IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

POINTE II ON SEMIAHMOO OWNERS ASSOCIATION dba SUNSET POINTE OWNERS' ASSOCIATION LLC, Appellants/Cross-Respondents, v. CLYNT NAUMAN and JAN NAUMAN, husband and wife and the marital community comprised thereof, Respondents/Cross-Appellants, and DEAN FRANCIS and ROSEMARIE FRANCIS, husband and wife and the marital community comprised thereof, Appellants/Cross-Respondents.	)	No. 67762-4-I consolid. w/ 67960-1-I DIVISION ONE UNPUBLISHED OPINION FILED: February 19, 2013

Spearman, A.C.J. — Clynt and Jan Nauman sought to build a boathouse on their property in the Pointe on Semiahmoo Phase II residential development in Blaine, Washington. The Sunset Pointe Owners' Association, LLC (Association) denied the Naumans' application, and filed suit against them in part because of a dispute about dirt that was piled in a common area in preparation for building the boathouse. The

Naumans counterclaimed for breach of the Association's Declaration of Covenants, Conditions, and Restrictions, arguing that the Association denied the permit in bad faith. The Naumans' neighbors, the Francises, intervened, seeking a declaration that a gravel access road in the common area was actually an exclusive easement in favor of their lot.

After a bench trial, the trial court found largely in favor of the Naumans. Because the record contains substantial evidence supporting the trial court's findings of fact, and those findings in turn support the court's conclusions of law, we affirm.

FACTS

Clynt and Jan Nauman are residents of the Pointe on Semiahmoo Phase II, a 12-lot residential development in Blaine, Washington. The Naumans own Lots 10 and 11 in the subdivision. Dean and Rosemarie Francis are owners of Lot 12, which is adjacent to the Naumans. There are only six resident owners among the 12 lots; other owners include Dr. Alan Williams, Barry Marshall, Jon Lee, and Kim Alfreds. The residents of the subdivision are governed by the Association, a homeowners' association whose members, including both the Naumans and the Francises, own lots within the subdivision. Mr. Nauman's testimony at trial indicated that the Association was formerly governed by a board of directors (Board) that was comprised of five residents, but later included only three residents. Neither Jan nor Clynt Nauman have served on the board since 2003, when Jan Nauman voiced concerns over the board's handling of financial matters and her concern that certain lot owners were treated more

favorably than others.

Each lot within the subdivision is accessed by way of a private road (Pointe Road North) which connects the subdivision to Semiahmoo Drive. Pointe Road North does not directly abut any of the lots, and as such, each owner must cross a "common area" to access their lot. The lots owned by Francis (Lot 12) and Alfreds (Lot 1), on the north and south ends of the subdivision, are separated from Pointe Road North by a larger amount of common area than the other lots. The plat shows two areas within the common area described as "Gravel Access Drive" (GAD). See Def. Ex. 1. One GAD reaches Lot 12 and the other GAD reaches Lot 1. In this case, the GAD reaching Lot 12 is in dispute. It is located to the east of Lots 11 and 12.

The Naumans decided to build a boathouse on their property to store their fishing boat. The Naumans' house is on Lot 11. The Board had previously told the Naumans that no accessory structure would be allowed on Lot 10 unless there was a primary residence on the lot. As such, the Naumans decided to locate the boathouse on the northeast corner of Lot 11. This location would require the Naumans to use part of the gravel access drive to access the boathouse. Mr. Nauman testified his use of the boat would be very limited and would not interfere with the Francises use of the gravel access drive.

The Association's Declaration of Covenants, Conditions, and Restrictions (CCRs) require that members obtain approval from an "Architectural Reviewer" before making any improvements on their property. When the Naumans presented their

boathouse plans to the board in October 2007, the Architectural Review Committee (ARC) (comprised of Williams, Marshall, and Alfreds) met with the Association's lawyer to discuss the boathouse plans. The board decided to outsource architectural review of the boathouse proposal. This outsourcing of review was atypical; the board had previously used an informal and friendly process and had approved similar projects. For example, the board had previously informally approved the Francises' construction of a large home on Lot 12 without outsourcing to an outside reviewer. ("Although the house plan was approved on Kim's yacht a couple of months ago, it may be a good idea to get it all in properly in the case that anything [is] challenged by any concerned party"). The Naumans testified that they were surprised the board was concerned about the proposed use of the GAD, as it was common area for the benefit of all members, and the Naumans and other residents had historically used and maintained the GADs without any objection.

On December 6, 2007, while waiting for approval of the boathouse application, the Naumans cleaned up and smoothed out the ground in the area where the boathouse was proposed to be located. The Naumans "scraped" the area and deposited excess dirt on the common area under a tarp, for "temporary storage." Verbatim Report of Proceedings (VRP) at 167, 170-71, 175, 206, 208. The Naumans believed this was acceptable as it was the "normal practice" among members of the Association to use the common area when doing work on their property. The trial court found that the Naumans' actions and expectations "were reasonable and in good faith."

Clerk's Papers (CP) at 971(finding of fact 15), and that depositing dirt in the common area "was consistent with prior similar uses by members that did not require approval of the Association[.]" Id.

The board took the position that the Naumans had violated the CCRs by doing groundwork on their property and by depositing dirt on the common area. The following day, the board signed a resolution that the work performed by Nauman was a "flagrant breach" of the CCRs and directed the Association's attorney to "take the maximum permissible and/or remedial action that is allowed." Defendant's Exhibit (Def. Ex.) 2. The board approved a $10,000 fine against the Naumans. Eight days later, the Association filed suit against the Naumans for trespass and violation of the Association's CCRs for the pile of dirt deposited on the common area.

The Naumans counterclaimed, alleging that the Association's denial of their boathouse application was unreasonable and done in bad faith, and that the Association breached fiduciary duties and the CCRs by failing to preserve the common areas for the benefit of all members. The Francises intervened seeking a determination that the GAD was an exclusive easement for the benefit of the Francises' property.

Before trial, the court ruled on a motion for partial summary judgment that the Naumans had committed trespass by depositing soil on the common area located east of their home. The court declined, however, to hold that the Naumans had violated the CCRs and ordered that that claim be tried, along with several of the Naumans' counterclaims.

After a bench trial, the court found largely in favor of the Naumans. The court concluded that although the Naumans' actions "technically" amounted to trespass, the actions were "reasonable and in good faith." CP at 971 (finding of fact 15; CP at 981 (conclusion of law 1). On the Naumans' counterclaims, the court rejected the Association's argument that it "'had no choice but to file suit against the Naumans,'" and found that instead, the Association's actions were "'retaliatory against the Naumans in response to prior years of animosity between the parties. . . .'" CP at 972 (finding of fact 16). The court concluded that the Association denied the Naumans' boathouse permit in bad faith by (1) applying protocols and standards with which no member had previously been required to comply; and (2) adopting a faulty legal position that the gravel access drive was an exclusive easement for the benefit of the Francises. The court also concluded that the Association breached fiduciary duties and Section III of the CCRs by failing to preserve the common areas for the benefit of all members.

The court ordered that the Naumans' proposed boathouse plan, as modified by the replacement architectural reviewer Mr. Landsem, be approved. The court awarded a small amount of damages to the Association for the Naumans' trespass, and awarded fees and costs to the Naumans for those issues relating to the counterclaims on which they prevailed. The court also ordered that an exclusive easement granted by the Association to the Francises in June 2011 "is subordinate to all rights, declarations, judgments, orders and injunctive relief granted through this Judgment and this case,

including but not limited to the Defendants' right to construct the boathouse and use the Common Area and/or Gravel Access Drive[.]" CP at 497.

DISCUSSION

Bad faith rejection of boathouse application. The Association argues the trial court erred by concluding the Association unreasonably rejected the Naumans' boathouse application in bad faith. We disagree.

"[C]ovenants providing for consent before construction or remodeling will be upheld so long as the authority to consent is exercised reasonably and in good faith." Riss v. Angel, 131 Wn.2d 612, 625, 934 P.2d 669 (1997); see also Day v. Santorsola, 118 Wn. App. 746, 758, 76 P.3d 1190 (2003). On this issue, the trial court made the following relevant conclusions of law:

> 9) The Naumans' boathouse application to the Association (more properly characterized as an application to construct a garage to be used to store a boat) was completed and submitted in material compliance with Section VI of the CCRs based on the requirements of Section VI and the prior history of similar applications by other members.
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> 11) The denial of the Naumans' boathouse application was arbitrary, capricious, and in bad faith, and the Association's consent was unreasonably withheld on multiple bases, including without limitation as follows:
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> a. The Association required the Naumans' boathouse application to comply with the more restrictive Architectural Guidelines, the Architectural Review Checklist, and the SMA despite that no member has previously been required to comply with these application protocols and standards in similar circumstances and none of these protocols and standards had been properly adopted by the Association.

b. The Association's denial of the Naumans' boathouse application was based in substantial part on a legal position adopted by the Association's Board of Directors that the GAD to Lot 12 through the eastern common area was an exclusive easement for the benefit of Lot 12 that the Naumans had no right to impede. The Francises intervened based on the same legal position. As a matter of law, the Court finds that the Association and the Francises are wrong for the following reasons:

i. The Court finds that the GAD to Lot 12 is not an easement, exclusive or otherwise, based on its reading and interpretation of the plat map, CCRs, Bylaws, Statutory Warranty Deeds, and other evidence at trial including related exhibits (collectively, "GAD-related Trial Exhibits"), and including the testimony of Richard Prieve, which the Court found to be inconsistent and inconclusive on the GAD/easement issue.

ii. The evidence, including the GAD-related Trial Exhibits, establishes that no owner was granted greater access rights to their respective lots than other owners. The reference to "Gravel Access Drive" for Lots 1 and 12 did not create an easement by these words, and the reference appears to be simply to show the extended access drive necessary to access the Lots 1 and 12 at the extreme northern and southern ends of the Sunset Pointe development.

iii. The Court finds that the Association had never previously asserted the GAD to Lot 12 (or the similar GAD to Lot 1) was an exclusive easement prior to the Naumans' boathouse application. Nor had the Alfreds, as owners of Lot 1, ever previously asserted that the GAD to Lot 1 was an exclusive easement. . . .

. . .

v. The Court finds that the Association's position on the character of the GAD to Lot 12 was adopted purposely, deliberately and in bad faith by the Association, in complicity with and at the urging of the Franc[is]es, to improperly deny the Naumans' boathouse application. . . .

c. The Association, directly and through its designated

> Architectural Reviewer, Mr. Telgenhoff, imposed setback requirements beyond those imposed on other members in similar circumstances, and refused to grant variances or to authorize reasonable uses of the common areas that had been freely granted to other members in similar circumstances. The Association's inconsistent and purposely selective enforcement of Section VI of the CCRs against the Naumans was arbitrary, capricious and in bad faith.

CP at 984-89. In other words, the gravamen of the trial court's conclusions of law is that the Association denied the Naumans' boathouse permit in bad faith by (1) applying more formal protocols and standards to the Naumans that typically were not applied to other members; and (2) adopting a faulty legal position that the gravel access drive was an exclusive easement for the benefit of the Francises.

The Association spends much of its opening brief arguing it did not deny the boathouse application in bad faith because it appointed an independent architectural reviewer to assess the application, and because that reviewer conducted his review in accordance with architectural guidelines that were adopted by the Association's Board of Directors. But these arguments fail to take into account our standard of review. The question we must answer is whether the trial court's conclusions of law are supported by its findings of fact. Hegwine v. Longview Fibre Co., Inc., 132 Wn. App. 546, 555, 132 P.3d 789 (2006).

Unchallenged findings of fact are verities on appeal. Keever & Associates, Inc. v. Randall, 129 Wn. App. 733, 741, 112, 119 P.3d 926 (2005). We review challenged findings to determine if they are supported by substantial evidence. Substantial evidence is that sufficient to persuade a fair-minded person of the finding's truth. City of

Tacoma v. William Rogers Co. Inc., 148 Wn.2d 169, 191, 60 P.3d 79 (2002). There is a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence. Fisher Properties, Inc. v. Arden–Mayfair, Inc., 115 Wn.2d 364, 369, 798 P.2d 799 (1990). An appellate court may not substitute its evaluation of the evidence for that made by the trier of fact. Goodman v. Boeing Co., 75 Wn. App. 60, 82-83, 877 P.2d 703 (1994). "[T]he substantial evidence standard is deferential and requires the appellate court to view all evidence and inferences in the light most favorable to the prevailing party." Lewis v. Dep't of Licensing, 157 Wn.2d 466, 468, 139 P.3d 1078 (2006) (citing, State v. Pierce County, 65 Wn. App. 614, 618, 829 P.2d 217 (1992).

The following findings, which are unchallenged by the Association and are therefore verities, support the trial court's conclusions on bad faith:

> 15) Mrs. Nauman's actions and expectations were reasonable and in good faith in light of the extensive testimony of multiple witnesses, including Mr. Williams and Mr. Marshall, regarding the history of the Association's actions and policies in similar circumstances:
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> a. Similar applications of the nature and scope of the Naumans' application had been routinely approved for other members, subject only to the normal collaborative process with the ARC (e.g., the construction of Alfreds, Lee, Williams', and Francises' residences and landscaping, Defendants' Tr. Exh. 15-19, 23-27, 29-32);
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> 17) The Association's action by filing suit against the Naumans is inconsistent with the Association's handling of prior instances of breaches of Section VI of the CCRs, for example, by Mr. Lee and the Francises during construction

> of their respective residences. Mr. Lee was admonished verbally and in writing after-the-fact, while the Frances were neither admonished nor penalized in any fashion for performing work on Lot 12 and in the northern and eastern common areas without prior approval. The Francises, in particular, were allowed to proceed with certain aspects of construction of their residence on Lot 12 and common areas without fully complying with the AR Process.
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> 18) The Association's prejudice and retaliation against the Naumans is further reflected by Mr. Alfreds' attempt after the events of December 6, 2007 to cause the Association to retroactively adopt a fine schedule for breaches of the CCRs and to impose a $10,000 fine against the Naumans for their actions on December 6, 2007.
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> 21) The Williams, Lee and Francis residences were all evaluated and approved, in substantial part, through the ARC and the AR Process. Testimony was consistent by all witnesses that the AR Process through the ARC had historically been a collaborative neighborhood-friendly process, in which concerns or deficiencies in the initial applications were addressed through suggested minor changes and the projects were approved. . . .

CP at 971-74.

Finding of facts 16 and 29 also support the trial court's conclusions. Those findings read as follows:

> 16) The Association testified through Dr. Williams and Mr. Marshall that the Naumans' actions on December 6, 2007 were in defiance of the Association's rights and the AR Process – that the Naumans had "thrown down the gauntlet," that the Naumans were playing a game of "gotcha," and that the Association had "no choice but to file suit against the Naumans." The Court does not find this testimony to be credible. The Association's actions were retaliatory against the Naumans in response to prior years of animosity between the parties, including, without limitation:
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> a. Mrs. Nauman's questioning of the Association's finances and expenditures and failure to follow governance formalities required by the CCRs and Bylaws;

> b. The Naumans' complaints to the Association about allowing the usurpation of common area[s] by the Alfreds and the Frances and appearance of favoritism; and
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> c. The Association's filing of liens against the Naumans' properties and threats of foreclosure.
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> 29) In sum, based on the totality of the testimony and exhibits introduced at trial, the motives of the Association in denying the Naumans' boathouse application and the decision itself was in bad faith, arbitrary and capricious. The Association had allowed other members to usurp portions of the common area to the south, east and north, and showed favoritism to influential members – particularly to the Alfreds and the Francises in approving projects in the common areas under Section III of the CCRs and on individual lots under Section VI of the CCRs. The Association's actions against the Naumans was retaliatory and discriminatory.

CP at 972. The Association challenges these findings, but viewed in a light most favorable to the Naumans, Lewis, 157 Wn.2d at 468, the findings are amply supported by substantial evidence in the record. See, e.g., 2/22/11 VRP at 816-18 (Mr. Marshall testimony regarding Ms. Nauman's demand for audit of Association); (Mr. Nauman's testimony regarding casual approval of the Francises' house on the Alfreds' yacht); (Mr. Nauman's testimony regarding use of common areas and appearance of favoritism); 2/15/11 VRP at 96-100 (Dr. Williams' testimony regarding use of common areas and appearance of favoritism); (Mr. Nauman's testimony regarding Association filing of liens against the Naumans, and seeking to foreclose on their home).

Moreover, the trial court made its findings on this issue based in part on the credibility of the witnesses. Specifically, the court found "Mrs. Nauman's testimony to

be credible[,]" CP at 971, and did not find Mr. Marshall and Dr. Williams' testimony credible. We defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence and credibility of the witnesses. Boeing Co. v. Heidy, 147 Wn.2d 78, 87, 51 P.3d 793 (2002) (disapproved on other grounds; Harry v. Buse Timber & Sales, Inc., 166 Wn.2d 1, 201 P.3d 1011 (2009)).

Regarding the issue of whether the gravel access road was an exclusive easement in favor of Lot 12 (owned by the Francises) granted by the plat, the parties spend much of their briefs arguing about what language is necessary to establish an easement. "No particular words are necessary" to constitute the grant of an easement, and any words "which clearly show the intention to give an easement" are sufficient. Zunino v. Rajewski, 140 Wn. App. 215, 222, 165 P.3d 57 (2007). The trial court concluded there was no clear intent to establish an easement. On this issue, the trial court made the following findings:

> 27) The Court disagrees with the factual basis for the denial of the Naumans' boathouse application, because it finds:
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> a. The GAD is only an access road to Lot 12. The evidence, including the GAD-related Trial Exhibits fails to show a clear intent to create an easement, exclusive or otherwise. Mr. Prieve's testimony was not only inconsistent on the easement issue, but his testimony sought to add words to the Sunset Point plat, CCRs, and Bylaws that do not exist. Further, he acknowledged that he did not have personal knowledge of any changes that may have been agreed to by the County and the original developer between the preliminary plat approval and final plat approval.
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> iii. The Court finds that the Association had never previously asserted that the GAD to Lot 12 (or the similar GAD to Lot 1) was an exclusive easement prior to the Naumans' boathouse application. Nor had the Alfreds, as owners of Lot 1, ever previously asserted that the GAD to Lot 1 was an exclusive easement. The Alfreds had been previously approved by the Association to extensively landscape and improve the common area adjacent to their lots at their expense, including the paving and curbing of the GAD to Lot 1 and the entrance to Lot 2. These earlier actions by the Association and the Alfreds are inconsistent with the legal position later taken by the Association in denying the Naumans' boathouse application with respect to the legal character of the GAD to Lot 12.

CP at 978 (finding of fact 27); CP at 987 (factual finding contained within conclusion of law 11(b)(iii)).

Regarding the latter finding, when viewed in a light most favorable to the Naumans, the finding is supported by substantial evidence in the record. Lewis, 157 Wn.2d at 468. Mr. Nauman testified that the Alfreds were permitted to landscape and improve the common area adjacent to their lots in such a way that it "subsumed" the common area, including installing "ornamental fountain type gardens and lighting." 2/17/11 VRP at 505. The Association also challenges finding of fact 27, but again, viewed in a light most favorable to the Naumans, the finding is supported by substantial evidence in the record. The plat itself does not describe the gravel access drives as "easements." Rather it simply labels them "gravel access drive." This is in contrast to the drainfield easements, which are specifically identified in the plat as "drainfield easement." Moreover, the gravel access drives are located within the common areas identified in the plat, which are defined in the CCRs as being "dedicated for the

beneficial use and enjoyment of the lot owners of the Subdivision." Trial Exhibit 2, page 6.[1]

In sum, the trial court's conclusions of law that the Association denied the Naumans' boathouse permit in bad faith by (1) applying more formal protocols and standards to the Naumans that typically were not applied to other members; and (2) adopting a faulty legal position that the gravel access drive was an exclusive easement for the benefit of the Francises, are supported by the trial court's findings of fact. Those findings of fact, in turn, are either unchallenged, or are supported by substantial evidence in the record.

Statute of limitations. In addition to its conclusion that the Association denied the Naumans' boathouse application in bad faith, the trial court also concluded that the Association breached fiduciary duties and Section III of the CCRs by failing to preserve the common areas for the benefit of all members. The Association argues these claims are barred by a three-year statute of limitation, which they claim began to run in 2002, when the Naumans learned the Association had given permission to homeowners to landscape common areas.

We disagree. Although the Association wishes to frame the alleged injury as the date when the Association gave approval to landscape common areas, there is nothing to indicate that such approval alone demonstrates a failure to preserve common areas

[1] The Francises likewise argue that the trial court erred in concluding the gravel access drive was not an easement, exclusive or otherwise, to Lot 12. We reject this argument for the same reasons we rejected the Association's argument.

"for the benefit of all members." Instead, the events triggering the Naumans' knowledge that the Association failed to preserve common areas for the benefit of all include the Associations 2007 denial of the Naumans' boathouse application and decision to sue the Naumans for temporarily placing a pile of dirt on the common area, something it had previously permitted other owners to do. Given it is undisputed, these events occurred less than three years before the Association filed suit, the Naumans' counterclaims are not barred.[2]

Standing. The Francises claim the Naumans lack standing to argue the gravel access drive is not an easement. Specifically, they contend the Naumans lacked standing because the issue of whether the gravel access drive is an easement is an issue between only the Association and the Francises. We disagree. Not only is the gravel access drive located within a common area that is for the benefit of all owners, it was the Association that used the allegedly exclusive easement as a reason to deny the Naumans' boathouse application.

Segregation of Attorney Fees awarded below. This court reviews an award of attorney fees for an abuse of discretion. Rettkowski v. Department of Ecology, 128 Wn.2d 508, 519, 910 P.2d 462 (1996). The Association claims the trial court abused its discretion because the trial court failed to segregate those fees related to the claims upon which the Naumans prevailed from other fees. But as the Naumans point out, the Association failed to assign error to any of the trial court findings of fact on attorney

[2] In light of our resolution of this issue, we need not address the Naumans' conditional cross-appeal of the trial court's application of a three year statute of limitation.

fees, and as such, they are verities on appeal. Keever & Associates, 129 Wn. App. at 741. These unchallenged findings state that "the attorney's fees claimed by Defendants and awarded by the Court . . . arise out of and are reasonably related to either the prosecution or defense of claims upon which the Defendants prevailed at trial" and that the fee award included no "unwarranted charges." CP at 2776-77 (findings 3, 5).

The Association responds that a single line, which included no citation to the record, in the argument section of its opening brief amounts to an assignment of error regarding the attorney fee findings of fact: "The findings that segregation was not possible are unsupported by substantial evidence." But even if we conclude the Association sufficiently preserved the error, the record contains substantial evidence supporting the trial court's finding. Counsel for the Naumans filed a declaration indicating that "fees have already been discounted and segregated for work not related to the issues upon which the Naumans prevailed in this suit[.]" CP at 522.

Attorney Fees on appeal. The Naumans seek attorney fees and costs on appeal as the prevailing party. A prevailing party may recover attorney fees authorized by statute, equitable principles, or agreement between the parties. Wiley v. Rehak, 143 Wn.2d 339, 348, 20 P.3d 404 (2001). This court may award attorney fees to the substantially prevailing party on the same grounds attorney fees were awarded below. See RAP 18.1. The basis of the trial court's award of attorney fees was the CCRs, which provide: "In any action to enforce any such covenant, restriction or condition, the prevailing party or parties in the action shall be awarded costs, including reasonable

attorney fees." Def. Trial Ex. 2. Given the Naumans are the prevailing party, we award the Naumans their reasonable fees and costs incurred on appeal.

Affirmed.

Spearman, A.C.J.

WE CONCUR:

Verellen, J.

Dwyer, J.