was a fair or reasonable amount for Bentley-Prestwich to pay as non-members of the Association. Under their deed, Bentley-Prestwich are only entitled to use the road from Stone Gate to their property – 0.7 miles of the ten-mile road system maintained by the Association. (See Ex. 26) To the extent the judgment against them was based on principles of equity, Bentley-Prestwich's contribution to road maintenance should be limited to that portion of the road system that they actually use, and not the entire 10-mile road system maintained by the Association. See e.g. *Bushy v. Weldon*, 30 Wn.2d 266, 272, 191 P.2d 302 (1948) (holding that it was "simple justice" to order two users of a driveway to share equally in the cost of maintenance when the driveway is used equally by the parties).

The trial court improperly relied on the Association's CCR's, which requires the Association to impose a "uniform rate" for assessments in encumbering the Bentley-Prestwich property with a covenant to pay 62.5% of the full assessment, which is the same amount as the agreements entered between the non-member lot owners and the Association. The CCR's provide that "both the annual and special assessments must be fixed at a uniform rate for

all lots.” (Ex. 15, Art. IV, § 5) But “lots” under the CCR’s by definition do not include properties outside of the jurisdiction of Buck Mountain, including the Bentley-Prestwich property. (See Ex. 15, Art. I, § 2, 4) Thus, the trial court erred in finding that the Association was required to impose a “uniform rate” on the Bentley-Prestwich property as other non-member lots because the “governing documents mandate that course.” (FF 28, 31, CP 323)

The trial court also erred in finding that it would be difficult for the Association to “actually prorate[e] [] costs” of road maintenance to support its order encumbering the Bentley-Prestwich property with a covenant to pay 62.5% of the full assessment. (FF 28, CP 323) The Association maintains written invoices and proposals for work and maintenance on its ten mile road system and nothing prevents the Association from assessing for work performed only on that portion of Parker Reef Road used by Bentley-Prestwich, or alternatively, and as originally proposed by Bentley-Prestwich, 7% of the full assessment paid by members, which reflects their use of .7 miles of the 10-mile road system. (See *e.g.* Ex. 150, 151, 152, 171, 175, 177, 179, 195; RP 995) The trial court order erred in imposing a binding covenant on the Bentley-Prestwich property

requiring payment of 62.5% of the full assessment levied by the Association.

E. Bentley-Prestwich's Statutory Warranty Deed Obligated Starr To Defend Against The Association's Lawsuit.

A grantor who conveys property by warranty deed covenants, among other things, an unencumbered title and that he or she "*will defend the title thereto against all persons who may lawfully claim the same.*" RCW 64.04.030 (emphasis added). "Where covenants under the warranty deed are breached, an injured grantee is entitled to recover 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*).

Here, 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 to the Association. The trial court erred in dismissing Bentley-Prestwich's third party claim against Starr.

1. Bentley-Prestwich Properly Tendered Defense To Starr.

To recover under the warranty to defend, the grantee must make an effective tender of defense to the grantor. ***Mastro v. Kumakichi Corp.***, 90 Wn. App. 157, 164-65, 951 P.2d 817, *rev. denied*, 136 Wn.2d 1015 (1998) (*citations omitted*). The trial court erred in finding that Bentley-Prestwich did not “tender the defense of BMOA's complaint for declaratory judgment to the Starr Trust.” (Third Party FF 8, CP 342) 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***, 90 Wn. App. at 164-65.

Here, by filing their third party complaint against Starr, Bentley-Prestwich effectively tendered the defense to Starr. ***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). In their complaint, Bentley-Prestwich notified Starr that the Association commenced an action against

them, and sought Starr's defense of their title against the Association's claims. (See CP 68-70) Bentley-Prestwich notified Starr that they were seeking indemnification "under the warranties of the B-P Statutory Warranty Deed and RCW 64.04.030, from and against all losses, costs, expenses, and damages, including reasonable attorneys fees and costs incurred by Bentley-Prestwich in connection with the claims made by the Association against them." (CP 69) Because they effectively tendered the defense to Starr, Bentley-Prestwich were entitled to recover under the warranty to defend.

2. A Covenant Requiring A Property Owner To Pay Assessments To An Association Is An Encumbrance Under RCW 64.04.030.

The trial court erred in dismissing Bentley-Prestwich's third party claim against Starr based on the erroneous legal conclusion that "any road maintenance fees and costs assessed against Prestwich-Bentley or their property did not constitute an encumbrance violating RCW 64.04.030(2)," (Third Party CL 3, CP 343), and that Bentley-Prestwich "have not been evicted from their land, nor have they been prevented in any way from using the road easement to access their property." (Third Party FF 7, CP 342) To the contrary, the Association sought, and the trial court provided,

relief directly affecting the title warranted by Starr in his deed, and granted the Association the right to dispossess Bentley-Prestwich of their land by allowing the Association to create and foreclose on liens for road assessments.

The trial court's order requiring Bentley-Prestwich to formally enter into a binding covenant was based on its conclusion that such a covenant already existed against the property. (See FF 34, CP 324: "The parties' predecessors-in-interest intended for all road users to pay a share of road maintenance fees, and defendants must do so as well.") The covenant (now in writing under the court's order) was in fact 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) (an obligation "to contribute one's share of the neighborhood's maintenance expenses generally is characterized as an affirmative covenant."); **Williams v. Hewitt**, 57 Wash. 62, 63-64, 106 P. 496 (1910) (undisclosed restrictive covenant is an encumbrance for purposes of allowing a grantee to seek damages against grantor for diminishment of value of property under the statutory warranty deed).

“Encumbrance” is defined as a “claim or liability that is attached to property.” Black’s Law Dictionary 432 (7th ed. Abridged 2000). Liability is defined as “the quality or state of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment.” Black’s Law Dictionary 739.

Here, the covenant is by definition a “liability” because it obligates Bentley-Prestwich to “pay 62.5% of all Maintenance Assessments, levied on individual Members” to the Association. (CP 333) This obligation is “enforceable by a civil remedy” because the covenant requires that unpaid assessments “shall become a lien upon the land. This lien may be foreclosed in the same manner as a mortgage under the laws of the State of Washington.” (CP 333) The covenant is thus an “encumbrance” because it is a liability that is “attached” to the property. By its terms, the covenant “shall run with the land owned by Prestwich-Bentley, Trustees, and described here and shall be binding upon all parties having or acquiring any right, title or interest in and to the described property.” (CP 333) See also **Rodruck v. Sand Point Maintenance Comm.**, 48 Wn.2d 565, 576, 295 P.2d 714 (1956) (covenants to pay assessments to homeowners association runs with the land).

The property acquired by Bentley-Prestwich from Starr was not free of encumbrances because it included a previously undisclosed covenant requiring them to pay assessments to the Association. As a matter of law, Starr breached the warranty of title under RCW 64.04.030 because he conveyed property to Bentley-Prestwich subject to this undisclosed covenant.

3. Notice Of A Potential Defect In Their Title Could Not Waive Bentley-Prestwich's Right To A Defense Under RCW 64.04.030.

The trial court dismissed Bentley-Prestwich's third party claim against Starr after finding that Bentley-Prestwich were on "notice" that they might be liable for assessments to the Association. (FF 5, 6, CP 342) The trial court erred in holding that such notice effectively disclaimed the warranty of title, and erred in finding that the closing statement's reference to "Association Dues" was sufficient to put a reasonable purchaser on notice of an undisclosed encumbrance. (FF 5, 6, CP 342)

Even if Bentley-Prestwich were on "notice" that the property might in fact be encumbered by a covenant to pay assessments to the Association, Bentley-Prestwich were entitled to rely on their title that the property was unencumbered by any covenant with the Association. See *Edmonson*, 172 Wn.2d at 283, ¶ 22. 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.

In **Edmonson**, the grantee obtained a survey on the property prior to closing and discovered that the southern adjoining property’s cyclone fence was located more than one foot north of the boundary. The grantee did not disclose the survey to the grantor and proceeded with the purchase. Shortly after the sale, the southern property owner sued grantee based on an adverse possession claim. The grantee tendered the defense to the grantor. The grantor argued that grantee waived the warranty of defense because they had knowledge of the encroachment prior to closing the sale. The Supreme Court held that this argument was “without merit” because “at least since 1901, Washington courts have followed the rule that a grantee does not waive the covenants of a deed by having knowledge of a defect.” **Edmonson**, 172 Wn.2d at 283-84, ¶ 22 (*citations omitted*).

Thus, even if Bentley-Prestwich had knowledge of a defect in their title, Starr was still bound to defend them against the Association as a matter of law. The trial court erred in relying on

notice of an encumbrance arising from the purchaser's closing statement to disclaim the statutory warranty of title.

In any event, the trial court's finding that Bentley-Prestwich "knew or should have known there would be road maintenance fees" because they had previously been members of the Association and they signed a "closing cost statement" that included "Association Dues" (Third Party FF 5, 6, CP 342), is not supported by substantial evidence. The closing statement signed by Bentley-Prestwich makes no mention of "Buck Mountain Owners Association." (See Ex. 29; RP 900) In light of the undisputed evidence that Bentley-Prestwich had specifically inquired about the property's status with the Association and the lack of any reference to the Association in their chain of title, it is not reasonable that they "should have known" that the "Association" in the closing statement referred to Buck Mountain Owners Association.

Further, the fact that Bentley-Prestwich were previously members of the Association makes it more likely that they would be able to determine from their chain of title that the property was *not* governed by the Association. Barbara Bentley testified that because she had previously been a member of the Association she was already familiar with the Association's CCR's. (RP 893)

Accordingly, she was able to determine based on the property described within the CCR's that the property was excluded from the property governed by the Association. (RP 893; Ex. 15)

Regardless of its disposition of Bentley-Prestwich's appeal of the Association's judgment, this court should reverse the dismissal of their 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.

F. Starr Should Be Ordered To Pay Attorney Fees Incurred By Bentley-Prestwich On Appeal.

This court should also order that Starr pay Bentley-Prestwich's attorney fees on appeal. RAP 18.1(a). This appeal is a continuation of the action below in which Bentley-Prestwich are defending their title against the Association. Under RCW 64.04.030, Starr was required to defend Bentley-Prestwich in this action. Starr's breach of the duty to defend entitles Bentley-Prestwich to their attorney fees incurred in defending their title below and in this court. *Edmonson*, 172 Wn.2d at 278, ¶ 13 ("an injured grantee is entitled to recover both damages for lost property or diminution in property value and attorney's fee incurred in defending title.").

VI. CONCLUSION

The Association has no authority to levy or collect assessments against the property of Bentley-Prestwich, which lies outside of its jurisdiction, absent an agreement or covenant. The trial court erred in awarding a judgment against Bentley-Prestwich for past due assessments, and in ordering Bentley-Prestwich to enter into a binding covenant requiring them and their successors-in-interest to pay future assessments levied by the Association. This court should reverse, and vacate the trial court's order.

Bentley-Prestwich were also entitled to a defense and indemnity from Starr against the Association's lawsuit seeking a declaratory judgment that Bentley-Prestwich's property was encumbered with a previously undisclosed covenant to pay assessments to the Association for road maintenance. Bentley-Prestwich properly tendered the defense to Starr, and he was required to defend against the Association's action. This court should reverse the trial court's order dismissing Bentley-Prestwich's third party claim.

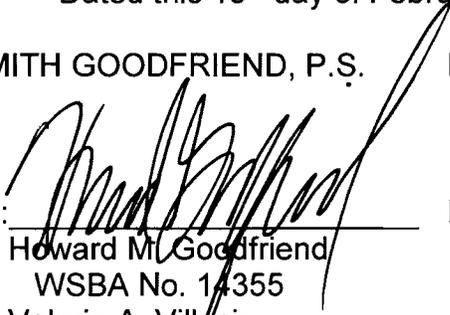
Finally, this court should order Starr to pay attorney fees to Bentley-Prestwich for fees incurred below and in this court to

pursue reversal of the trial court's order entered in the Association's action against Bentley-Prestwich.

Dated this 13th day of February, 2012.

SMITH GOODFRIEND, P.S.

MICHAEL K. MURRAY, P.S.

By: 

Howard M. Goodfriend
WSBA No. 14355
Valerie A. Villacin
WSBA No. 34515

By: 

Michael K. Murray
WSBA No. 5920

Attorneys for Appellants

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 February 13, 2012, I arranged for service of the foregoing Brief of Appellants, 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
Michael Simon Landerholm Legal Advisors 805 Broadway Street, Suite 1000 P.O. Box 1086 Vancouver, WA 98666-1086	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Michael K. Murray Michael K. Murray, P.S. 109 North Beach Road, Suite D-4 P.O. Box 10 Eastsound, WA 98245	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Derek Mann Derek Mann & Associates PLLC P.O. Box 399 Eastsound, WA 98245	<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 13th day of February, 2012.



 Victoria K. Isaksen

FILED
 COURT OF APPEALS DIV 1
 STATE OF WASHINGTON
 2012 FEB 14 AM 10:39

AUG 04 2011

JOAN P. WHITE
SAN JUAN COUNTY, WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SAN JUAN

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

Plaintiff,)

vs.)

GLENN PRESTWICH and BARBARA BENTLEY, his)
spouse, and their marital community, Individually and as)
Trustees of the Bentley-Prestwich Living Trust, and all)
other persons or parties unknown claiming any right,)
title, estate, lien or interest in the real estate described)
below and in Paragraph 3 of the Complaint in this matter.)

Defendants,)

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

Third-Party Defendants.)

NO. 06-2-05182-4

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND JUDGMENT AND
ORDER

JUDGMENT SUMMARY

Judgment Creditor: Buck Mountain Owners' Association
Attorney for Judgment Creditor: Mr. Derek Mann, P.O. Box 399, Eastsound, WA 98245

Judgment Debtors: Mr. Glenn Prestwich and Mrs. Barbara Bentley
Attorney for Judgment Debtors: Mr. Michael Murray, P.O. Box 10, Eastsound, WA 98245
Amount of Judgment: \$11,132.44

Real Property Affected: A portion of Government Lot 2, Section 18, Township 37
(subject to future road North, Range 2 West, W.M.; Tax Parcel Number 171823010
maintenance obligations) Full Legal Description Attached as page 7 to Exhibit A

FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND JUDGMENT AND ORDER

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This matter having come to trial on March 29 – April 1, and April 6 – 7, 2011;

The Plaintiff Buck Mountain Owners Association appearing and being represented by attorney Derek Mann, and the Defendants Glenn Prestwich and Barbara Bentley appearing and being represented by attorney Michael Murray;

The Court having heard the testimony of the Plaintiff and its witnesses and the testimony of the Defendants and their witnesses, and having reviewed the Pleadings herein and read the trial briefs and heard the arguments of counsel;

FINDINGS OF FACT

The Court hereby enters the following findings of fact:

1. Plaintiff Buck Mountain Owners Association brought this First Amended Complaint for Declaratory Judgment as to Road Maintenance Obligations, to have the court determine the road maintenance obligations between two users of a common access easement, accruing since 2005.
2. Defendants Glenn Prestwich and Barbara Bentley (defendants) have denied the complaint and brought several counterclaims against the plaintiff, which counterclaims the plaintiff has denied.
3. Plaintiff is a Washington non-profit corporation, in good standing, organized under RCW 24.03 *et seq.*
4. Defendants Glenn Prestwich and Barbara Bentley purchased in 2005 real property adjacent to that governed by the covenants, conditions and restrictions and other governing documents administered by the plaintiff owners' association.
5. Defendants' real property is described at page 7 to Exhibit A hereto.

FINDINGS OF FACT, CONCLUSIONS OF LAW,
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6. Defendants' real property is not within the real property defined by the plaintiff association's governing documents.

7. Defendants' real property benefits from a non-exclusive perpetual easement for access over and across roadways maintained by the plaintiff association for the benefit of plaintiff's 130 member-parcels, and for the benefit of other parcels of real property similarly situated to that of the defendants with whom the plaintiff has road maintenance agreements.

8. The easement in question is the Declaration of Easement, San Juan County Auditor's file number 116378, Exhibit 10 at trial. Both the defendants' and the plaintiff's predecessors-in-interest obtained the right access over and across said roadways under this easement.

9. Defendants' predecessors-in-interest were Jack M. Starr, Mary M. Starr, Victor B. Guynup and Dorothea B. Guynup ("Starr and Guynup"), who in 1977 sold approximately .200 acres of land on Buck Mountain to plaintiff's predecessors-in-interest who were William H. Carlson, David A. MacBryer, Barbara MacBryer, Donald S. Gerard, and M. Arlene Gerard ("Carlson, MacBryer and Gerard"). This transaction was recorded in the Statutory Warranty Deed, San Juan County Auditor's File number 98153.

10. The 1977 Statutory Warranty Deed AFN 98152 was subject to a previous 1973 Easement granted to Starr and Guynup in 1973, San Juan County Auditor's File number 82319.

11. As part of this sale, as stated in the 1977 Statutory Warranty Deed AFN 98152, defendants' predecessors-in-interest Starr and Guynup retained an L-shaped parcel of approximately 30 acres (described as the west half and the southeast quarter of Government

1 Lot 2, Section 18, Township 37 North, Range 1 West, W.M.). A portion of this retained parcel
2 is the real property now owned by the defendants.

3 12. Also as part of this sale, and also as stated in the 1977 Statutory Warranty Deed AFN
4 98152, Starr and Guynup retained an easement for access 50 feet in width "from the Stonegate
5 north to the property retained by grantors."

6 13. The 1977 Statutory Warranty Deed AFN 98152 is silent on the issue of road
7 maintenance.

8 14. Concurrently with the 1977 sale, plaintiff's predecessors-in-interest Carlson, MacBryer
9 and Gerard granted a Deed of Trust, San Juan County Auditor's File number 98153, for the
10 benefit of Starr and Guynup, in which the Carlson, MacBryer and Gerard agreed to "construct
11 a serviceable rock roadbed twenty (20) feet in width and at least six (6) inches in depth within
12 two years after July 8, 1977 over the existing roadbed and fifty (50) feet easement held by the
13 Beneficiaries from the Stonegate north to the property retained by the Beneficiaries."

14 15. Defendants argue that paragraph 1 of said Deed of Trust AFN 98153 require Carlson,
15 MacBryer and Gerard and now the plaintiff as their successor to maintain the roadway without
16 any obligation on the defendants' part to contribute to such costs. Paragraph 1 states that
17 Carlson, MacBryer and Gerard agree "To keep the property in good condition and repair: to
18 permit no waste thereof; to complete and building, structure or improvements being built or
19 about to be build thereon; to restore promptly any building, structure or improvement thereon
20 which may be damaged or destroyed, and to comply with all laws, ordinances, regulations,
21 covenants, conditions and restrictions affecting the property."
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FINDINGS OF FACT. CONCLUSIONS OF LAW.
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16. The Deed of Trust AFN 98153 (and its paragraph I) is a form document, on which was interlineated the language requiring Carlson, MacBryer and Gerard to construct the rock roadbed as stated above.

17. Under Deed of Trust AFN 98153, Carlson, MacBryer and Gerard did not intend to provide free road maintenance in perpetuity. Had they intended to do so, they would have added certain words, such as "That Grantors construct and maintain a serviceable rock roadbed..."

18. This conclusion is also supported by extrinsic evidence of the original signors' intent in the 1977 Deed of Trust AFN 98153, which evidence was provided in the form of the testimony of Mr. Carlson. Mr. Carlson testified that "there was no free ride for anybody," and that "everybody would share equal," and that "they would all share in the Buck Mountain Road Maintenance Association," and that it was always the intent that everybody would share equal in road maintenance."

19. In all events, Deed of Trust AFN 98153 was reconveyed, and all obligations thereunder extinguished in 1994 under the Full Reconveyance, San Juan County Auditor's File number 94020910, many years prior to the occurrence of the road maintenance that is the subject of the plaintiff's suit for recovery here.

20. The right-of-access retained in the 1977 Statutory Warranty Deed AFN 98152 was extinguished and replaced in 1981 by the Declaration of Easement, San Juan County Auditor's File number 116378.

21. The 1973 Easement AFN 82319 and listed in the 1977 Statutory Warranty Deed was released and abandoned by the express terms of the 1981 Declaration of Easement, AFN 116378.

22. The 1981 Declaration of Easement AFN 116378 expanded the width of the accessway to 60 feet, extended the accessway across the L-shaped parcel retained by defendants' predecessors'-in-interest to the real property purchased in 1977 by plaintiff's predecessors'-in-interest, and granted the benefit of the easement to such real property purchased by plaintiff's predecessors'-in-interest.

23. The 1981 Declaration of Easement AFN 116378 is silent on the issue of responsibility for road maintenance.

24. According to the testimony of Mr. Carlson and Mr. Gerard, the purpose of the 1981 Declaration of Easement AFN 116378 was to provide access to real property that was to become a part of the Buck Mountain development. This real property was divided and known as the Short Plat of Sucia View.

25. The governing documents of Sucia View grant its parcels access over the easement described by the 1981 Declaration of Easement AFN 116378, and require its parcels to abide by and become part of the Buck Mountain subdivision.

26. The course of conduct of the Starrs, as predecessors-in-interest to the defendants, is significant as to the parties' intent and supports the contention that all users were to share equally in the maintenance of the roadway.

27. Until the defendants took title from them in 2005, the defendants' predecessors-in-interest paid 100% of the road maintenance obligations levied by the plaintiff association. J.

Michael Starr assumed responsibility for the subject real property from his father Jack M. Starr in 1989, several years after the plaintiff began to levy and collect road maintenance assessments on the subject property. J. Michael Starr testified that he continued to pay the plaintiff's assessment because he assumed the property was subject to the assessment.

28. With limited exceptions, plaintiff association assesses each of its 130 member parcels the same amounts for road maintenance. The plaintiff does so because of the difficulties in accurately prorating such costs, and because its governing documents mandate that course.

29. The plaintiff association also charges its road users a construction impact fee, based upon a percentage of the County's permit fees. The court finds that this fee is a reasonable charge to recover for the road degradation caused by construction-related traffic.

30. One such exception is the plaintiff's agreements with some owners within the L-shaped parcel retained by the defendants' predecessors-in-interest to pay 62.5% of the full assessment amounts, plus 100% of the plaintiff's fee for construction impacts.

31. It would be well within the evidence presented and the court's discretion to require the defendants' parcel to pay 100% of the share paid by all members of the plaintiff association. However, the court finds that the exceptions (as set forth in the preceding paragraph) carved out for other owners in the L-shaped area are also reasonable, and will order that the defendants pay according to such exceptions.

32. The agreement attached as Exhibit A hereto is based upon the agreements with other owners within the L-shaped area, and reasonably constructed to achieve this purpose with respect to the defendants' parcel.

1 33. Plaintiff provided defendants notice of and demand of payment for such assessments and
2 construction impact fees, together with interest at 12% and late fees, since 2005.

3 34. The parties' predecessors-in-interest intended for all road users to pay a share of road
4 maintenance fees, and defendants must do so as well.

5 35. Plaintiff is entitled to judgment in the form of a binding covenant requiring the
6 defendants' parcel's owners to contribute a 62% share of the sums regularly assessed by the
7 plaintiff association on its members for road maintenance. The form of said agreement is
8 attached hereto as Exhibit A.

9 36. Plaintiff is entitled to judgment for monetary damages for 62.5% of such past unpaid
10 road maintenance assessments, beginning in May, 2005, through the present, plus interest and
11 late fees.

12 37. Plaintiff is entitled to judgment for monetary damages for 62.5% of such past unpaid
13 construction impact fees, beginning in May, 2005, through the present, plus interest and late
14 fees.

15 38. Plaintiff's allowed assessments, construction impact fees, interest and late fees are those
16 listed in the spreadsheet attached hereto as Exhibit B, and total \$11,132.44.

17 39. In their counterclaim, defendants assert that plaintiff maliciously commenced and
18 prosecuted its complaint for declaratory judgment to intimidate and coerce them to pay road
19 maintenance fees assessed in 2005 and in future years. This action, they claim, has caused
20 them emotional and physical distress; had damaged their credit and ability to obtain financing;
21 has damaged their personal and professional reputations by substantially disrupting and
22 causing them to lose work; has damaged their right to the peaceful use of their home and real
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FINDINGS OF FACT, CONCLUSIONS OF LAW,
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property; and has caused substantial costs and expenses including attorney's fees incurred to defend against the plaintiff's claims.

40. Defendants did not brief their claims. To the extent that the court has done so for them, the court finds that the defendants are claiming malicious prosecution, slander of title, abuse of process, intentional and negligent infliction of emotional distress, and damage to their personal and professional reputations as a result of libel, slander or defamation.

41. To maintain an action for malicious prosecution, a claimant must prove each of the following elements: (1) that the prosecution claimed to have been malicious was instituted or continued by the defendant; (2) that there was want of probable cause for the institution or continuance of the prosecution; (3) that the proceedings were instituted or continued through malice; (4) that the proceedings terminated on the merits in favor of the claimant or were abandoned; and (5) that the claimant suffered injury or damage as a result of the prosecution.

42. Without addressing all of the elements, the defendants have failed to prove the fifth element. To show injury of damage as a result of the prosecution, the defendants must allege and submit proof of arrest of his or her person or seizure of his or her property. It is undisputed that neither occurred.

43. The necessary elements of a slander of title action are that the words: (1) must be false; (2) must be maliciously published; (3) must be spoken with reference to some pending sale or purchase of the real property; (4) must result in a pecuniary loss or injury to the claimant; and (5) must be such as to defeat the claimant's title. Without addressing all of the elements, it is undisputed that the defendants still have fee simple title to their property. The Plaintiff has filed no encumbrance on their property. This claim lacks merit.

FINDINGS OF FACT, CONCLUSIONS OF LAW,
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44. The essential elements of abuse of process are: (1) the existence of an ulterior purpose to accomplish an object not within the proper scope of the process; and (2) an act in the use of legal process not proper in the regular prosecution of the proceedings. The mere institution of a legal proceeding even with a malicious motive does not constitute an abuse of process.

There is no evidence that the plaintiff sought to accomplish an object not within the proper scope of the process or acted improperly in the prosecution of these proceedings. This claim has no merit.

45. "Outrage" and "intentional infliction of emotional distress" are synonyms for the same tort. The tort of outrage requires proof of three elements: (1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the claimant of severe emotional distress. Defendants have failed to prove any of the above elements. The plaintiff filed this action for declaratory judgment asking for the court to determine the parties' responsibilities, and amended its complaint and abandoned some claims. Such conduct is not "extreme or outrageous." Even assuming that such actions were extreme or outrageous (which the court does not find), the defendants have not shown any severe emotional distress. To be involved in a lawsuit is always distressing and emotionally disturbing, but the defendants' anger and emotional distress do not rise to the level of "severe emotional distress."

46. A claimant for negligent infliction of emotional distress must prove that he or she has suffered emotional distress by "objective symptomatology" and the emotional distress must be susceptible to medial diagnosis and proved through medical evidence. The symptoms must also "constitute a diagnosable emotional disorder." The defendants have not proved through

FINDINGS OF FACT, CONCLUSIONS OF LAW,
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medical evidence any medical diagnosis or "objective symptomatology" of emotional distress.

This claim lacks merit.

47. Defamation is concerned with compensating an injured party for damages to reputation. Proof of defamation requires a showing of: (1) falsity; (2) an unprivileged communication; (3) fault; and (4) damages. The degree of fault for a private person, as defendants are here, is negligence. The Defendants claim that the plaintiff's mention of the lawsuit in the minutes of its proceedings was defamatory and damaged their personal and professional reputations. The court finds that the references in the minutes either to the lawsuit or to the defendants are not false. Instead they are factual. This claim has no merit.

CONCLUSIONS OF LAW

1. This court has jurisdiction pursuant to RCW 7.24.010, RCW 2.08.010 and Washington State Constitution article 4, section 6.
2. Venue is proper under RCW 4.12.010(1) and 2.08.210.
3. Plaintiff may sue and be sued, complain and defend, in its corporate name.
4. Plaintiff is not limited to suits involving just the real property described within its governing documents.
5. This action is an actual, present and existing dispute, between parties having genuine and opposing interests, which involves direct and substantial interests, a judicial determination of which will be final and conclusive.
6. Plaintiff has standing to bring its first amended complaint under the Uniform Declaratory Judgments Act.
7. Plaintiff and defendants are co-users of a common easement, which easement silent on the issue of road maintenance, and therefore plaintiff is entitled to judgment in the form of a

FINDINGS OF FACT, CONCLUSIONS OF LAW,
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1 binding covenant requiring the owners of the defendants' parcel to contribute a share of the
2 sums for road maintenance regularly assessed by the plaintiff association on its members.

3 8. Plaintiff is entitled to judgment against defendants for monetary damages for a share of past
4 unpaid road maintenance assessments, beginning in May, 2005, through the present, plus
5 interest and late fees.

6 9. Plaintiff is entitled to judgment against defendants for monetary damages for a share of past
7 unpaid construction impact fees, beginning in May, 2005, through the present, plus interest
8 and late fees.

9 10. Defendants' counterclaim of malicious prosecution lacks merit, for failure to prove arrest of
10 their person or seizure of their property.

11 11. Defendants' counterclaim of slander of title prosecution lacks merit fee, for failure to prove
12 interference with simple title to their property.

13 12. Defendants' counterclaim of abuse of process lacks merit fee, for failure to prove that the
14 plaintiff sought to accomplish an object not within the proper scope of the process or acted
15 improperly in the prosecution of these proceedings.

16 13. Defendants' counterclaim for the torts of outrage and intentional infliction of emotional
17 distress lacks merit, for failure to prove that the plaintiff's actions were "extreme or
18 outrageous" or that the defendants suffered "severe emotional distress."

19 14. Defendants' counterclaim for the tort of negligent infliction of emotional distress lacks
20 merit, for failure to prove through medical evidence any medical diagnosis or "objective
21 symptomatology" of emotional distress.

22 15. Defendants' counterclaim for damage to personal and professional reputations lacks merit,
23 for failure to prove the falsity of any statements made by plaintiff.

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FINDINGS OF FACT, CONCLUSIONS OF LAW,
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1 NOW THEREFORE, it is HEREBY ORDERED:

2
3 1. The Defendants' real property shall be from this date forward subject to the terms of the
4 Road Maintenance Agreement Between Buck Mountain Owners Association and Prestwich-
5 Bentley, the form of which is attached hereto has Exhibit A.

6 2. The Defendants are hereby ordered to execute said document before a notary public and to
7 deliver the original to the plaintiff within 10 days of the entry of this judgment. In the event
8 the defendants fail to do so, the plaintiff may apply to this court for a certified order permitting
9 plaintiff to enter the document into San Juan County's land use records on that basis.

10 3. Monetary judgment is awarded to plaintiff against defendants Glenn Prestwich and
11 Barbara Bentley in the amount of \$11,132.44.

12 4. Plaintiff shall submit a statement and supporting affidavits for its costs and fees pursuant
13 to RCW 8.84. et seq within 10 days of the entry of this judgment.

14 5. The Defendants' counterclaims against the plaintiff all lack merit and are dismissed with
15 prejudice.

16
17 Dated: Aug. 2, 2011

18
19 Vickie L. Churchill

20 Hon. Vickie Churchill, Judge

21 Presented by:

22 DEREK MANN & ASSOCIATES, PLLC

23 By: Derek A. Mann 8/2/11
date

24 Attorney for Plaintiff

25 WSBA No. 20194

26 P.O. Box 399

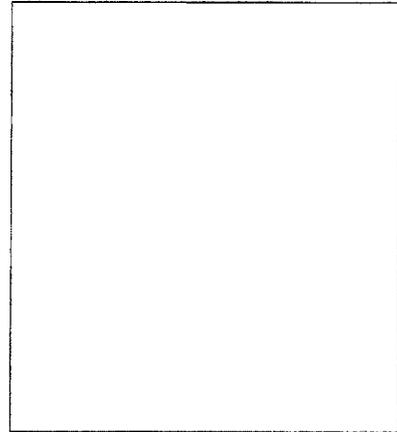
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AFTER RECORDING MAIL TO:
Law Office of Mann & Blaine
P. O. Box 399
Eastsound, WA 98245



RECORDING COVERSHEET

Document Title:

ROAD MAINTENANCE AGREEMENT BETWEEN BUCK MOUNTAIN OWNERS ASSOCIATION AND PRESTWICH-BENTLEY

Grantors and Property Affected:

GLENN PRESTWICH and BARBARA BENTLEY, Trustees of the Bentley-Prestwich Living Trust: Abbreviated Legal Description: A portion of Government Lot 2, Section 18, Township 37 North, Range 2 West, W.M. Full Legal Description at page 7: Tax Parcel No. 1718-23010-000.

Grantees:

BUCK MOUNTAIN OWNERS' ASSOCIATION

ROAD MAINTENANCE AGREEMENT BETWEEN BUCK
MOUNTAIN OWNERS ASSOCIATION AND PRESTWICH-BENTLEY

PAGE 1 OF 7

Exhibit A

CP 331

**ROAD MAINTENANCE AGREEMENT BETWEEN BUCK MOUNTAIN
OWNERS ASSOCIATION AND PRESTWICH-BENTLEY**

This Agreement ("Agreement") is hereby made this _____ day of _____, 2011, by and between Glenn Prestwich and Barbara Bentley, Trustees of the Bentley-Prestwich Living Trust ("Prestwich-Bentley, Trustees"), and Buck Mountain Owners' Association ("Association").

RECITALS

Whereas, Prestwich-Bentley, Trustees, are the owners of the real property described in Exhibit A, attached hereto and incorporated herein by this reference, located at 390 Parker Reef Road, Eastsound, Washington; and

Whereas, Prestwich-Bentley, Trustees, use such property for non commercial uses as defined by San Juan County; and

Whereas, the Association was established pursuant to Chapter 24.03 RCW, and

Whereas, the primary function of the Association is to maintain the road network on Buck Mountain, included but not limited to Buck Mountain Road and Parker Reef Road ("Roads"); and

Whereas Prestwich-Bentley, Trustees, and the Association desire to enter into an Agreement, whereby the Association will maintain the Roads and Prestwich-Bentley, Trustees, will equitably share the cost associated with the maintenance of the Roads.

Now, therefore, in consideration of the mutual promises, conditions and covenants set forth herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto do mutually covenant and agree as follows:

1. It is understood and agreed that the easement roads described in an instrument recorded under San Juan County Auditor's File No. 117378, including a portion of Buck Mountain Road and Parker Reef Road ("Roads") shall be the responsibility of the Association to maintain for the benefit of Prestwich-Bentley, Trustees, as well as other members of the Association located on Parker Reed Road. The Association has established a Five-Year Road Plan to improve the Road Network on Buck Mountain which is updated and amended from time to time as circumstances change.

2. The Association establishes Maintenance Assessments each year which are levied on the owners ("Members") of the approximately 130 lots comprising the Association. Prestwich-Bentley, Trustees, are not members of the Association and nothing in this Agreement shall change that relationship.

3. It is agreed that Prestwich-Bentley, Trustees, shall pay 62.5% of all Maintenance Assessments levied on individual Members, except that in any year or portion thereof that they uses or proposes to use their property for commercial uses, then he shall pay 100% of all Maintenance Assessments for such year. Commercial use includes the use of the subject property as a transient rental as defined by San Juan County ordinance. The roadway is intended to be used for normal residential ingress and egress. Because construction of a residence is deemed to cause higher maintenance costs, Prestwich-Bentley, Trustees, shall pay the Association's Building Permit Fee, which is currently 50 % of San Juan County's building permit fee.

4. In the event the Association fails to maintain the Road, then, in that event Prestwich-Bentley, Trustees, their heirs, successors or assigns, may undertake such maintenance on the Road as may be reasonable and may withhold future payments of Assessments until the cost of such maintenance or repair is reimbursed, provided however, that in no event shall the Assessment be withheld based upon maintenance performed by Prestwich-Bentley, Trustees, without having first made written demand upon the Association to perform the routine annual maintenance and the scheduled improvement as set forth in the Five-Year Road Plan of the Association as it may be amended from time to time.

5. That in the event of non-payment of any assessment due, the Association may file a Notice of Claim of Assessment with the San Juan County Auditor's Office and thereafter said assessment shall become a lien upon the land. This lien may be foreclosed in the same manner as a mortgage under the laws of the State of Washington, provided that such lien shall be subordinate to any first Deed of Trust of record.

6. That in the event of any dispute arising over the terms of this agreement or the enforcement thereof, the rights of the parties and the remedies available to them shall be enforced in the appropriate court with venue being limited to San Juan County.

7. This Agreement shall run with the land owned by Prestwich-Bentley, Trustees, and described here and shall be binding upon all parties having or acquiring any right, title or interest in and to the described property or a part thereof, and shall inure to the benefit of each owner thereof.

8. Time shall be considered of the essence in the performance of all of the requirements of this Agreement.

9. In the event any party is required to resort to litigation to enforce its rights hereunder, the parties agree that any judgment awarded to the prevailing party shall include all litigation expenses, including reasonable attorney's fees.

10. The Effective Date of this Agreement shall be the date set forth in the first paragraph hereof.

11. In case any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision hereof, and this Agreement shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein.

12. This Agreement shall be governed by the laws of the State of Washington. No failure by a party to exercise and no delay in exercising any right, power, privilege or discretion under this single or partial exercise of any right, power, privilege or discretion hereunder shall preclude any other or further exercise thereof or the exercise of any right, power, privilege or discretion; nor shall any waiver thereof be effective unless in writing and signed by the party waiving the same.

13. This Agreement shall contain the final and entire agreement between the parties, and they shall not be bound by any terms, conditions, statement or representations, oral or written, no herein contained.

14. This document may be executed in two original counterparts, which when fully executed shall constitute one binding document.

BUCK MOUNTAIN OWNERS ASSOCIATION

BY: _____, _____ (title) (date)

STATE OF WASHINGTON)
) ss.
County of San Juan)

On this _____ day of _____, 2011, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared to me _____, known to be the individual described in and who executed the foregoing instrument, and acknowledged to me that, as a duly authorized officer of Buck Mountain Owners Association, he signed and sealed the said instrument as his free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal hereto affixed the day and year in this certificate above written.

Print Name: _____
NOTARY PUBLIC in and for the State of Washington
Residing at _____
My commission expires: _____

THE BENTLEY-PRESTWICH LIVING TRUST

By: Glenn Prestwich, Trustee (date)

By: Barbara Bentley, Trustee (date)

STATE OF _____)
) ss.
County of _____)

On this ____ day of _____, 2011, before me, the undersigned, a Notary Public in and for the State of _____, duly commissioned and sworn, personally appeared to me Glenn Prestwich, known to be the individual described in and who executed the foregoing instrument, and acknowledged to me that, as Trustee of the Bentley-Prestwich Living Trust, he signed and sealed the said instrument as his free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal hereto affixed the day and year in this certificate above written.

Print Name: _____
NOTARY PUBLIC in and for the State of _____
Residing at _____
My commission expires: _____

STATE OF _____)
) ss.
County of _____)

On this ____ day of _____, 2011, before me, the undersigned, a Notary Public in and for the State of _____, duly commissioned and sworn, personally appeared to me Barbara Bentley, known to be the individual described in and who executed the foregoing instrument, and acknowledged to me that, as Trustee of the Bentley-Prestwich Living Trust, she signed and sealed the said instrument as her free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and official seal hereto affixed the day and year in this certificate above written.

Print Name: _____
NOTARY PUBLIC in and for the State of _____
Residing at _____
My commission expires: _____

EXHIBIT "A"

PROPERTY DESCRIPTION

The land referred to in this Commitment is described as follows:

That portion of Government Lot 2, Section 18, Township 37 North, Range 1 West, W.M., described as follows:

Commencing at the 1" iron pipe with a plastic cap marked K & S LS 15038 marking the Northwest corner of said Government Lot 2; thence along the North line of said Government Lot 2 North 89°48'36" East, 652.77 feet to the West line of Lot 1 of Sucia View Short Plat, as recorded in Volume 5 of Short Plats, Page 17, records of said County; thence along said West line South 01°21'56" East 651.73 feet to the Southwest corner of said Lot 1 and the TRUE POINT OF BEGINNING; thence along a line that extends to the West Quarter corner, as shown in Land Corner Records per Auditor's File No. 111344, said records, South 44°48'27" West 150.00 feet; thence leaving said line South 88°57'50" West 158.45 feet to a point on the centerline of a 60 foot wide easement described in Auditor's File No. 116378, said records; thence along said easement centerline South 12°53'49" West 36.06 feet to the P.C. of a curve to the left having a central angle of 29°10'06" and a radius of 250.00 feet; thence along said curve 127.27 feet to a point on said extended line between the Southwest corner of Lot 1 and said Quarter corner, said point designated as Point S herein for reference purposes; thence leaving said centerline and along said extended line South 44°48'27" West, 543.04 feet to said West Quarter corner; thence along the South line of said Government Lot 2 North 89°39'50" East 625.50 feet; thence continuing along said South line, North 89°39'50" East 685.18 feet to the East line of said Government Lot 2; thence along said East line North 0°28'43" West 650.90 feet to the Southeast corner of said Lot 1 of Sucia View Short Plat; thence along the South line of said Lot 1, South 89°44'12" West, 654.05 feet to the TRUE POINT OF BEGINNING

EXCEPT: any portion thereof lying Northerly of the following described line:

Commencing at the Southwest corner of the above described of Lot 1 of Sucia View Short Plat; thence along the South line of said Lot 1, North 89°44'12" East, for a distance of 654.05 feet to the Southeast corner of said Lot 1; thence South 48°12'07" West, for a distance of 508.61 feet to the TRUE POINT OF BEGINNING of this line description; thence said line runs North 89°44'12" East, for a distance of 381.99 feet, more or less to a point on the East line of said Government Lot 2 and the Eastern terminus of this line description; and from said TRUE POINT OF BEGINNING, said line also runs North 81°06'45" West, for a distance of 81.00 feet; thence North 60°25'21" West, for a distance of 49.01 feet; thence North 24°07'40" West, for a distance of 40.74 feet; thence North 84°31'48" West for a distance of 54.15 feet; thence South 70°57'13" West, for a distance of 129.49 feet; thence North 86°47'19" West for a distance of 109.87 feet; thence North 64°13'33" West, for a distance of 51.81 feet; thence North 89°49'01" West, for a distance of 71.39 feet; more or less to the above described Point S and the Western terminus of this line description.

TOGETHER WITH AND SUBJECT TO a non exclusive easement for ingress and egress, across, over and under that certain parcel of land being 60 feet in width as described within and as conveyed by Declaration of Easement, recorded March 30, 1981, in Volume 77, of Official Records, at page 43, under Auditor's File No. 116378, records of San Juan County, Washington.

Situate in San Juan County, Washington.

Date	Transaction	Amount	Assessments	Late Fees	2006	2007	2008	2009	2010	2011
3/1/2006	Inv # 2006-140 - Special Assessment for new construction - Storage bid/bath (permit S254.8)	\$84.95	84.95							
4/1/2006	Late payment fee	\$100.00		100.00						
7/11/2011	Interest at 12% - March 2006 thru July 2011 (65 months)	\$51.81			8.50	10.19	10.19	10.19	10.19	2.55
4/8/2006	Inv # 2006-8 - Annual Assessment \$700 @ 62.5%	\$437.50	437.50							
6/1/2006	Late payment fee	\$200.00		200.00						
7/11/2011	Interest at 12% - June 2006 thru July 2011 (62 months)	\$271.26			30.63	52.50	52.50	52.50	52.50	30.63
11/1/2006	Special Assessment for new construction - House (permit S5182.05 x .5)	\$2,691.03	2,691.03							
12/1/2006	Late payment fee	\$100.00		100.00						
7/11/2011	Interest at 12% - November 2006 thru July 2011 (57 months)	\$1,533.87			53.82	322.92	322.92	322.92	322.92	188.37
Total for 2006 Assessments and fees		\$5,233.66								
4/1/2007	Inv # 2007-149 - Annual Assessment \$900 @ 62.5%	\$562.50	562.50							
6/1/2007	Late payment fee	\$200.00		200.00						
7/11/2011	Interest at 12% - June 2007 thru July 2011 (50 months)	\$281.86				39.38	67.50	67.50	67.50	39.98
Total for 2007 Assessments and fees		\$1,044.36								
4/6/2008	Inv # 2008-142 - Annual Assessment for 2008 \$975 @ 62.5%	\$609.38	609.38							
6/1/2008	Late payment fee	\$200.00		200.00						
7/11/2011	Interest at 12% - June 2008 thru July 2011 (38 months)	\$231.58					42.66	73.13	73.13	42.66
Total for 2008 Assessments and fees		\$1,040.96								
4/4/2009	Inv # 2009-101 - Annual Assessment for 2009 \$975 @ 62.5%	\$609.38	609.38							
6/1/2009	Late payment fee	\$200.00		200.00						
7/11/2011	Interest at 12% - June 2009 thru July 2011 (16 months)	\$158.45						42.66	73.13	42.66
Total for 2009 Assessments and fees		\$967.83								
4/17/2010	Inv # 9007 - Annual Assessment for 2010 \$825 @ 62.5%	\$515.63	515.63							
6/1/2010	Late payment fee	\$200.00		200.00						
7/11/2011	Interest at 12% - June 2010 thru March 2011 (10 months)	\$72.18							36.09	36.09
Total for 2010 Assessments and fees		\$787.81								
3/28/2011	Inv # 9158 - Annual Assessment for 2011 \$875 @ 62.5%	\$546.88	546.88							
6/1/2011	Late payment fee	\$200.00		200.00						
7/11/2011	Interest at 12% - June 2011 thru July 2011 (2 months)	\$10.94								10.94
Total for 2011 Assessments and fees		\$757.82								
Bookkeeping fee June 2006 - July 2011 - 62 months @ \$20/month		\$1,300.00			200.00	240.00	240.00	240.00	240.00	140.00
Total assessments, late fees and interest		\$11,132.44	5,972.30	1,300.00	284.45	654.80	725.58	798.71	865.27	531.33

EXHIBIT B
CP 338

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SAN JUAN

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

Plaintiff,

vs.

GLENN PRESTWICH and BARBARA BENTLEY, his
spouse, and their marital community, Individually and
as Trustees of the Bentley-Prestwich Living Trust, and
all other persons or parties unknown claiming any right,
title, estate, lien or interest in the real estate described
in Paragraph 3 of the Complaint in this matter,

Defendants,

vs.

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

Third-Party Defendants.

NO. 06-2-05182-4

THIRD PARTY CLAIM

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND
JUDGMENT

The above matter was tried by the Court on March 29-April 1, 2011 and April 6-7, 2011.
Third-Party Plaintiffs' Glenn Prestwich and Barbara Bentley appeared personally and through
their attorney, Michael K. Murray. Third-Party Defendants J. Michael Starr and Richard U.
Starr, Trustees, and the Jack M. Starr Credit Shelter Trust appeared through J. Michael Starr,
Trustee, *pro se*. Testimony and exhibits were received in evidence, and after arguments by

J. Michael Starr, Trustee *pro se*
278 Spyglass Drive
Eugene, OR 97401
(541) 683-6560

CP 341

1 counsel the Third-Party Claim was submitted to the Court for decision. The Court, being fully
2 advised and having rendered a written opinion, makes the following Findings of Fact and
3 Conclusions of Law.

4 *FINDINGS OF FACT*

5 1. Third-Party Plaintiffs filed a Third-Party Complaint against Third-Party Defendants
6 alleging breaches of the Washington Statutory Warranty Deed statute, RCW 64.04.030.

7 2. The warranty deed in issue conveyed unimproved land from the Starr Trust to Prestwich-
8 Bentley and was fully executed and recorded in May of 2005.

9 3. At the time of the conveyance the Starr Trust possessed an estate in fee simple in the
10 involved land, had full capacity to convey and did convey a fee simple estate to Prestwich-
11 Bentley.

12 4. Both the warranty deed and the attached legal description subjected the conveyance to
13 easements of record and specifically the road easement for ingress and egress to Prestwich-
14 Bentley's land. That easement is the subject of the litigation between Buck Mountain Owner's
15 Association ("BMOA") and Prestwich-Bentley. The road easement was silent as to road costs
16 and maintenance.

17 5. Prestwich-Bentley had previous to May 2005 owned property on Buck Mountain and paid
18 dues to BMOA for road costs. Prestwich-Bentley were thereby on notice they could be subject to
19 paying dues to BMOA for road costs when they received and both signed a closing cost
20 statement which noted Six Hundred Dollars (\$600.00) due to BMOA to be *pro rated* between the
21 buyer and seller.

22 6. Prestwich-Bentley knew or should have known there would be road maintenance fees.

23 7. Prestwich-Bentley have not been evicted from their land, nor have they been prevented in
24 any way from using the road easement to access their property.

25 8. Prestwich-Bentley never tendered the defense of BMOA's complaint for declaratory
26 judgment to the Starr Trust.

J. Michael Starr, Trustee *pro se*
278 Spyglass Drive
Eugene, OR 97401
(541) 683-6560

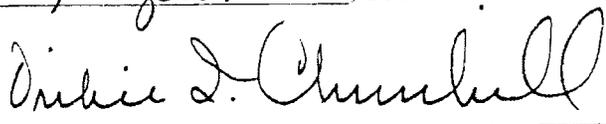
1 Based on these Findings of Fact the Court makes the following:

2 *CONCLUSIONS OF LAW*

- 3 1. At the time of the conveyance, the Starr Trust was lawfully seized of an infeasible
4 estate in fee simple. RCW 64.04.030(1).
- 5 2. At the time of the conveyance, the Starr Trust had a good right and full power to convey
6 the estate. RCW 64.04.030(1).
- 7 3. Any road maintenance fees and costs assessed against Prestwich-Bentley or their property
8 did not constitute an encumbrance violating RCW 64.04.030(2).
- 9 4. Prestwich-Bentley have had the quiet and peaceful possession of the premises. RCW
10 64.04.030(3).
- 11 5. No person has made a lawful claim against the title to Prestwich-Bentley's premises, nor
12 have Prestwich-Bentley tendered to the Starr Trust any claim to defend. RCW 64.04.030(3).
- 13 6. Third-Party Plaintiffs Prestwich-Bentley have failed to sustain their burden of proof that
14 any of the covenants in RCW 64.04.030 were breached.

15 Based upon the above Findings of Fact and Conclusions of Law, Glenn Prestwich and
16 Barbara Bentley's Third Party Complaint and claim is dismissed, with prejudice, and Third Party
17 Defendants J. Michael Starr and Richard U. Starr, Trustees, and the Jack M. Starr Credit Shelter
18 Trust are entitled to judgment in their favor, together with their costs and disbursements.

19 DATED this 15 day of August, 2011.

20 
21 Vickie I. Churchill, Judge

22 PRESENTED BY:

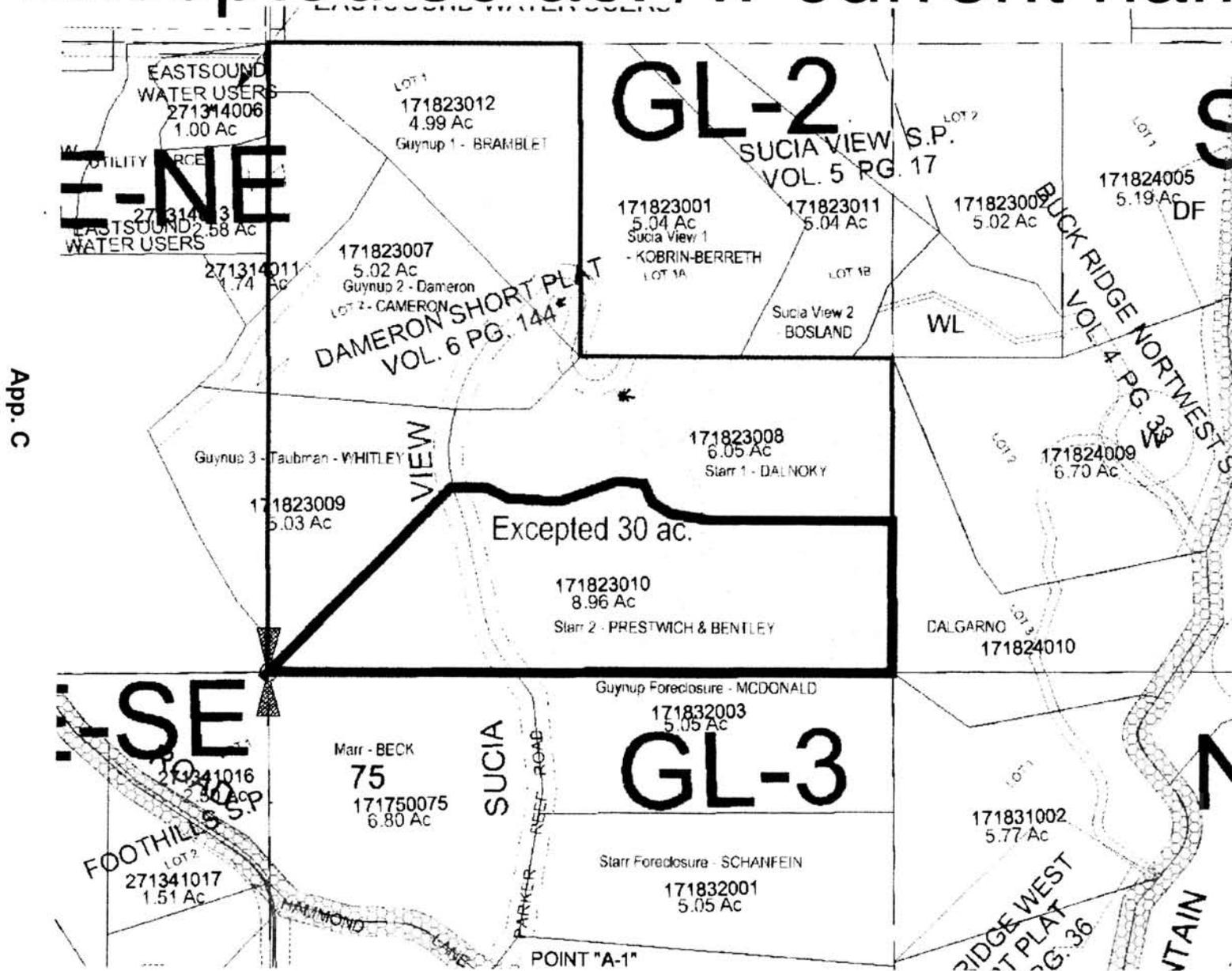
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24 J. Michael Starr, Trustee, *pro se*
25 Dated: AUG. 8, 2011
26 Trustee of the Jack M. Starr Credit Shelter Trust
278 Spyglass Drive
Eugene, OR 97401
Telephone: (541) 683-6560; Fax: (541) 349-1959

J. Michael Starr, Trustee *pro se*
278 Spyglass Drive
Eugene, OR 97401
(541) 683-6560

2 p.17

Excepted 30 ac. /w current names



Assessor Plat Area/Parcel A & that portion of Area/Parcel C in Section 18

