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NO. 73369-9-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BIRNEY DEMPCY and MARIE DEMPCY,

Petitioners/Appellants,

vs.

CHRIS AVENIUS and NELA AVENIUS, husband and wife, and their
marital community; et. al,

Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY
The Honorable Theresa Doyle

APPELLANTS' REPLY BRIEF

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FILED
COURT OF APPEALS DIV. I
STATE OF WASHINGTON
2016 APR -1 PM 3:50

ORIGINAL

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. REPLY ARGUMENT.....	2
A. <u>Respondents Rely Heavily on Contested Facts which Are Construed in Favor of Appellants on Appeal.....</u>	2
B. <u>The Exceptions to partition as Set Forth in Carter and Ascribed by the PPD are Applicable Here.....</u>	7
i. The first and third exceptions of Carter are satisfied by the PPD.....	8
ii. The second exception set forth in Carter is satisfied because the Appellants’ equitable rights will be minimalized or defeated by partition	11
iii. Section 2.15 of the PPD prohibits the division of Common Property by partition.....	12
iv. Partition would be a useless act.....	13
C. Respondents are obligated to maintain the entirety of The Common Property.....	15
D. Appellants’ right to maintain the Common Area and seek contribution is supported by law.....	18
E. Appellants are Entitled to damages for Contractual Interference.....	21
F. Appellants are Entitled to Attorneys’ Fees.....	22
III. CONCLUSION.....	23

TABLE OF AUTHORITIES

<u>WASHINGTON CASES</u>	PAGE
<i>Carter v. Weowna Beach Comm. Corp.</i> 71 Wn.2d 498, 429 P.2d 201 (1967)	1, 7, 8, 9, 10, 11
<i>Chelan County Deputy Sherriffs Ass'n v. Chelan County</i> 109 Wn.2d 282, 745 P.2d 1 (1987).....	3
<i>Davis v. Microsoft Corp.</i> 149 Wn.2d 521, 70 P.3d 126 (2003).....	2
<i>In re Foster Estate</i> 139 Wash. 224, 246 P. 290 (1926).....	19
<i>Morris v. Swedish Health Servs.</i> 148 Wn.App. 771, 200 P.3d 261 (2009).....	17
<i>Old City Hall LLC v. Pierce Cnty. AIDS Foundation</i> 181 Wn.App. 1, 329 P.3d 83 (2014).....	3
<i>Pacific Northwest Shooting park Ass'n v. City of Squim</i> 158 Wn.2d 342, 144 P.3d 276 (2006).....	21
<i>Reilly v. Sageser</i> 2 Wn. App. 6, 467 P.2d 358 (1970)	9
<i>Tindolph v. Schoenfeld Bros.</i> 157 Wash. 605, 289 P.530 (930).....	20
<i>Tri-Financial Corp. v Dept. of Rev.</i> 6 Wn.App. 637, 495 P.2d 690 (1972).....	18
<i>Womach v. Sandygren</i> 107 Wash. 80, 180 P. 922 (1919)	19
<i>Yankavonis v. Tilton</i> 93 Wn. App 304, 968 P.2d 908 (1998)	19

RULES, STATUTES, AND OTHER AUTHORITIES

BMC Chapter 20.45B.....13, 15
RCW 7.52 *et. seq.*14, 22
Oxford Online Dictionary: www.oxforddictionaries.com/us.....13

I. INTRODUCTION

Respondents assert, without qualification, that they have a right to partition the Common Property they share with Appellants, and which Appellants have enjoyed for over forty (40) years. They are incorrect. The right is not absolute. Washington along with many other jurisdictions has limited this right as evinced by the seminal case *Carter v. Weowna Beach Cmty. Corp.*, 71 Wash.2d 498, 429 P.2d 201 (1967). As discussed below on page 8-14 hereof, *Carter v. Weowna* did not permit the Trial Court to rule as a matter of law that partition is appropriate in this case.

Respondents attempt to justify the propriety of partition by alleging that the parties have “irreconcilable differences.” However, the record before the Trial Court only supports one difference: the Respondents do not wish to be subject to the 1968 Covenants or the Pickle Point Declaration (PPD) which encumber the Appellants' property, the Respondents' property, and the Common Property they all share as tenants in common. To that point, there were no “irreconcilable” differences before Respondents Avenius and Zemel moved into the Pickle Point Neighborhood or for the decades when Respondent Shannon and the Appellants lived in the neighborhood. (CP 300; 312; 314).

Both the 1968 Covenants and the Pickle Point Declaration were recorded against all Properties and the Common Property. (See, Appendix to App's Opening Brief). Specifically, the 1968 Covenants which required the maintenance of the tennis court and landscaping on the Common Property were contained in three (3) of the four (4) neighbors' chain of title. (RP 11; CP 311, 312). Yet, the Respondents have attempted to interpret these binding covenants so that the Respondents are not obligated to maintain the Common Property in good condition and repair, except on a voluntary basis as they choose. This is not an “irreconcilable difference.” Instead, it is the Respondents' attempt to abrogate the binding 1968 Covenant and PPD. Once the Court enforces the obligations of the 1968 Covenant and the PPD, the Appellants' justification for partition collapses.

II. REPLY ARGUMENT

A. **Respondents rely heavily on contested facts which are construed in favor of Appellants on appeal.**

The appellate court reviews summary judgment orders on appeal with the same standards of the trial court. *Davis v. Microsoft Corp.*, 149 Wash.2d 521, 530-31, 70 P.3d 126 (2003). At summary judgment, it is not the movant's version of facts that prevail, but, instead “the court views all facts and reasonable inferences drawn in the light most

favorable to the nonmoving party.” *Old City Hall LLC v. Pierce Cnty. AIDS Foundation*, 181 Wash. App. 1, 329 P.3d 83 (2014). Even if the facts are disputed, if reasonable minds could draw different conclusions, summary judgment is improper. *Chelan Cty. Deputy Sheriffs' Ass'n v. Chelan Cty.*, 109 Wash.2d 282, 284, 745 P.2d 1, 2 (1987).

The Appellants appeal, in part, the Trial Court's Order granting partial summary judgment to the Respondents as to the right to partition the property. (See, Opening Brief p.3; CP 719-723). In their brief, Respondents recount a narrative which the Appellants dispute, almost in its entirety, and did so at Summary Judgment. Appellants address certain factual assertions, which are also contested, on reply.¹

First, Respondents assert that owners planned to replace the tennis court with an “attractive greenbelt.” In support of this theme, Respondents cite to two documents in the record: (1) Appellant's Complaint, which proffers simply that the Respondents themselves declared the intention to undertake a plan. (Resp' Brief p.41; CP 8-16); and (2) the Declaration of Jack Shannon, in which Mr. Shannon asserts that three of the owners discussed the possibility of a greenbelt, and that

¹ Appellant has no comment on Respondents' counter-statement statement of procedure except that with respect to the trial of the Dempcy/Avenius issues. The Court held that Avenius was in violation of PPD § 2.6 and ordered the removal of certain fences and hedges. However, the Court failed to award attorney's fees and costs to Dempcy as the prevailing party as required by PPD § 6.1. This is the only issue being appealed from the Dempcy/Avenius trial with a tracking appeal.

such conversations ceased upon litigation. (Resp' Brief p. 4; CP 106-07). Respondents have not, and cannot, substantiate the assertion that Respondents committed to or enacted a plan to create a greenbelt. Appellants could not conceivably object to something that did not exist other than as an ephemeral, at best, "desire." (*See*, Resp' Brief p.4).

Additionally, the Respondents assert that the 1968 Covenant is not binding upon all of the residents of the Pickle Point Neighborhood because it was not recorded and successively conveyed on the deeds of all residents. (Resp' Brief p. 31). However, that is not true, Dempcy, Avenius and Shannon all have covenants in their chain of title which obligate them to develop and maintain a tennis court on the Common Property. (App's Brief, Appendix 1-5). Significantly, the covenant bound all predecessors of Dempcy, Avenius and Shannon. (App' Brief, Appendix 1-5). It also bound all successors: "The foregoing [1968 Covenants...] shall be binding on the Grantors, Grantees and their respective heirs, successors, and assigns." (CP 300; 311; 549-74). The predecessor deeds of Dempcy², Avenius and Shannon contained covenants requiring the construction and maintenance of the tennis court

² Although this covenant was not in the Dempcy deed, it was in the predecessor's deed (Mueller to Overly) which is in the record. (App' Brief, Appendix 1-5). The Dempcys were bound by the Covenant because the predecessor deed bound all subsequent successors, assigns, etc. which included the Dempcys.

and the Common Property landscaping, and the contribution by each of them to such maintenance. (App' Brief, Appendix 1-5). Appellants have and continue to assert that the 1968 Covenant was never superseded or rescinded, that it runs with the land, and is still in effect. (CP 289). This issue and Respondent Zemel's obligation of maintenance is discussed in more detail later in this Reply.

Although irrelevant to the issues in this appeal, the Respondents repeatedly construe the PPDs as the sole idea of Dempcy, rather than that of all of the tenants in common at the time of formation and recording. (App's Brief pp.4-5). However, again, this is fully refuted by Appellants. (CP 275-76, 294, 300). Further, there is no evidence that any provision of the PPD was not the agreement of all of the parties before Respondent Avenius arrived. Finally, there is no finding by the trial court that the PPD was not desired by all tenants who signed it. To the contrary, the evidence shows that the PPD was drafted at the request and with the input of all of the tenants at the time. (CP 275-76; 300). There is no indication that the tenants lacked time to seek advice, professional or otherwise, or suggest changes. *Contra proferentem* does not apply.

Respondents state as a fact that the PPD designated the Architectural Control Committee (ACC) to establish “what work (is) to be done on the C.A.T.” (App's Brief p.6). In fact, PPD § 5.6 does not

specify anything about what work should be done on the Common Property. (CP 334-35; 721-22; RP 21:4-23:19). Other sections of the PPD, including § 5.1, provide the standard for work to be done as well as does the obligation set forth in the 1968 Covenant. (CP 345). PPD § 5.6 only gives the ACC additional assessment powers if two of the members approve to levy an assessment. (CP 315). One of the core disputes of this case, is that Respondents misinterpret PPD §5.6, which only describes assessment powers, as providing an escape from their duty to maintain the Common Property. This dispute is revisited later in this reply.

Respondents also assert that Appellants previously agreed that two votes were necessary when they attempted to cause the ACC to assess to repair the tennis court. However, as set forth in Respondents' reply brief, that repair plan included a new feature which was an expensive root barrier. (see, Resp' Brief p.6) This new feature would be installed along with resurfacing the tennis court at a cost of \$40,000. (Resp' Brief p.28). There is no dispute that Appellants did then, and do now, believe that for the ACC *to issue an assessment for installation of this root barrier* or any other new feature would require two votes to make a *non judicial* assessment. (See, Resp' Brief p.28). This root barrier installation required the addition of new construction and was not

limited to keeping existing facilities in good condition and repair. Such a project is easily distinguishable from the dispute in this case which is limited to keeping existing facilities in good condition and repair so that they may be “used and enjoyed” by all of the tenants and does not involve voting to levy a non judicial assessment for new capital improvements. (*See*, PPD § 5.1, CP 345).

Appellants have asserted, and maintain, that the maintenance of the tennis court to keep it in good condition and repair would not require capital improvements by adding anything new to the Common Property, and as such was consistent with the 1968 Covenants and PPD §5.1. (CP 302-06). By implication, and construed in the light most favorable to the Appellant, such facts demonstrate that the maintenance is nothing “extraordinary,” or a new capital improvement. (CP 302-06). Finally, Respondent’s brief goes far beyond the findings of the Court, raising multiple matters which were simply not the subject of the Court’s ruling.

B. The Exceptions to Partition as Set Forth in Carter and Ascribed by the PPD are Applicable Here.

Respondents misconstrue the law, and misinterpret the PPD, to avoid the clear conclusion that *Carter* and the PPD prevent a partition of the Common Property. Indeed, *multiple* grounds exist to prevent

partition. The seminal case of *Carter*—with its clear exceptions to partition—is directly applicable to this case. *Carter* provides as follows:

“The right to sale, as a remedy guaranteed by the statute, *supra*, is not absolute in all cases of partition. *Leinweber v. Leinweber*, 63 Wash.2d 54, 385 P.2d 556 (1963); 40 Am.Jur. Partition s 83, p. 72. [(1)] It is not available where a cotenant, by his own acts, is estopped or has waived his right by express or implied agreement, *Huston v. Swanstrom*, 168 Wash. 627, 13 P.2d 17 (1932); or [(2)] where his co-tenant's equitable rights will be minimized or defeated, *Leinweber, supra*, 63 Wash.2d at p. 56, 385 P.2d 556; or [(3)] in violation of a condition or restriction imposed upon the estate by one through whom he claims. *Ortmann v. Kraemer*, 190 Kan. 716, 378 P.2d 26 (1963); *See Annot.*, 132 A.L.R. 666; 68 C.J.S. Partition s 44, p. 66, s 213, p. 346; 40 Am.Jur. Partition s 5, p. 5.”

Carter v. Weowna Beach Cmty. Corp., 71 Wash. 2d 498, 502, 429 P.2d 201, 204 (1967) (internal cites included, numericals added by Appellants).

i. The first and third exceptions of Carter are satisfied by the PPD.

First, the Parties are subject to the PPD, an agreement which states that each of them shall have the right to “use and enjoy” the entire Common Property PPD § 5.1. Partition would interfere with this right. With regard to the third exception to partition, Respondents Avenius and Zemel would be in violation of a condition or restriction imposed upon their estate by one through whom he claims, since they took their titles subject to the recorded PPD. Appellants Dempcy and Respondents Shannon were also subject to the first exception because they were

parties who entered into the PPD, and by such act, agreed that each parcel owner would have the right to use and enjoy the entire Common Property.

Carter supports, as do the other cases cited in Appellants' brief, the proposition that if the parties have agreed-- or taken title subject to recorded predecessor agreements --that each shall have the right to use the entire Common Property, they are estopped from pursuing partition without the consent of all parties.

The primary "distinction" that the Respondents make in their brief is that the covenant in the instant litigation was not on each deed, but was only in a recorded agreement and it was not restated in each and every deed from the time the Common Property was created down to the current set of neighbors as was the case in *Carter*. (Resp' Brief 21-22). Respondents cite no authority for this erroneous proposition that the covenant that "estops" the parties from partition must be inscribed in a deed and cannot be in an agreement between the parties. The *Carter* case itself applied the exception to both (1) "agreements" and (3) "deeds" in the quote above. In addition, there are "agreement cases" such as *Reilly v. Sageser*, 2 Wash. App. 6, 7, 467 P.2d 358 (1970), which cites *Carter* as authority. Appellants cannot find a single case in Washington that stands for the proposition that the exception to the right of partition only

applies if the restriction is in a deed. In accordance with *Reilly*, a stand alone agreement, like the PPD, is sufficient. It is telling that the Respondents ignored the other cases cited in Appellants' Opening Brief on this subject.

Another distinction which Respondents try to make is that there were more parties in the *Carter* case. The mere fact that *Carter* involved a larger number of parties in the neighborhood enjoying the common park is unavailing. If anything, the small number of parties in the Pickle Point Neighborhood means that each person would have a greater individual stake vis-à-vis the group stake in enjoying the Common Property as it was intended.

Beyond the PPD, the 1968 Covenants also support the fact that the Common Property cannot be subdivided because they require all tenants to participate in the maintenance of, and implicitly get the benefit of, a tennis court as well as an entire common area. This burden and benefit does not just arise out of the Common Property alone but also from owning a residence in Pickle Point. Not only are the 1968 Covenants recorded, but, there is express language in each of the foregoing instruments that states its binding nature runs with the land. Respondents have presented no authority for the proposition that a conveyor can unilaterally erase a recorded encumbrance/covenant that

benefits another. Imagine if easements across property could just be “erased” by a seller not placing the same in a deed to a buyer? Respondents’ analysis would upend every recorded easement in Washington as well as the legal concept of “runs with the land.” If the Trial Court decided on this basis, the implication would be untenable: title insurance companies would be rendered obsolete if Respondents could simply eliminate covenants they do not like.

ii. The second exception set forth in Carter is satisfied because the Appellants’ equitable rights will be minimized or defeated by partition.

The Common Property was created for the benefit of the neighborhood and each of its residents. The open park like, and shared, Common Property, is an essential feature of the Pickle Point Neighborhood. This was reiterated in the PPD, twenty two (22) years later.³ The situation is *identical* to *Carter*. Even the language of the Covenant in *Carter* is similar to § 5.1 of the PPD.

The Common Property’s *very creation* evidences the grantors’ intent and justifies its importance and continued existence. The Common Property was created for the very purpose of *having* an open

³ PPD § 5.1 gives *each* of the Pickle Point neighbors the “right to use and enjoy the common property according to the nature of that property.”

and recreational Common Property in the Pickle Point Neighborhood.⁴ The Trial Court should not have ruled that, *as a matter of law*, the Appellants did not have sufficient equitable rights as a forty year resident of the Pickle Point Neighborhood to enjoy the Common Property which was an essential feature of the neighborhood. By its very nature, as an assertion of an equitable right being terminated, there should have been an evidentiary hearing held to ascertain and weigh the equitable rights. The Appellants' declarations clearly established equitable rights which were improperly disregarded by the Court in ordering partition.

iii. Section 2.15 of the PPD prohibits the division of Common Property by partition.

Another reason that partition is not applicable to this case is that PPD § 2.15 prohibits the division of any parcel into smaller parcels. PPD § 2.15 provides: “Subdivision: No parcel shall be subdivided into smaller parcels without the written consent of all parcel owners.” Respondents claim that the caption defined the section by using the word “SUBDIVISION” rather than some other word indicating smaller sizes. (Resp' Brief p. 24). In so doing, Respondents ignore that PPD § 6.4 says explicitly: “6.4 Captions:The captions are not to be used to interpret

⁴ If this was not grantors' purpose, then why was the Common Property carved out in the first place and construction and maintenance of a tennis court mandated?

the meaning of the Declaration.” Therefore, the only word that describes the signers’ intention is “subdivide” in the body of the provision. The Respondents correctly state the rule in their brief that the Court, when interpreting a covenant, should give language its usual meaning. (Resp' Brief p.16).⁵

Respondents argue, without evidentiary support, that the signers of the PPD were not concerned with a division of the Common Property, but were instead afraid of the subdivision process of the Bellevue Municipal Code, as set forth at BMC Chapter 20.45B. (Resp' Brief p. 23-24). This is mere conjecture. Respondents fail to present any evidence of the conversations that transpired during the formation of the PPD in regards to §2.15. Respondents also fail to address PPD § 6.4 and why this section is contrary to their argument.

iv. Partition would be a useless act.

Section 1 of the PPD states that all its provisions would bind all subsequent owners of any parcel which includes the Common Property. Therefore, all owners would have the right to use each disparate parcel and would be obligated to maintain it. The 1968 Covenants also run

⁵ Without relying upon the caption, the word in the text is “subdivide.” The usual meaning of “subdivide is “1. divide something that has already been divided or that is a separate unit.” “subdivide.” Oxford Online Dictionary. 2016. www.oxforddictionaries.com/us (March 23, 2016).

with the land and bind all successors thus requiring the successors of Dempcy, Avenius and Shannon to contribute 25 percent to the maintenance of the tennis court.

Neither the partition statute RCW 7.52 *et. seq.*, nor any known authority allows the referee to do away with recorded encumbrances and restrictions. No known authority allows the referee to excise specific paragraphs from an existing recorded document affecting neighboring properties as well as the Common Property. Even if the Common Property was subdivided, in contradiction to the text of the PPD, any subdivided property and any purchaser at an ordered partition sale would also be subject to rights/obligations of the four (4) Pickle Point Neighbors as set forth in 1968 Covenant and the PPD. Nothing would actually change except there would be unwanted visitors, enjoying recreational activities, on each others own property.⁶ Appellants' argument that partition would be a useless act because the recorded covenants would continue with the new owners of the partitioned parcels was countered by the Respondents with the argument that the covenants would simply disappear upon partition. This might be called the “vanish

⁶ For example, the Pickle Point Neighbors would still have a “right to use and enjoy the common property” by dint of being an “owner of a parcel” per the PPD § 5.1. They would also have as well an obligation to construct and maintain a tennis court per the 1968 Covenant as a successor to the Grantees who undertook this obligation.

into thin air” legal theory. The Respondents cite no authority for such a theory.

It should also be noted that the minimum lot size under the BMC⁷ would not allow subdivision of the common parcel so it is hard to believe that subdivision was a worry of the signers.

C. Respondents are obligated to maintain the entirety of the Common Property.

The Trial Court determined, erroneously, that PPD §5.6 proscribed what work was required to be done in order to maintain the Common Property and how such work would be approved. In-so-doing, the Trial Court ignored the clearly stated purpose of this section which is to *merely authorize additional non judicial assessment power* for capital expenditures. This is all that PPD § 5.6, does—and nothing more.

Appellants assert that § 5.6 has no application to this lawsuit. Once a lawsuit is filed under § 6.1 to enforce the agreements of the parties under §§ 5.1 and 5.5 of the PPD as well as the 1968 Covenants, the power of the parcel owners to levy a non judicial assessment under § 5.6 is irrelevant. The Court does not need to direct the parties to exercise their assessment powers, in order to enter a judgment directing the Respondents to maintain the Common Property in good condition

⁷ The required minimum lot size is 10,000 square feet for plats with critical areas. BMC 20.45A.060(3)

and repair so that each parcel owner can “use and enjoy the common property according to the nature of that property...” (PPD § 5.1), or to require the parties to perform “ordinary maintenance of the common property” under § 5.5 in order to achieve the requirement of § 5.1, or to adhere to the 1968 Covenants. However, since the Trial Court based its decision on this irrelevant provision, the Respondents' faulty analysis should be discussed.

The Trial Court’s finding that § 5.6 requires two votes to authorize *an assessment* is not questioned. However, the Trial Court erroneously added the words “as sought by plaintiffs” to its order. The Plaintiffs (now Appellants) were in fact seeking that the Common Property, including the tennis court, be kept in good condition and repair so that it could be used and enjoyed by all parcel owners as required by § 5.1, and liberated from its dangerous and dilapidated state. (CP 8-16).

It is uncontested, and indeed conceded, that the tennis court could not be used and that it was a dilapidated and dangerous eyesore. (CP 105; 107). Appellant was able to get bids to resurface and repaint the tennis court for the reasonable amount of \$5,000 per parcel owner to maintain the Common Property so the Common Property could be used and enjoyed. The Respondents presented no evidence that periodic resurfacing and repainting of an outdoor sport court in the Pacific

Northwest would be “extraordinary,” or that the small cost per parcel would render it so. To the extent that the case was decided on this disputed issue, this case should be remanded for trial.

Respondents argue that since the PPD did not mention the tennis court, the ACC had no obligation to maintain it. It is true that the PPD contains no express mention of the tennis court. However, it is part of the Common Property whose maintenance is required. It should be noted that no mention is made of other facilities in the Common Property such as steps, curbs, bulkheads, lawns, shrubs, roads, etc. Respondents cannot reasonably assert that these items should not be maintained within the Common Property because they are not explicitly called out in the PPDs.

The Respondents argue that under the PPD §6.6, the ACC, which they control, has the power to interpret Section 5.6 as they choose. (Resp' Brief 16-17). However, the Court made no reference to this provision, and its actual application would require *factual* determinations such as whether the ACC acted in “good faith” as required by the section. See, *Morris v. Swedish Health Servs.*, 148 Wash. App. 771, 200 P.3d 261 (2009)(good faith is generally a question of fact, and can only be resolved on summary judgment where no reasonable minds could differ on the question). The actions of the Respondents raised many factual questions about their “good faith.” Questions of fact

also remain as to whether the ACC ever acted upon any of the provisions which are relevant to this case. Again, the facts proffered by the Appellants, the non-moving party on partition, should receive deferential analysis. Given the facts presented, “good faith” cannot be found based on the trial record. (*See*, CP 303-04).

D. Appellants' right to maintain the Common Property and seek contribution is supported by the law.

At trial and in its opening brief, Appellant presented copious authorities for the proposition that a co-tenant who repairs the Common Property may seek pro rata reimbursement. (App' Brief p.33). *See also, Tri-Financial Corp. v. Dept. of Rev.*, 6 Wash. App. 637, 495 P.2d 690 (1972)(a contract is presumed to have been made in contemplation of existing law). Respondents claim that the common law right does not apply if the tenants-in-common have an agreement concerning repair and maintenance, but do not explain what remedy a cotenant would seek if *the tenants refuse to make repairs under those provisions*. If this Court reverses the Trial Court, and it is held that the parties have agreed to maintain the Common Property so that it can be used and enjoyed according to its nature, or pursuant to the obligations under the 1968 Covenants to maintain a tennis court, the Respondents could at least argue that Appellant’s remedy would be to enforce the agreement.

However, that would require a reversal and remand for further argument about whether the common law rights to maintenance were actually replaced by the 1968 Covenant and/or PPD.

Respondents' attempts to distinguish *Womack*, *Foster*, and *Yankovani* are unavailing. First, the *Yankovani* case supports the Appellant's position that each tenant has the right to possess the whole. Second, the cases evince sound black letter support for the right of reimbursement for tenants-in common. No known contract provision, or legal principle, prohibits any tenant from maintaining and/or repairing Common Property to keep it useable.⁸ The question of whether an agreement to repair between the tenants interferes with a common law right to enter and make repairs was not addressed in any of the cases cited by Respondents, nor do any of the covenants contain provisions that prohibit the tenants from exercising their common law rights. This does not mean Appellants have free reign as suggested by Respondents. (Resp' Brief p.36). They simply have the right to maintain the Common Property as it exists in a good condition and repair, or, at the very least in a safe condition.

⁸ As Plaintiffs establish in its opening brief and on reply, there is no dispute, and all parties agree, that the repairs are necessary so that the Common Property can be used and enjoyed according to the nature of the property which is to have a playable surface to play tennis. Indeed, it is dilapidated, dangerous and an eyesore.

Respondents cite *Tindolph v. Schoenfeld Bros.*, 157 Wash. 605, 608, 289 P. 530 (1930), to argue that because the 1968 Covenants were not in Respondent Zemel's chain of title, the other tenants are released from their obligations. *Tindolph* involved restrictive covenants. The covenants at issue in the titles of Dempcy, Avenius and Shannon are not restrictive covenants and do not restrict the free use of anyone's property, and *Tindolph* is therefore inapplicable to this litigation. The 1968 Covenants merely require that each of the named owners will contribute to the upkeep of the tennis court and landscaping which are the center pieces of their parcels. These obligations were publicly recorded and constructively accepted by purchasing a property with the covenants in the public record. To that point, even if Respondent Zemel does not have to contribute under his deed (but he does have to contribute under the PPD) that does not restrict anyone's free use of his property. If Appellant makes necessary repairs to the Common Property, the Appellant is not prohibited from being reimbursed by Respondents Avenius and Shannon to the full extent provided in their deeds and under common law.

The Respondents argue that the 1968 Covenants do not apply since they were superseded by the PPD. The PPD does not state that it supersedes, or even modifies, any document. Indeed, the *only* testimony

from actual signatories to the PPD, including Respondent Jack Shannon (who, beside the Dempcys, was the only other signer of the PPD), is that the PPD was not intended to supersede the 1968 Covenant or that it provided any power to interpret the 1968 Covenant. (CP 233, 304, 404-08; RP 11:8-22). If the Trial Court failed to consider the 1968 Covenants, it did so in error.

E. Appellants are entitled to damages for contractual interference.

Tortious interference with a contract is established upon a showing that the plaintiff had a valid contract, and the defendant intentionally caused the contract to be breached by improper means or for an improper purpose, proximately causing damage to the plaintiff. *See, Pacific Northwest Shooting Park Ass'n v. City of Sequim*, 158 Wash.2d 342, 351, 144 P.3d 276 (2006). As presented on summary judgment and in its opening brief, Appellants secured contracts with Northshore Paving Company to repair the tennis court for about \$20,000. (App' Brief p. 18, citing CP 307; 319). Respondent Shannon knowingly and intentionally sent a letter to Northshore Paving Company which caused the contracts not to be performed. (CP 307; 319; 368). Damages are calculable based upon the difference between the contracts and the actual cost of such repairs.

Respondents rely on § 3.6, which prohibits damage actions against ACC members resulting from actions of the ACC, to inoculate Respondent Shannon. Respondents' reliance is misplaced. This action could not have been authorized by the ACC since there was no meeting of the ACC to authorize the letter, nor is there evidence that Appellants received notice of such a meeting as is required under § 3.6. (CP 306). If Respondents claim the shield of § 3.6, it is incumbent upon them to provide evidence that their individual actions were those of the ACC. None of this exists in the record. All that exists is that Appellant Dempcy disputed that this was an authorized act of the ACC. (CP 306).⁹

F. Appellants are entitled to attorney's fees.

For purposes of Reply, the Appellants reiterate that they believe that after appeal they will be deemed the prevailing party. In addition, neither RCW 7.52, *et. seq.*, the 1968 Covenant, nor common law provide for attorney's fees. Finally, Appellants were the prevailing party against one of the Respondents, Avenius, under the PPD § 2.6.

⁹ Another clear damage issue includes the decrease in the value of the Appellants' parcel because of Respondents' actions which were not the acts of the ACC. However, this issue requires factual findings and the Appellants did not seek to have these adjudicated at summary judgment.

III. CONCLUSION

Since this Reply supports the Appellants' position that the Trial Court's decision and Respondents' arguments in support thereof are without merit either in fact or law, Appellants request that this Court enter the following judgment:

- 1) That Respondents' motion for partition of the Common Property be denied,
- 2) That §§ 5.1 and 5.5 of the PPD require that the Common Property as it presently exists be maintained in good condition and repair so that it may be used and enjoyed according to its nature.
- 3) That § 5.6 of the PPD solely grants to the ACC the non judicial power to assess the property of the tenants for improvements to the Common Property which are in addition to those required for maintenance under 2), above, provided that at least 2 tenants approve such assessments.
- 4) That each tenant in common has the right to enter the Common Property and maintain it in good condition and repair and may seek contribution from the other tenants if such action is either necessary or increases the value of the property; provided, however, in any event Dempcy, Avenius

and Shannon and their successors are each required to contribute 25 percent of the reasonable costs of so maintaining the common area tennis court and landscaping pursuant to the 1968 Covenants.

- 5) That this case be remanded to the Trial Court to enter the following findings pursuant to this judgment:
 - A. The cost to restore the Common Property to good condition and repair and the amount thereof which is the responsibility of each of the tenants;
 - B. Whether Respondent Shannon's letter to Northshore Paving Company was an authorized act of the ACC. If not, the amount of damage suffered by the tenants for costs to maintain the Common Property in addition to the agreements entered into by the Appellants with Northshore Paving Company;
 - C. An award of attorney's fees for this appeal to Appellants as the prevailing party, and other damages that may be proved by any party;
 - D. The amount of attorney's fees to be awarded to the prevailing party pursuant to § 6.1 of the PPD.

It is Appellants' hope that if the Respondents are required to take responsibility for the maintenance of the Common Property, that the parties will have incentive to come to a mutually acceptable agreement as to their future relations that will be beneficial to all parties.

DATED this 1 day of April, 2016

Respectfully Submitted,

BAROKAS MARTIN & TOMLINSON



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PROOF OF SERVICE

On April 1, 2016, I caused the foregoing Appellants' Reply Brief to be served on the parties to this action, by email and legal messenger to:

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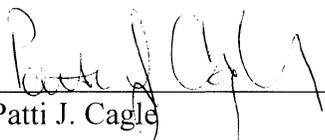
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I declare that the statements above are true to the best of my information, knowledge and belief.

DATED this 1 day of April, 2016.



Patti J. Cagle