

No. 71115-6

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION ONE

WHITE WATER INVESTMENT, LLC
a Washington limited liability company,

Appellant,

v.

COOL BEANS EASTLAKE, LLC,
a Washington limited liability company,

Respondent.

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RESPONDENT'S BRIEF

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ORIGINAL

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I. INTRODUCTION

Respondent Cool Beans Eastlake, LLC (“Cool Beans”) and Appellant White Water Investment, LLC (“White Water”) own adjoining parcels on Eastlake Avenue in Seattle, Washington (the “Cool Beans Parcel” and “White Water Parcel”). In 2003, the former owners of both parcels entered into a Reciprocal Easement Agreement (“REA” or “Easement”) which depicted where buildings would be allowed, the square footage of any buildings, and designated the remainder as common area for the use of shared parking and drive aisles. In 2004, the former owner of the Cool Beans Parcel constructed a building within the allowable square footage, but outside of the depicted building area. White Water’s predecessor knew that the building was going to be constructed outside of the depicted building area before construction even began, but did not protest or demand any consideration for the change.

In 2006, Cool Beans purchased the Cool Beans Parcel. Six years later, in 2012, White Water purchased the White Water Parcel. Both parties knew at the time of their respective purchases that the building on the Cool Beans Parcel did not conform to the provisions in the REA. In fact, White Water used this knowledge to negotiate a significantly lower

price for the boarded-up and unused property. Despite having secured a low price for the White Water Parcel, White Water decided in 2012 that it wanted more. Styled as a claim for Breach of Easement Agreement, White Water asked the trial court to hold Cool Beans responsible for a decision made eight years beforehand by the former owner of the Cool Beans Parcel, and to order the demolition of the Cool Beans building.

The trial court properly rejected White Water's claim, finding "[t]his is a case about breach of contract," and after applying the six-year statute of limitation in Washington "for written contracts, including written contracts governing property," concluded "it should have been brought within six years of the time that the contract was breached, which was back in 2004." RP 24-25. The trial court also properly concluded that, even if a longer statute of limitations applied, White Water's claim would be barred by the doctrine of balancing the equities:

In this case, although [Cool Beans] took their property with knowledge of the difference between the REA and the footprint here, they did not have any part in creating that situation. And disproportionality of harm to [Cool Beans] is a little overwhelming to the Court in this case.

Compared to the harm to [sic] tearing down a building, the harm in putting up with a different or eliminated drive area and

reconfigured parking spaces pales in comparison.

RP 29.

White Water seeks to overturn the trial court's correct ruling. In addition, White Water asks this Court to award relief it never sought below—an order terminating the REA. White Water's exact plans for the White Water Parcel are unknown. However, it has admitted it is considering tearing down the existing structure, rebuilding, and adding one or more floors to increase the height of the structure in contravention of the provisions of the REA. These are likely the motivations behind White Water's newly sought relief. Whatever they are, White Water's attempt to seek additional relief for the first time on appeal is barred because White Water failed to raise the issue below.

II. ISSUES ON APPEAL

1. White Water challenged the construction of a building, which is largely comprised of concrete and stone, eight years after it was built. Did the trial court properly dismiss White Water's claim for Breach of Easement Agreement as barred by the statute of limitations? Yes.

2. In the alternative, if not barred by the statute of limitations, did the trial court properly apply the defense of balancing the equities in dismissing White Water's claim for Breach of Easement Agreement when

(a) Cool Beans was not responsible for the construction, and (b) the harm Cool Beans would face in having its building demolished far outweighs White Water's interests? Yes.

III. STATEMENT OF THE CASE

A. Within Months of Signing the REA, White Water's Predecessor Knew that Cool Beans' Predecessor Intended to Build Outside the Parameters of the REA, But Did Not Object.

Barber Development ("Barber") originally owned both Parcels. In 2003, Barber sold the White Water Parcel, which held a mini-mart, to Castellum LLC ("Castellum"). CP 320. Barber's remaining parcel, the Cool Beans Parcel, was undeveloped. CP 322. However, anticipating future development of the Cool Beans Parcel, Barber and Castellum signed and recorded the REA on June 16, 2003. CP 44-58. The purpose of the REA was to "provide, primarily, access off of the main road there, access and shared parking[.]" CP 321. A "Preliminary Site Plan," attached to the REA, outlined the location and size of the existing mini-mart on the White Water Parcel, the location and size of any new retail shops on the Cool Beans Parcel, and the common areas for parking and drive aisles. CP 57.

Later, Barber successfully marketed the Cool Beans Parcel to Starbucks as a location for a future lease. CP 322. As part of the

development of the Cool Beans Parcel, Barber developed a new site plan, which Castellum acknowledged on February 11, 2004. CP 333. Specifically, Castellum's attorney sent Barber a letter—seven months before the building was constructed—noting “the positioning of the Starbucks [on the revised site plan] and the arrangements of the parties' common areas has changed substantially from that agreed to in the Reciprocal Easement Agreement.” CP 294; CP 333.

Although Castellum acknowledged the proposed change in the building footprint, Castellum never asked Barber to revise the site plan to comply with the REA. Nor did Castellum request compensation or any other consideration in exchange for the change. CP 326. Likewise, Castellum never challenged the footprint of the Starbucks building during or after the completion of construction. CP 24, 27, 65. Although Castellum's attorney sent Barber another letter regarding the REA in July 2006, the primary purpose of the letter was to request that Starbucks stop selling deli sandwiches because “deli was our main business. If they started deli business, then that would affect my [Quick Stop Deli] business.” CP 339. In fact, Mr. William Kim, a member of Castellum, does not recall ever alleging or asserting that the construction of the Starbucks building was a violation of the REA, or otherwise complaining

about it. CP 341.

B. Cool Beans Purchased the Cool Beans Parcel Two Years After Construction of the Starbucks.

Barber sold the Cool Beans Parcel to Cool Beans in 2006, two years after construction of the Starbucks building was completed. CP 2. As the materials used to construct the building illustrate, its construction was intended to be permanent. CP 295. The south wall, along the property line, consists of concrete masonry without any windows or doors. CP 295, 370. The west façade, facing Eastlake Avenue, has a masonry base that spans approximately thirty inches to the storefront window. Id. The east face has an employee entry door and concrete masonry garbage enclosure with metal frame gates and wood panels. Id. In addition, wood framing and fiber-cement siding panels, with wood trim and battens, cover the façade above the storefront. Id. Manufactured stone veneer is below the windows, with cast-stone trim. The roof structure consists of exposed laminated wood beams and wood decking. Finally, the floor is composed of acid-stained concrete, with vinyl tile in the restrooms. Id.

C. White Water Purchased the White Water Parcel in 2012 with Full Knowledge of the Discrepancy between the Preliminary Site Plan Attached to the REA and the As-Built Construction on the Cool Beans Parcel.

In 2012, Castellum sold the White Water Parcel to White Water.

White Water's manager, who is a real estate broker, admitted to seeing the REA prior to White Water's purchase. CP 348, 350. She also admitted that she visited the property prior to closing and noticed that the footprint of the Starbucks building was different from the drawing that was attached to the REA. CP 349-350. Indeed, the difference was quite obvious. CP 353. She also noticed that the configuration of the parking stalls was different. CP 350. White Water ultimately took advantage of the difference between the REA and the actual configuration, and used the difference to negotiate a significantly lower purchase price. CP 573-74.

D. Procedural History

1. Only One of White Water's Claims is at Issue on Appeal

White Water filed suit against Cool Beans on July 10, 2012, seeking damages for claims of Breach of Easement Agreement and continuing intentional trespass. CP 1-5. White Water has since conceded that its trespass claim is barred by the statute of limitations. Therefore, this appeal concerns only White Water's claim for Breach of Easement Agreement. RP 11, 22.

2. The July 2013 Summary Judgment Hearing

White Water moved for partial summary judgment, seeking a declaration that Cool Beans is in breach of the REA. CP 22-34. After oral

argument on July 12, 2013, the trial court granted White Water's motion, in part, ruling as a matter of law that, "the Easement Agreement is unambiguous and the 2004 construction violated the Reciprocal Easement Agreement ("REA")," but declining to find that Cool Beans had violated the REA. CP 246-47.

Then, exercising its power under CR 56(d), the trial court directed "such further proceedings in the action as are just" by identifying what the trial court perceived to be key legal issues in this litigation. CP 519. The first issue is whether this is an action on contract, which is time-barred by the six-year statute of limitations. CP 525. If it is not an action on contract, then equitable doctrines come into play; specifically, laches and balancing equities. CP 526.

3. Cool Beans Successfully Moved to Amend Its Answer

Subsequently, Cool Beans moved to amend its answer to assert the defenses of statute of limitations, laches and balancing the equities. CP 249-59. White Water did not object. Accordingly, the trial court granted Cool Beans' motion. CP 276-77.

4. The October 2013 Summary Judgment Orders

The trial court heard cross-motions for summary judgment on October 11, 2013 on the issues of statute of limitations and application of

equitable principles. Cool Beans argued that the three-year, and alternatively the six-year, statutes of limitations applied to bar White Water's claim for Breach of Easement Agreement. CP 291-312. Moreover, even if White Water's claim was not barred, it should nevertheless be dismissed under the doctrine of balancing the equities, among others. Id. White Water argued that the ten-year statute of limitations for "recovery of land" applied, and that even if barred, Cool Beans could not take advantage of equitable defenses. CP 387-408.

The trial court rejected White Water's argument, denying White Water's motion for summary judgment and granting Cool Beans' motion for summary judgment, "for the reasons set forth in the recorded transcript of proceedings." CP 614-19. Regarding the applicable statute of limitations, the trial court looked to the language of RCW 4.16.020(1), which addresses actions for the recovery of real property, and concluded that that statute did not apply because "[t]here is no claim of title here." RP 22. While the trial court acknowledged "there are some easements that seem to fall under the 10-year statute; specifically, easements that are being created by prescription...", the trial court emphasized the narrowness of the statute's language, "narrower than some of the statutes that have been cited to in the out-of-state cases that favor White Water's

argument.” RP 23-24. Because Washington’s 10-year statute is “only for recovery of real property or for the recovery of the possession thereof,” the trial court concluded:

I don’t see anything possessory about the easement claimed here. There are two: One is a drive area, and the other is parking. And that’s not, to me, language that falls within the language of recovery of real property or recovery of the possession thereof....

[U]nlike other cases involving easements by way of prescription – i.e. adverse possession – here we deal with easements created by contract, by written contract between parties that appear to me to have been of equal bargaining power at the time the contract was entered into....

The statute that comes right to the mind in Washington for written contracts, including written contracts governing property, is the six-year statute.

The purpose of a long 10-year statute for landowners is as a defense against adverse possession. But for parties that negotiate a written contract, including a contract about land or a deed about land, it seems clear that the intention and policy of the law is to make them get to court within six years.

This case is a case about breach of contract, and it should have been brought within six years of the time that was [sic] contract was breached, which was back in 2004.

RP 24-25.

Alternatively, if the statute of limitations was ten years rather than six, the trial court nevertheless looked to whether the doctrine of balancing

the equities would apply. Concluding that the doctrine did apply, the trial court rejected White Water's contention that Cool Beans' knowledge that its predecessor had violated the REA prevented it from availing itself of the defense. Specifically, the trial court noted:

Now, plaintiff has argued to me that defendant with knowledge of the REA took a calculated risk that enforcement action would not be pursued. But the cases they cite to me are cases involving the very property owner who is proceeding in defiance of notice of likely action for long-standing use by another. Such party may not receive the benefit of the balancing of the equities doctrine.

In this case, although the defendant took their property without knowledge of the difference between the REA and footprint here, they did not have any part in creating that situation. They weren't responsible for that situation. And disproportionality of harm to the defendant is a little overwhelming to the Court in this case.

Compared to the harm to [sic] tearing down a building, the harm in putting up with a different or eliminated drive area and reconfigured parking spaces pales in comparison.

It seems to me as well that the fact that plaintiff did not feel the need to dash into court for eight years strongly suggests that they haven't suffered a great deal of harm.

Really with regard to the equitable remedy for plaintiff under the 10-year statute, it seems to me clear that balancing the equities would result in overly harsh results to the defendant, after major delay by plaintiff in

bringing this action and the documented benefit to the plaintiff in reduction of purchase price because, in part, of the difference between the footprint and the REA.¹

RP 29-30.

Having granted Cool Beans' motion, the trial court dismissed the action. CP 614-15.

IV. ARGUMENT

A. Standard of Review

In reviewing a summary judgment order, this Court undertakes the same inquiry as the trial court. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The Court is to consider all evidence in the light most favorable to the non-moving party, and “the motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.” Id. Review is confined to the issues the parties raised and the trial court considered. Babcock v. State, 116 Wn.2d 596, 606, 809 P.2d 143 (1991). Summary judgment is appropriate if there are no issues of material fact, such that the moving party is entitled to judgment as a matter of law. Wilson, 98 Wn.2d at 437.

¹ The trial court also ruled that even if the ten-year statute of limitations did apply, it still would not apply to White Water's claims for damages, which would be barred under the six-year statute of limitations. RP 30-31. White Water does not challenge this ruling on appeal.

B. The Trial Court Properly Dismissed White Water's Claim for Breach of the Easement Agreement as Barred by the Six-Year Statute of Limitations.

“Every conveyance of real estate, or any interest therein ... shall be by deed.” See RCW 64.04.010. “Therefore, when easements and profits, being interests in land, are created by express act in Washington, they should be created in an instrument having the form of a deed.” 17 WILLIAM B. STOEBCUK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE § 2.3 (2d ed. 2004). Under Washington law, an action for breach of a warranty deed is subject to the six-year limitation period of RCW 4.16.040(1). Erickson v. Chase, 156 Wn. App. 151, 154, 157, 231 P.3d 1261 (2010) (holding six-year statute of limitations applied to breach of warranty claim to defend title and damages for the diminution in value of their property). The statute of limitations begins running “when the cause of action accrues, meaning when a party has the right to apply to the court for relief.” Erickson, 156 Wn. App. at 157. In this case, the trial court properly concluded that the breach of easement claim accrued in 2004, when the Starbucks was built.

The parties' predecessors signed the REA on June 16, 2003. Castellum's owner, Mr. Kim, testified that he realized that Starbuck's building footprint differed from the Preliminary Site Plan “when it was

being built.” CP 204. The store was built and opened by August 2004. But White Water’s predecessor, Castellum, never filed suit. By the time White Water initiated litigation July 10, 2012 against Barber’s successor, Cool Beans, eight years had passed since Castellum knew or discovered that the Starbuck’s building footprint differed from the Preliminary Site Plan recorded with the REA. Accordingly, White Water’s claim for breach of the REA is barred under Washington’s six-year limitations period.

C. White Water’s Breach of Easement Claim is Not an Action to Recover Land Subject to a Ten-Year Statute of Limitations.

White Water attempts to shoe-horn its breach of easement claim into the statute of limitations for claims of adverse possession or prescriptive easement. Claims for adverse possession, prescriptive easement, boundary line adjustments, or condemnation are “actions for the recovery of real property, or for the recovery of the possession thereof...” pursuant to RCW 4.16.020(1). See 15A KARL B. TEGLAND & DOUGLAS J. ENDE, WASHINGTON PRACTICE: HANDBOOK ON CIVIL PROCEDURE § 5.2 (2013-2014 ed.) (“This section of the statute is most often invoked in adverse possession and prescriptive easement cases.”).

These types of cases, which seek either to affirm title to real

property in the owner of record, or award title to real property to the claimant, carry a ten-year limitations period. See Chaplin v. Sanders, 100 Wn.2d 853, 857, 676 P.2d 431 (1984) (citing 4.16.020 as authority that the period throughout which elements to establish adverse possession must concurrently exist is ten years); The Mountaineers v. Wymer, 56 Wn.2d 721, 722, 355 P.2d 341 (1960) (holding plaintiff established prescriptive easement in case of undisputed use of roadway for more than ten years, which is also the period of limitations); Lilly v. Lynch, 88 Wn. App. 306, 316-17, 945 P.2d 727 (1997) (holding that ten-year period of limitations applies in claims for mutual recognition and acquiescence of boundary line).

But as the trial court noted, “[t]here is no claim of title here.” RP 22. There is nothing “possessory about the easement claimed here.” RP 23. While White Water complains about the use of a drive area and the parking configuration, those complaints do not fall within “the language of recovery of real property or recovery of the possession thereof.....” RP 24. And despite White Water’s suggestion otherwise, Cool Beans has not asserted adverse possession of the easement, which is clear from the absence of any such allegations in its answer. CP 6-19. As the trial court aptly observed:

I don't truly think there can be any argument here that Cool Beans is creating some new claim to the ability to possess its property by the fact it's been operating without the drive area that was intended, or the exact configuration of the parking stalls that was intended since its predecessor built its building.

RP 25.

Even White Water concedes that no Washington case has ever held that a ten-year limitations period applies to claims for breach of easement. To the contrary, Washington law is clear that RCW 4.16.020(1) does not apply to White Water's breach of easement claims. Free Methodist Church Corp. of Greenlake v. Brown, 66 Wn.2d 164, 165-66, 401 P.2d 655 (1965) (holding RCW 4.16.020(1) does not apply to an action for damages for removal of lateral support to real property). Even the black letter law White Water quotes in support of applying a ten-year statute of limitations, when read completely, affirms the trial court's proper application of the six-year statute of limitations for breach of warranty deed:

Instruments creating easements frequently carry the caption "easement agreement." **It would be better to label them "deed for easement"....**

STOEBUCK & WEAVER, supra (emphasis added).

Because of the scarcity of helpful Washington authority, White Water relies on out-of-state cases that are both factually and legally distinguishable. For example, in Mnuk v. Harmony Homes, the reason the Wisconsin court declined to apply a six-year statute of limitations for a general contract action was that Wisconsin has a specific statute of limitations for “actions to enforce easements, or covenants restricting the use of real estate.” 329 Wis.2d 182, n. 7, 790 N.W.2d 514 (2010). This ruling comes as no surprise, as black letter law dictates that a specific statute will prevail over a more general statute. See, e.g. Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council, 165 Wn.2d 275, 309, 197 P.3d 1153 (2008) (“Under the general-specific rule, a specific statute will prevail over a general statute.”). But Washington has no comparable statute to Wisconsin’s statute of limitations for enforcing easements. Thus, the comparison to Mnuk is simply inapt.

White Water’s reliance on Terre Du Lac Property Owners’ Assoc., Inc. v. Wideman, 655 S.W.2d 803 (1983) (Mo. Ct. App. 1983) is equally misplaced. There, the Widemans challenged a suit initiated by their homeowners association to enjoin an electronic sign and other equipment in the Wideman’s yard, as violating the association’s restrictive covenants.

Id. at 805. Specifically, the Widemans argued the association’s suit was barred by a two-year statute of limitations, which provides, in relevant part:

No action for breach of a covenant restricting use of land ... resulting from the ... location of buildings or other visible improvements on the premises in violation of the covenant, including a proceeding to compel the removal of buildings or visible improvements on the land because of the violation of the terms of the covenant, shall be commenced after two years from ... the date when the right of action accrues.....

Id. at 806; Mo. Rev. Stat. § 516.095 (1978).

In denying the Widemans’ relief, the court concluded that the statute did not apply because neither the electric sign nor the equipment in the yard constituted visible improvements. Terre Du Lac Property Owners’ Assoc., Inc., 655 S.W.2d at 806. Rather, the appropriate statute of limitations was a ten-year statute of limitations. Id. The same cannot be said under these facts, which would fall squarely within Missouri’s two-year statute of limitations. Under Terre Du Lac, White Water’s claim challenging the “location of buildings or other visible improvements” would have been barred in 2006, two years after the Starbucks was built. See Mo. Rev. Stat. § 516.095 (1978).

Finally, the trial court's application of the six-year statute of limitations is consistent with Washington's policy of repose; in Washington, the goals are to eliminate the fears and burdens of threatened litigation and to protect a defendant against stale claims. Ruth v. Dight, 75 Wn.2d 660, 664, 453 P.2d 631 (1969). To order the destruction of a building eight years after-the-fact, even though White Water has already benefitted from a reduced purchase price, would greatly prejudice Cool Beans.

D. Whether or Not Barred by the Statute of Limitations, White Water Has No Right to Damages as a Subsequent Purchaser.

Regardless of the limitations period, White Water may not pursue damages against Cool Beans because any damages occurred prior to White Water's purchase of its parcel. See, e.g., Gillam v. City of Centralia, 14 Wn.2d 523, 128 P.2d 661 (1942). The right to damages for an injury to property is a personal right belonging to the owner, which will not pass by deed unless expressly conveyed. Id. at 531 (holding where injury to real property occurred when owned by the community, right to damages did not pass to husband after the community quit-claimed the property to him); see also In re City of Seattle v. Norris, 26 Wash. 602, 605, 67 P. 250 (1901) (holding right to damages for injury to property will not pass by a

sale under a decree of foreclosure unless directed by the decree).

Here, any damage to the White Water Parcel was caused by Barber during the period of time Castellum owned the White Water Parcel. Put another way, the damage was not caused by Cool Beans, and the damage caused by Barber did not occur during White Water's ownership of the White Water Parcel. Moreover, there is no evidence that Castellum conveyed to White Water the right to seek damages against Barber or Cool Beans. Thus, regardless of whether White Water's claim for breach of easement is barred by the statute of limitations, White Water cannot pursue Cool Beans for damages.

The "subsequent purchaser rule," described in Wolfe v. State Dep't of Transp., 173 Wn. App. 302, 293 P.3d 1244 (2013), leads to the same result. Wolfe involved erosion damage to real property related to the construction of a bridge. Id. at 303-04. There, the appellate court upheld the dismissal of the plaintiff's claim for damages as barred by the "subsequent purchaser rule" where, although the plaintiff alleged that erosion of the property was ongoing, the bridge piers causing the erosion were installed prior to the plaintiff's purchase, and the plaintiff knew about the erosion beforehand. Id. at 309. Therefore, the court presumed that the "purchase price reflected the diminution in value." Id. Thus,

defendant could not be liable for damages that occurred when plaintiff's predecessor owned the property. Id. Similarly, here, White Water has incurred no loss because the price it paid took into consideration the discrepancy between the REA and the as-built construction.

E. The Trial Court Properly Applied the Defense of Balancing the Equities in Dismissing White Water's Breach of Easement Claim.

Alternatively, in concluding that White Water was not entitled to injunctive relief that would have required the destruction of the Starbucks, the trial court properly applied the doctrine of balancing the equities. The purpose of an injunction is not to punish the defendant for past transactions, but to restrain present or future wrongful acts. Lewis Pacific Dairymen's Ass'n v. Turner, 50 Wn.2d 762, 776, 314 P.2d 625 (1957). Courts will not award injunctive relief where the damage complained of is doubtful, remote, or speculative, and particularly where the relief would result in injury to the party enjoined in an amount greater than any damage which plaintiff would suffer from the acts complained of. Funk v. Inland Power & Light Co., 164 Wash. 110, 117, 1 P.2d 872 (1931).

In considering whether to grant an injunction requiring the removal of an erected building or structure, a trial court may balance the equities of the parties, weighing factors such as the character of the interest to be

protected and the relative hardship likely to result to the defendant if an injunction is granted or to the plaintiff if it is denied. Holmes Harbor Water Co., Inc. v. Page, 8 Wn. App. 600, 603, 508 P.2d 628 (1973). If a party takes a calculated risk by proceeding with construction, despite notice that doing so violates the property rights of others, that party forfeits the right to a balancing of the equities. Hollis v. Garwell, Inc., 137 Wn.2d 683, 700, 974 P.2d 836; Arnold v. Melani, 75 Wn.2d 143, 152, 449 P.2d 800 (1968). But that forfeiture does not apply to innocent parties such as Cool Beans. Holmes Harbor Water Co., Inc., 8 Wn. App. at 606. (refusing to award injunctive relief because the landowner's violation of the restrictive covenant was unintentional, the plaintiffs delayed bringing suit until the construction was complete, and the cost of removing the violation was exorbitant when compared with the slight violation of the covenant).

The cases White Water relies upon have no relevance here because, in each, the party that was not allowed to take advantage of the doctrine of balancing the equities was a party that took the calculated risk or acted indifferently, not as here, a party that purchased property after-the-fact. In Bach v. Sarich, 74 Wn.2d 575, 578-82, 445 P.2d 648 (1968), the appellate court was asked to review the trial court's order compelling

removal of an apartment which had been constructed over a lake bed owned by plaintiffs, and to determine whether the doctrine of balancing the equities should have applied. There, the defendants made the decision to proceed with construction after plaintiffs had initiated litigation, and in fact admitted that they “proceeded as fast as we could” with construction after plaintiffs’ preliminary injunction was denied on procedural grounds. Id. at 581. The defendants who lost at trial were the very same defendants responsible for rapidly constructing the apartment and who admitted they “knowingly took a risk by continuing construction while the case was pending on the merits...” Id. at 582. Declining to overturn the trial court’s decision, the appellate court held it would not balance the equities where “defendants proceeded to construct an apartment with full knowledge that their right to do so was contested and that there was a real likelihood ... that the case on the merits would be decided against them.” Id. at 581.

Similarly, in Mahon v. Haas, 2 Wn. App. 560, 563-65, 468 P.2d 713 (1970), a claimant who learned that a landowner was about to construct a greenhouse over a roadway that claimant (as well as the general public) had used for more than 25 years, and that would prevent claimant from accessing his property, sent the landowner a letter

threatening legal action if the landowner proceeded with his plans. Despite the risk of litigation, the landowner went ahead and constructed the greenhouse. Id. at 564. The move backfired when, at trial, the court ordered the landowner to remove her greenhouse. Id. at 562. On appeal, the landowner argued that, when balancing the equities, the landowner's damage was greater than the claimant's and therefore the landowner should not be required to remove the greenhouse. Id. at 565. But the appellate court did not agree. "When plaintiff erected the greenhouse after receiving a warning letter from defendant's attorney before building the greenhouse, she was either taking a calculated risk, or acting with indifference to the consequences." Id.

The remaining cases White Water relies upon are equally irrelevant; none hold that a subsequent property owner should be responsible for a prior property owner's decision to erect a building in contravention of restrictive covenants. For example, in Peterson v. Koester, 122 Wn. App. 351, 360, 92 P.3d 780 (2004), the Court of Appeals affirmed the trial court's refusal to apply balancing the equities because the defendants (rather than a subsequent purchaser) intentionally defied their subdivision's construction covenant and began building before submitting plans to an architectural control committee. In Littlefair v.

Schulze, 169 Wn. App. 659, 662, 668, 278 P.3d 218 (2012), the Court concluded the trial court erred in refusing to order the removal of a fence built across an access easement, but unlike here, the offending party (Schulze) was responsible for building the fence. Finally, in 810 Properties v. Jump, 141 Wn. App. 688, 692, 170 P.3d 1209 (2007), the Court addressed Ms. Jump's (rather than a subsequent owner's) decision to block a shared roadway with apple bins, even though adjacent property owners had historically used the road to truck cattle to grazing areas. Importantly, the doctrine of balancing the equities was not raised in either Littlefair or 810 Properties.

Contrary to White Water's interpretation, the cases above do not support removal of the building. Rather, they underscore White Water's failure to recognize the important distinction between knowledge and responsibility. Having constructive knowledge that a building one purchased was built two years prior within a footprint that contradicted the Easement is not the same as being responsible for the decision about where to build. In any event, the harm Cool Beans would face in having its building demolished far outweighs White Water's unarticulated interest in obtaining a second drive lane and/or the same number of parking spaces in a different layout. The trial court properly applied the doctrine of

balancing the equities in dismissing White Water's claim.

F. White Water Offers No Precedent for Terminating the Easement, Relief it Seeks for the First Time on Appeal.

Acknowledging that the trial court may not grant White Water's request to demolish the building, now, for the first time on appeal, White Water asks that the Easement be terminated altogether. White Water's exact plans for the White Water Parcel are unknown. However, it has admitted it is considering tearing down the existing structure, rebuilding, and adding one or more floors to increase the height of the structure in contravention of the provisions of the REA. CP 577-78. These are likely the reasons for White Water's newly sought relief. Because White Water did not seek such relief below, White Water may not seek it for the first time on appeal. See Babcock, 116 Wn.2d at 606; see also RAP 9.12 ("On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.").

V. CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court affirm the trial court's orders on cross-motions for summary judgment.

DATED this 16th day of June, 2014.

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CERTIFICATE OF SERVICE

I, Jane A. Mrozek, hereby certify that on the 16th day of June, 2014, I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

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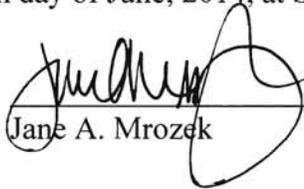
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I certify under penalty of perjury under the laws of the United States and the state of Washington that the foregoing is true and correct.

EXECUTED this 16th day of June, 2014, at Seattle, Washington.



Jane A. Mrozek