

June 14, 2016

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

CHRISTOPHER and SUZANNE GUEST,  
husband and wife,

Appellants,

v.

DAVID and KAREN LANGE, husband and  
wife, and the marital community comprised  
thereof,

Respondents.

No. 46802-6-II

UNPUBLISHED OPINION

MELNICK, J. — Christopher and Suzanne Guest appeal the trial court’s summary judgment orders and final judgment in favor of their neighbors, David and Karen Lange. We conclude that the trial court did not abuse its discretion by denying the Guests’ motion to amend their complaint; it did not err by granting the Langes’ motion for summary judgment dismissing the Guests’ claims; it did not err by denying the Guests’ motion for partial summary judgment; and, it did not err in instructing the jury. Finally, there was no cumulative error.<sup>1</sup> We affirm.

**FACTS**

The facts of this case are not in dispute. The Guests and the Langes are neighbors in the Spinnaker Ridge community in Gig Harbor. The Guests reside on Lot 5 and the Langes reside on Lot 4. Nu-Dawn Homes, Inc. developed the community in 1986. As part of the original

---

<sup>1</sup> The Guests raised many issues in their reply brief for the first time that were not raised in their opening brief. The Guests further raised issues related to the Coe Family Trust, intervenors in the original action, in their reply brief for the first time. Pursuant to RAP 10.3(c), we will not consider them.

development, Nu-Dawn Homes recorded the Spinnaker Ridge declaration of covenants, conditions, restrictions, and reservations (CC&Rs), and a document titled “Patio or Deck Easement” (Easement).<sup>2</sup> Clerk’s Papers (CP) at 211. Both documents granted easements for decks. The easement over the Guests’ property covered an area of 5 feet by 21 feet for the Langes’ deck.

In 2011, the Langes wanted to rebuild their deck because they had concerns with its structural integrity. The original deck’s footprint covered the easement over the Guests’ property and an additional encroachment area of approximately three feet by five feet. The Langes talked with the Guests about their intent to replace the deck. The Guests told the Langes that they did not have the right to reconstruct their deck on the original deck’s footprint which ran along the edge of the Guests’ house. The Langes decided to rebuild the deck in a smaller area than the original one.

Later, the Langes’ lawyer informed them that they had the legal right to rebuild the deck within the location of the original deck. The Langes asked the Guests for permission to rebuild the deck as it had originally existed. The Guests refused to give their permission. Eventually, the situation deteriorated, and the Langes communicated to the Guests that they were going to rebuild the deck in the same place as the original one. In April, while the Guests were out of town, the Langes rebuilt the deck in the same footprint as the original deck.

---

<sup>2</sup> The Easement was recorded under Pierce County Auditor Document No. 8704290509 and the CC&Rs were recorded under Pierce County Auditor Document No. 8608080472.

I. PROCEDURAL HISTORY

A. Complaint, Answers, and Counterclaims

In December 2011, the Guests filed a complaint alleging breach of contract and trespass. In May 2012, the Langes filed an answer, affirmative defenses, and counterclaims to quiet title and for trespass. The Guests answered the Langes' counterclaims and asserted affirmative defenses.

B. Amended Complaint

In October, the Guests filed their first amended complaint. It alleged breach of contract, trespass, and breach of the covenant of good faith and fair dealing. It also alleged the Langes had a duty to indemnify the Guests for all claims arising from their actions in connection with the deck and the utilization of the easement.

The Langes filed an answer with affirmative defenses and a counterclaim. They admitted that the deck might encroach on the Guests' property, but the original CC&Rs allowed it, and that the deck covered the same area as the original deck. The Langes alleged that the Guests trespassed. The Langes denied all of the Guests' causes of action. In their counterclaim, the Langes relied on the following language from paragraph 16.4 of the 1986 CC&Rs:

Encroachments: Each Lot and all Common Areas are hereby declared to have an easement over all adjoining Lots and Common Areas for the purpose of accommodating any encroachment . . . and any encroachment due to building overhang or projection, and any encroachment for a deck, patio and/or parking area or driveway constructed (and assigned for the use of a Lot) by Developer. There shall be valid easements for the maintenance of said encroachments . . . however, that in no event shall a valid easement for encroachment be created in favor of an Owner or Owners if said encroachment occurred due to the willful act or acts with full knowledge of said Owner or Owners. In the event a Lot or Common Areas are partially or totally destroyed, and then repaired or rebuilt, the Owners agree that minor encroachments over adjoining Lots and Common Areas shall be permitted, and that there shall be valid easements for the maintenance of said encroachments so long as they shall exist.

CP at 49.

The Guests answered the Langes' counterclaim and asserted affirmative defenses. They alleged that the indemnity provision contained in paragraph D of the Easement was an insurance contract that obligated the Langes to indemnify and insure the Guests against suits related to the deck. Paragraph D of the Easement states:

Grantee promises, covenants and agrees that the Grantor shall not be liable for any injuries incurred by the Grantee, the Grantee's guests and/or third parties arising from the utilization of said easement and further Grantee agrees to hold Grantor harmless and defend and fully indemnify Grantor against any and all claims, actions, and suits arising from the utilization of said easement and to satisfy and all judgments that may result from said claims, actions and/or suits.

CP at 212.

C. Motions to Amend Complaint and for a Continuance

On January 29, 2013, the Guests filed a motion to amend their complaint and to continue the trial. The proposed second amended complaint would have added five new defendants and eleven new causes of action. It was 135 pages long. The Guests claimed that they received late discovery responses and the documents produced gave rise to new causes of action. The case was set for trial on June 4. The Guests requested a six month continuance of all deadlines, including those that had already passed, to join new parties and to adequately prepare for trial.

The Langes opposed the motion because the deadline to add defendants had passed and because they faced significant prejudice if the scope of this litigation expanded and was continued. The trial court denied the motion because it was untimely and because the Langes would be prejudiced.

D. Summary Judgment Motions<sup>3</sup>

1. Guests' Motion for Summary Judgment

On March 8, the Guests filed a motion for summary judgment and dismissal of the Langes' counterclaims of trespass and to quiet title. The Guests claimed they could not trespass on their own property. Even if there was an easement, it would be for the mutual benefit of the parties. The Guests also claimed that paragraph D of the Easement barred any counterclaims by the Langes.

On April 8, the Langes responded to the Guests' motion for summary judgment and agreed that there were no genuine disputes as to the material facts, but because the Guests could not show that they were entitled to judgment on either of the Langes' counterclaims, the motion should be denied.

2. Langes' Motion for Summary Judgment

On March 22, the Langes filed a motion for summary judgment of the Guests' claims, arguing that each claim was legally insufficient. In support of their motion, the Langes included surveys of the Guests' and Langes' lots that showed the deck easement area, the actual deck, and the disputed three feet by five feet area.

On April 9, the Guests responded and claimed the Langes did not have standing because their counterclaims were barred, and that the multiple contracts the Guests entered into with the Langes defeated the motion for summary judgment.

3. Court's Rulings on Summary Judgment Motions

On April 19, the trial court heard arguments on the summary judgment motions. On May 6, the trial court entered a written order granting the Guests' motion for dismissal of the

---

<sup>3</sup> The facts previously outlined above are those the trial court relied on when deciding the motions for summary judgment.

counterclaim for trespass, but denying the motion to quiet title. The trial court also ruled that the indemnification language in paragraph D of the Easement did not bar the other counterclaims. On that same date, the trial court entered a written order granting the Langes' summary judgment motion in part, dismissing the Guests' claims for trespass with respect to the area described in the Easement, for breach of contract for a violation of the CC&Rs, for breach of contract based on the alleged contract to share the Langes' deck, for breach of indemnity, and for breach of duty of good faith and fair dealing.<sup>4</sup>

After the ruling on both motions for summary judgment, the following claims and counterclaims remained: the Guests' claim for trespass regarding the three feet by five feet encroachment area of the deck; the Guests' claim for breach of contract based on the Langes' alleged promise to not build a deck on the easement area; and the Langes' claim to quiet title.

E. Other Motions

On May 6, the Guests filed CR 56(f) declarations for postponement of entry of the summary judgment orders until the conclusion of discovery, and for denial of the Langes' motion for summary judgment because the grantor in the Easement was not the owner of the development. The Guests' declarations claimed that they acquired newly discovered evidence that proved the Easement was invalid, including that Nu-Dawn Homes Limited Partnership owned and developed the community, not Nu-Dawn Homes Inc., the listed grantor on the Easement.<sup>5</sup> The trial court ruled that the declarations were untimely and declined to consider the Guests' arguments.

---

<sup>4</sup> The court orally ruled that the Langes had the right to rebuild the deck in the easement area.

<sup>5</sup> The Guests requested the continuance to potentially add the prior owners of Lot 5 as a party to the action.

## II. TRIAL

The case proceeded to jury trial with testimony consisting of the same pertinent facts as summarized above. Prior to trial, the Guest's moved in limine that the parties be prevented from presenting any testimony, evidence or argument that there was any easement on the Guests' property that benefitted the Langes' property. The trial court denied the motion, stating that it did not understand the motion and it had already granted summary judgment and ruled that a valid easement existed.

### A. Jury Instructions

The Guests argued about three specific jury instructions. The trial court instructed the jury using an instruction the Langes proposed. It read, "If you find that plaintiffs justifiabl[y] relied on defendants' promise not to build a new deck in the area identified in the patio or deck easement, then there was consideration." CP at 4646, 4747. The trial court gave the Langes' proposed instruction because it did not understand the Guests' proposed instruction. In ruling, the trial court explained that the instruction would still allow the Guests to argue their theory of the case, i.e. that they justifiably relied on the Langes' promise not to build a new deck on the easement.

The Guests proposed an instruction on the implied duty of good faith and fair dealing. Although the Langes objected, the trial court agreed to give the instruction, but inadvertently failed to give it.

The trial court also instructed the jury regarding the Easement. "The Court has determined as a matter of law that Defendants had the right to rebuild in and occupy the area described in the patio or deck easement recorded under Pierce County Auditor Document No. 8704290509 [the Easement]." Report of Proceedings (RP) (July 15, 2014) at 132; CP at 4755 (Instr. 17). The trial

court noted that it had determined the validity of the Easement at summary judgment, but the Guests could still argue that there may have been some contract that vacated the Easement.

The trial court asked the parties to check the jury instruction packet to make sure it accurately reflected the court's rulings. Both parties agreed the packet was correct apparently unaware that it did not include the good faith and fair dealing instruction.

#### B. Verdict

On July 16, 2014, the jury returned a special verdict in the Langes' favor. The jury found the Langes did not breach a contract with the Guests and they did not breach their covenant of good faith and fair dealing with the Guests. The jury also found that the new deck, which was in the same position as the old deck, did not trespass on the Guests' property. On September 19, the trial court entered judgment for the Langes, dismissed all of the Guests' claims with prejudice, awarded judgment to the Langes on their claim to quiet title. It awarded the Langes \$565 for attorney fees. The Guests appeal.

### ANALYSIS

#### I. MOTION TO AMEND COMPLAINT

The Guests argue that the trial court abused its discretion by denying their motion to amend their complaint because a motion's timeliness alone is not a proper reason to deny a motion to amend. We disagree in part because the way the Guests frame the issue does not accurately reflect the trial court's ruling. The trial court denied the motion because it was untimely and because it would prejudice the Langes.

#### A. STANDARD OF REVIEW

We review a trial court's ruling on a motion to amend a complaint for abuse of discretion. *Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters*, 100 Wn.2d 343, 351, 670 P.2d 240



(1983). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). To amend a pleading after the opposing party has responded, the party seeking to amend must obtain the trial court's leave or the opposing party's consent. CR 15(a).

Leave to amend a complaint should be freely granted unless the opposing party would be prejudiced. *Olson v. Roberts & Shaffer Co.*, 25 Wn. App. 225, 227, 607 P.2d 319 (1980), *repudiated on other grounds by State v. Eppens*, 30 Wn. App. 119, 633 P.2d 92 (1981). In determining prejudice, a court may consider undue delay and unfair surprise as well as the futility of amendment. *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 165, 736 P.2d 249 (1987). Undue delay is a proper ground for denying leave to amend. *Elliott v. Barnes*, 32 Wn. App. 88, 92, 645 P.2d 1136 (1982). "In all cases, "[t]he touchstone for denial of an amendment is the prejudice such amendment would cause the nonmoving party.'" *Herron*, 108 Wn.2d at 166 (quoting *Del Guzzi Constr. Co. v. Global Nw., Ltd.*, 105 Wn.2d 878, 888, 719 P.2d 120 (1986) (quoting *Caruso*, 100 Wn.2d at 350))).

Where the proposed amendment encompasses new concerns and new facts, the likelihood of prejudice to the defendant is greater. "When an amended complaint pertains to the same facts alleged in the original pleading, denying leave to amend may hamper a decision on the merits." *Herron*, 108 Wn.2d at 167. "When the amended complaint raises entirely new concerns, the plaintiff's right to relief based on the facts in the original complaint is unaffected." *Herron*, 108 Wn.2d at 167. "Moreover, the defendant in the latter case is more likely to suffer prejudice because he has not been provided with notice of the circumstances giving rise to the new claim and may have to renew discovery." *Herron*, 180 Wn.2d at 167. "Appellate decisions permitting amendments have emphasized that the moving parties in those cases were merely seeking to assert

a new legal theory based upon the same circumstances set forth in the original pleading.” *Herron*, 108 Wn.2d at 166.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION

Here, the Guests moved to file an amended complaint more than seven months after the deadline to add defendants had passed. In addition, their motion came nearly nine months after the Langes filed their answer and three months after the Guests filed their first amended complaint.

The Guests attempted to add five new defendants and eleven new causes of action that were significantly different from the original claims. Many of the new claims were based on conduct that occurred well after the Langes reconstructed the deck, and many of the new claims involved conduct by third parties who were not named as defendants. The trial court concluded that the filing of the second amended complaint would have extended litigation over a long period of time, and would have caused undue delay that would clearly prejudice the Langes. Because these reasons are tenable, the trial court did not abuse its discretion. There is no error.

II. LANGES’ MOTION FOR SUMMARY JUDGMENT

The Guests argue the trial court erred by granting the Langes’ motion for summary judgment and dismissing the Guests’ breach of contract and indemnity claims. They also argue the trial court erred by granting summary judgment on the validity of the Easement because it did not consider new evidence included in their CR 56(f) declarations.<sup>6</sup> We disagree.

---

<sup>6</sup> The Guests do not argue that the trial court improperly granted summary judgment based on the information it had at the time. Rather, they argue that with the new information contained in the declarations, summary judgment should not have been granted.

## A. STANDARD OF REVIEW

We review summary judgment orders de novo, engaging in the same inquiry as the trial court. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment is proper if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c). We view the evidence and draw reasonable inferences from it in a light most favorable to the nonmoving party. *Schaaf v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 665 (1995).

A party moving for summary judgment bears the burden of demonstrating that there is no genuine issue of material fact. *Atherton Condo. Apt.-Owners Ass’n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). “A material fact is one upon which the outcome of the litigation depends in whole or in part.” *Atherton*, 115 Wn.2d at 516. If the moving party satisfies its burden, the nonmoving party must present evidence demonstrating that a material fact remains in dispute. *Atherton*, 115 Wn.2d at 516.

The nonmoving party’s response, by affidavits or as otherwise provided under CR 56, must set forth specific facts that reveal a genuine issue for trial. *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988). “[C]onclusory statements of fact will not suffice.” *Grimwood*, 110 Wn.2d at 360. If the nonmoving party fails to do so, and reasonable persons could reach but one conclusion from all the evidence, summary judgment is proper. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

## B. DISMISSAL OF GUESTS' BREACH OF CONTRACT CLAIM

The Guests argue that the trial court erred by dismissing their breach of contract claim based on the CC&Rs.<sup>7</sup> In addition, the Guests contend that because the Langes admitted that they were bound by the CC&Rs, the trial court should have vacated the interlocutory summary judgment order dismissing the Guests' claims. We disagree.

A contract is an agreement creating an obligation. *See Ketcham v. King Cty. Med. Serv. Corp.*, 81 Wn.2d 565, 593, 502 P.2d 1197 (1972). To form a contract, the parties must objectively manifest their mutual assent. *Yakima County Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 388, 858 P.2d 245 (1993). Mutual assent is expressed by an offer and acceptance of that offer. *FDIC v. Uribe, Inc.*, 171 Wn. App. 683, 689, 287 P.3d 694 (2012). "A contract requires an offer, acceptance, and consideration." *FDIC*, 171 Wn. App. at 688. The "terms assented to must be sufficiently definite" and "supported by consideration to be enforceable." *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 178, 94 P.3d 945 (2004).

We apply principles of contract interpretation to interpret provisions in CC&Rs and other governing documents relating to real estate developments. *See, e.g., Roats v. Blakely Island Maint. Comm'n, Inc.*, 169 Wn. App. 263, 273-75, 279 P.3d 943 (2012). Contract interpretation is a question of law we review de novo. *Dave Johnson Ins. Inc. v. Wright*, 167 Wn. App. 758, 769, 275 P.3d 339 (2012). "The purpose of contract interpretation is to determine the parties' intent." *Roats*, 169 Wn. App. at 274. Contractual language generally must be given its ordinary, usual, and popular meaning. *Jensen v. Lake Jane Estates*, 165 Wn. App. 100, 105, 267 P.3d 435 (2011).

---

<sup>7</sup> Because we conclude that the CC&R's did not form a contractual relationship between the parties, we do not decide whether a genuine issue of material fact existed.

Both parties agreed that the 1986 CC&Rs applied. The resolution of this cause of action rests entirely on a legal interpretation of paragraph 16.4 and whether it formed a contractual relationship between the parties. The CC&Rs were developed for the Spinnaker Ridge community long before either the Guests or the Langes purchased a home in the community. It is clear that the plain language of this paragraph is not a contract between the Langes and the Guests. Nothing in the CC&Rs gives one homeowner a contract cause of action against another homeowner. The elements of a contract are missing. The parties did not agree with each other. Because the CC&Rs do not grant any contract rights, the Guests would have no basis to sue the Langes for breach of the CC&Rs.

The Guests rely on *Piepkorn v. Adams*, 102 Wn. App. 673, 10 P.3d 428 (2000), as support for their argument that the CC&Rs provide for a cause of action in contract. This reliance is misplaced. In *Piepkorn*, the court held that an adjoining landowner could get injunctive relief but could not recover damages. 102 Wn. App. at 685-86.

The trial court did not err by dismissing this cause of action because there is no contract between the parties based on the CC&Rs.

C. TRIAL COURT'S DISMISSAL OF GUESTS' CLAIM OF BREACH OF INDEMNITY

The Guests argue that the trial court erred by dismissing their breach of indemnity claims because the trial court's ruling was contrary to the plain language of paragraph D of the Easement. We disagree.

1. Legal Principles

“Indemnity agreements are essentially agreements for contractual contribution, whereby one tortfeasor, against whom damages in favor of an injured party have been assessed, may look to another for reimbursement.” *MacLean Townhomes, L.L.C. v. Am. 1st Roofing & Builders Inc.*,

133 Wn. App. 828, 831, 138 P.3d 155 (2006) (quoting *Stocker v. Shell Oil Co.*, 105 Wn.2d 546, 549, 716 P.2d 306 (1986)). “When interpreting an indemnity provision, we apply fundamental rules of contract construction.” *Maclean Townhomes*, 133 Wn. App. at 831. The words used in a contract should be given their plain and ordinary meaning. *Maclean Townhomes*, 133 Wn. App. at 831. “Courts may not adopt a contract interpretation that renders a term absurd or meaningless.” *Maclean Townhomes*, 133 Wn. App. at 831.

2. The Trial Court Properly Granted Summary Judgment on the Breach of Indemnity Claim

The indemnity provision on which the Guests rely is contained in paragraph D of the Easement. A plain reading of this language shows that it is to bind the indemnitor with respect to claims asserted against the indemnitee by third parties. This interpretation is in accord with *City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584, 269 P.3d 1017 (2012). In *City of Tacoma*, the court interpreted the broad language of an indemnity provision. 173 Wn.2d at 593. It held that while Tacoma agreed to indemnify and defend another city, the proposed “interpretation produces an absurd result . . . : Tacoma would be forced to bear all costs for litigation when any dispute over contractual performance between parties arises. That result simply cannot be obtained from reading the provision as it currently exists.” *City of Tacoma*, 173 Wn.2d at 594.

The indemnity clause does not mean, as the Guests propose, that the Langes would be required to indemnify them for all claims related to the Easement in any way. The only reasonable interpretation of the clause is that it only applies to suits related to injury, or where a plaintiff might sue the Guests because of injury caused by or on the Langes’ deck. It does not apply to the circumstances of this case.

The trial court did not err by granting the Langes’ summary judgment motion on the Guests’ claim of breach of indemnity.

D. THE TRIAL COURT DID NOT ERR IN REFUSING TO CONSIDER NEW EVIDENCE OR MODIFY THE PARTIAL SUMMARY JUDGMENT ORDER

The Guests argue that the trial court erred by refusing to hear additional evidence on the partial summary judgment motion or to continue the hearing.<sup>8</sup> We disagree.

1. CR 56(f) Declarations

A trial court may accept affidavits at any time before issuing its final order on summary judgment. *Felsman v. Kessler*, 2 Wn. App. 493, 498, 468 P.2d 691 (1970); *see Jobe v. Weyerhaeuser Co.*, 37 Wn. App. 718, 727, 684 P.2d 719 (1984). Its decision on whether to accept or reject untimely filed affidavits lies within the trial court's discretion. *Felsman*, 2 Wn. App. at 498. A "trial court has discretion to reject an affidavit submitted after the motion has been heard." *Brown v. Peoples Mortg. Co.*, 48 Wn. App. 554, 559, 739 P.2d 1188 (1987). We review the trial court's decision for an abuse of discretion. *Brown*, 48 Wn. App. at 559.

CR 56(f) states:

Should it appear from the affidavits of a party opposing the motion that, for reasons stated, the party cannot present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

The trial court did not abuse its discretion by declining to consider the declarations the Guests presented. At the presentation of the summary judgment order, the Langes told the trial court they did not receive the declarations until that morning. The trial court declined to consider the Guests' declarations because they were untimely and the Guests were attempting to potentially add other parties.

---

<sup>8</sup> The Guests also assign error to the trial court's denial of their motion in limine as to the invalidity of the Easement. Their brief does not argue this point or cite to authority or to the record. We do not review it. RAP 10.3(6).

Under CR 59(b), “[a] motion for a new trial or for reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision.” If the Guests wanted the trial court to reconsider its decision on the summary judgment motion because of newly discovered evidence the Guests could not have obtained previously with reasonable diligence, they should have filed a motion for reconsideration on that issue. CR 59(a)(4). They failed to do so. If a party fails to timely move for reconsideration, the party is “not entitled to relitigate the facts and issues decided on summary judgment.” *Barrett v. Friese*, 119 Wn. App. 823, 851, 82 P.3d 1179 (2003).

In addition, RAP 9.12 provides that:

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. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered. Documents or other evidence called to the attention of the trial court but not designated in the order shall be made a part of the record by supplemental order of the trial court or by stipulation of counsel.

We will not consider this issue further because the Guests did not submit their declarations to the trial court before it considered summary judgment arguments.

### III. JURY INSTRUCTIONS

The Guests argue that the trial court erred in instructing the jury because it misstated the definition of consideration, it instructed the jury that the Easement created a valid easement, and it failed to provide an instruction defining the duty of good faith and fair dealing. We disagree.

#### A. Standard of Review

Generally, we review a trial court’s decision on whether to give a jury instruction for an abuse of discretion. *Tuttle v. Allstate Ins. Co.*, 134 Wn. App. 120, 131, 138 P.3d 1107 (2006). But where a trial court’s decision to give an instruction is based on a ruling of law, we review the ruling



de novo. *Tuttle*, 134 Wn. App. at 131. If an instruction contains an erroneous statement of the applicable law it is reversible error if it prejudices a party. *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 453, 105 P.3d 378 (2005). Our Supreme Court summarized the standard of review in *Keller v. City of Spokane*, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002): “Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law. Even if an instruction is misleading, it will not be reversed unless prejudice is shown. A clear misstatement of the law, however, is presumed to be prejudicial.” Error is prejudicial if it affects or presumptively affects the outcome of the trial. *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983).

#### B. Jury Instruction 9—Definition of Consideration

The Guests argue that the trial court erred by instructing the jury on the definition of consideration because it misstated the law. We disagree.

We review this definitional instruction de novo. *Tuttle*, 134 Wn. App. at 131. The trial court’s instruction stated “If you find that plaintiffs justifiably relied on defendants’ promise not to build a new deck in the area identified in the patio or deck easement, then there was consideration.” CP at 4747. This instruction did not misstate the law.<sup>9</sup> “Every contract must be supported by a consideration to be enforceable.” *King v. Riveland*, 125 Wn.2d 500, 505, 886 P.2d 160 (1994). “Consideration is any act, forbearance, creation, modification or destruction of a legal relationship, or return promise given in exchange.” *King*, 125 Wn.2d at 505. To constitute

---

<sup>9</sup> It was based on a patterned instruction. 6A WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 301.04, at 178-79 (6th ed. 2009).

consideration, an act or promise “must be bargained for and given in exchange for the promise.” *King*, 125 Wn.2d at 505.

The trial court’s instruction accurately stated the law and allowed both parties to argue their theories of the case. In fact, during closing argument the Guests argued,

You have heard evidence that when [the Langes] wrote us by e-mail on March 12th, after we had reached this agreement, after they had made the promise, after we had this contract, that they wrote us and they asked us for permission to extend further . . . and would we allow them to go further forward, which is actually south, but further forward.

That all on its own is an admission to you that, yes, we did have a contract. Yes, we did have an agreement, and that they recognized that what was required at that point was to ask our permission.

RP (July 15, 2014) at 139.

We conclude that the trial court did not err by instructing the jury on the definition of consideration because the instruction properly informed the jury of the applicable law.

C. Jury Instruction 17—Valid Easement

The Guests argue that the trial court erred in instructing the jury that there was a valid easement because they demonstrated at trial that the easement was invalid. We disagree.

Here, the trial court based its decision to give the jury instruction on its previous summary judgment ruling that the Easement created a valid easement. Such ruling has not been appealed. Therefore, we review this instruction de novo. *Tuttle*, 134 Wn. App. at 131.

An express conveyance of an easement by grant or reservation must be made by written deed, signed by the party bound by the deed, and the deed must be acknowledged. RCW 64.04.010; 64.04.020. Accordingly, a deed of easement is required to convey an easement that encumbrances a specific servient estate. *Berg v. Ting*, 125 Wn.2d 544, 551, 886 P.2d 564 (1995). Similarly, a “deed of easement is not required to establish the actual location of an easement, *but*

*is required to convey an easement' which encumbrances a specific servient estate."* *Berg*, 125 Wn.2d at 551 (quoting *Smith v. King*, 27 Wn. App. 869, 871, 602 P.2d 542 (1980)). The agreement to the easement by the owner of the servient estate is a vital element in the creation of an easement. *Beebe v. Swerda*, 58 Wn. App. 375, 382, 793 P.2d 442 (1990).

"No particular words are necessary to constitute a grant, and any words which clearly show the intention to give an easement, . . . are sufficient." *Beebe*, 58 Wn. App. at 379. "In general, deeds are construed to give effect to the intentions of the parties, and particular attention is given to the intent of the grantor when discerning the meaning of the entire document." *Zunino v. Rajewski*, 140 Wn. App. 215, 222, 165 P.3d 57 (2007).

Because the Guests have not appealed from the trial court's summary judgment order determining the validity of the easement, it is valid, and the trial court properly instructed the jury.

#### D. Jury Instruction on Good Faith and Fair Dealing

The Guests contend that the trial court erred by failing to instruct the jury on the duty of good faith and fair dealing, despite agreeing to provide the instruction. They argue that the failure to instruct the jury on this issue prejudiced them. We do not consider the issue because the Guests' waived their right to appeal the issue when they failed to object to the missing instruction.

It is well settled that an "appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). The Guests did not object to the trial court's failure to give the instruction. The trial court asked the parties to check the jury instruction packet and "agree with [the court] that it encompasses the Court's ruling on the instructions." RP (July 15, 2014) at

121. Both parties agreed the packet included the instructions. The trial court read the packet aloud to instruct the jury, and still, the Guests did not object. Finally, when the jury posed a question about the duty of good faith and fair dealing, the Guests still did not realize the mistake or object to the trial court's answer to the question.

Therefore, we do not consider the issue because the Guests failed to preserve this issue on appeal.

IV. CUMULATIVE ERROR—(JUDGMENT AND QUIETING TITLE)

The Guests argue that the cumulative errors in this case denied them a fair trial. We determined that the trial court did not commit any errors below, thus, the Guests' arguments regarding cumulative error are without merit, and we need not consider the issue further.

V. ATTORNEY FEES

The Guests argue that we should award them attorney fees as the prevailing party under RAP 18.1 and paragraph D of the Easement.<sup>10</sup> The Langes argue that the Guests are not entitled to attorney fees because Washington courts follow the American rule, and the Guests failed to cite to any legal authority in their argument for attorney fees. Br. of Resp't at 48.

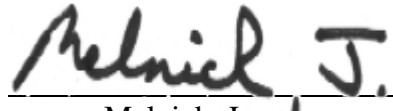
The Guests did not adequately address the issue of attorney fees in their opening brief because they failed to cite to any legal authority in support of their argument. RAP 18.1(b). Nonetheless, the Guests are not the substantially prevailing party on appeal, and they are not entitled to attorney fees. RAP 14.2; 18.1.

---

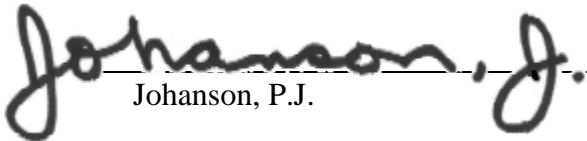
<sup>10</sup> The trial court determined on summary judgment that the Easement did not provide for indemnification in this case, and therefore, this argument has no basis.

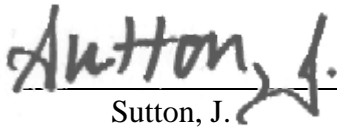
We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

  
\_\_\_\_\_  
Melnick, J.

We concur:

  
\_\_\_\_\_  
Johanson, P.J.

  
\_\_\_\_\_  
Sutton, J.