IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ROGER ULRICH and DIANE ULRICH, a marital community,	)	No. 81351-0-I
Appellants,	)	DIVISION ONE
v.	)	UNPUBLISHED OPINION
AHMET TAYFUN GURBUZ, and STEPHANIE LEHWALD GURBUZ, a marital community,	)	
Respondents.	)	

COBURN, J. — A view covenant restricts the height of structures on an Issaquah property formerly owned by Ahmet and Stephanie Gurbuz (Gurbuz Property). Roger and Diane Ulrich own the property across the street (Ulrich Property). The Ulrichs sued the Gurbuzes and sought injunctive relief after the Gurbuzes constructed a chimney that the Ulrichs claimed violated the view covenant. The trial court summarily dismissed the Ulrichs' claim for injunctive relief. The Ulrichs appeal. Because the Ulrichs failed to raise a genuine issue of material fact as to whether the chimney violated the view covenant, we affirm.

FACTS

The Gurbuz Property and the Ulrich Property are both located in the Issaquah Highlands community. The Gurbuz Property is subject to a view

covenant that limits the height of structures constructed on that property. The covenant provides that the maximum "ridge height" elevation for the Gurbuz Property is 1,063 feet above sea level. The covenant defines "ridge height" as "the height of the highest portion of the roof of a structure, *except that chimneys may extend above the ridge height to the extent required by the applicable Building Code*." (Emphasis added.) The covenant requires lot owners to report suspected view covenant violations to the Issaquah Highlands Community Association (Association).

In early 2013, the Gurbuzes retained architect Philip McCullough and his firm to design a custom home on the Gurbuz Property. On December 10, 2018, while the home was under construction, the Ulrichs emailed Gurbuz[1] to indicate that they were "concerned about the height of [the] chimney." The Ulrichs wrote:

> The covenant permits a chimney to extend above the ridge height to the extent that it meets code requirements (which is 2 feet higher than any part of the roof within 10 feet) but does not permit exceeding this. Your chimney is several feet higher than permitted by covenant, and unfortunately now dominates our panoramic view.

Two days later, the Ulrichs wrote to Sarah Hoey, the Association's executive director, to lodge a formal complaint.

That same day, Hoey, on behalf of the Association, instructed Gurbuz by letter to "immediately cease and desist from further construction of the chimney

[1] In this opinion, "Gurbuz" refers to Ahmet Gurbuz.

at [the Gurbuz Property]." In her letter, Hoey indicated that "[a] formal complaint has been filed . . . stating that the chimney being constructed exceeds the maximum ridge height and is significantly obscuring the view covenant protection for [the Ulrich Property]." Hoey explained, "Per the 2015 International Residential Code, Chapter 10 section R1003.9 Termination[,] 'Chimneys shall extend not less than 2 feet . . . higher than any portion of a building within 10 feet . . . .' The chimney depicted must meet the minimum code requirements." Hoey requested Gurbuz "submit in writing a plan to remedy this situation" within 10 business days.

On December 14, 2018, McCullough emailed Hoey that Gurbuz "ha[d] instructed the contractor to reduce the chimney by 24 [inches] which would be the maximum, code-allowed reduction possible." Hoey responded, "This is an acceptable resolution to this issue, thank you." Hoey also emailed the Ulrichs to inform them of the proposed resolution. The Ulrichs responded, "This is certainly reasonable and it is the resolution we were looking for."

About a month later, on January 14, 2019, the Ulrichs wrote to Hoey again to request "a reassessment of the height violation on [the Gurbuz Property]." The Ulrichs indicated that "in reviewing our many sunset and landscape photos, we have come to realize that the structure in question is not a functional chimney, but rather appears to be a faux chimney (empty box)." The Ulrichs expressed

their belief that "[i]f this is not a functional chimney, then . . . the height of this structure should not exceed the ridge height restriction in the [view] covenant." Hoey subsequently notified McCullough in an email that the Association had received another formal complaint. Hoey indicated that "additional information has been provided to [the Association] that this chimney is not an actual chimney . . . and is merely decorative and not functioning as a chimney." Hoey continued, "Since this box is over the ridge height requirements for this lot, . . . it cannot exceed the ridge height. It would seem that the most practical thing to do at this point would be to remove the box altogether since it serves no purpose and is a violation."

Gurbuz, who was copied on Hoey's email, responded that he was not aware that a fireplace on the first floor of the house had been side vented instead of vertically vented through the chimney. He indicated that "[t]he vent opening on the side wall will be closed [and t]he chimney will be functioning as a chimney as intended originally by the architect."

On January 28, 2019, Erica Buckley, the program manager for the Issaquah Highlands Custom Home Architectural Review Committee (CHARC), wrote to Gurbuz. According to a later declaration from McCullough, the CHARC reviews all proposed plans for homes to be constructed in the Issaquah Highlands community, and "[c]onstruction of homes cannot begin without prior

approval of the design by the [CH]ARC." Buckley wrote to confirm the CHARC's understanding that Gurbuz was "initially unaware that the fireplace had been vented through the sidewall and not the chimney" but had since "directed [his] contractor to remove the side vent, and to vent the fireplace vertically through the chimney." Buckley also stated the CHARC's understanding "that the chimney will be reduced in height by approximately 24 inches to the minimum height that satisfies the Issaquah building code and no higher . . . as a step to ensure the chimney complies with the [view covenant]."

Buckley requested that Gurbuz "have [his] architect correct and submit the plan sheet(s) depicting these changes for the CHARC's review prior to completing the work." McCullough's firm submitted revised drawings to Buckley on February 22, 2019. On March 5, 2019, in a letter to the Ulrichs' attorney, the Association confirmed its determination that the Gurbuzes' chimney, once lowered, complied with the view covenant.

On March 19, 2019, the Ulrichs filed a complaint against the Gurbuzes for breach of the view covenant. The Ulrichs alleged that the Gurbuzes "have had a false chimney structure constructed on the residence on the Gurbuz Property that exceeds the ridge height limit of 1063 feet and no applicable Building Code allows for an exemption from the height limitation." The Ulrichs sought, among other things, damages, attorney fees, and "an Order mandating that [the]

Gurbuz[es] promptly have the false chimney structure . . . lowered to a ridge height no higher than 1063 feet."

PROCEDURE

In December 2019, the Gurbuzes moved for summary judgment. It is undisputed that by then, the Ulrichs' only claim (apart from attorney fees) was for injunctive relief—namely, an order compelling the Gurbuzes to either remove the chimney or lower it to no higher than 1,063 feet. To this end, the Gurbuzes argued that "the balancing of equities would require that [injunctive] relief be rejected by the Court." Relying in part on Riss v. Angel, 131 Wn.2d 612, 934 P.2d 669 (1997), the Gurbuzes also argued that the Ulrichs were "bound by the . . . decisions of the [Association and] the [CH]ARC, which were made in good faith."

McCullough declared, in support of the Gurbuzes' motion, that the CHARC required the Gurbuzes to construct a chimney:

> It also should be noted that the [CH]ARC required . . . Gurbuz to construct a chimney as it is an [CH]ARC design requirement that all homes constructed in the . . . community have chimneys, whether they be functioning or non-functioning, for aesthetics purposes. However, the chimney constructed at the Gurbuz residence is a functioning chimney that is vertically vented, not a "false" chimney.

McCullough also declared that the height reduction the Gurbuzes agreed to in December 2018, after determining the chimney did indeed violate the covenant, "was the maximum, code-allowed reduction possible." He declared, "If the

chimney. . . was lowered any further, it would be in violation of Building Code."

In their opposition to the Gurbuzes' motion, the Ulrichs argued that because the Gurbuzes' fireplace was a gas (not wood burning) fireplace, the applicable code was the International Fuel Gas Code (IFGC), which the City of Issaquah had adopted. Relying on IFGC excerpts attached to a declaration from their expert Tim Coulter, the Ulrichs argued that "[w]hile the general rule for chimneys that vent real wood burning fireplaces is that they be a minimum of [two feet] above a roof top, the IFGC requires that one follow the manufacturer's instructions for installing a chimney for a gas appliance." The Ulrichs submitted installation manuals for the gas fireplaces installed at the Gurbuz residence and asserted that "the manufacturer's instructions require only 16 inches of chimney above the roof top." Thus, they argued, "[t]he Gurbuz[e]s' chimney, at [two feet], is too high and its height must be reduced." The Ulrichs argued further that the Gurbuzes were not entitled to a balancing of the equities and that the court was not required to defer to the Association's judgment.

The trial court granted the Gurbuzes' motion for summary judgment for, according to its written ruling, "two reasons." First, the court stated that "Riss . . . guides the Court" and "[t]he Court concludes that it should defer to the Association." Second, the court concluded that the Gurbuzes were entitled to a balancing of the equities, and the equities weighed against granting injunctive

relief. In balancing the equities, the trial court noted that the Gurbuzes were required to construct a chimney, the Ulrichs participated in the Association's complaint process, which ultimately resulted in the chimney being lowered, and the Ulrichs did not raise their gas-versus-wood theory during that process.

The Ulrichs moved for reconsideration, which the trial court denied. The Ulrichs appeal.

ANALYSIS

The Ulrichs argue that the trial court erred by granting the Gurbuzes' motion for summary judgment.[2] We disagree.

We review summary judgment orders de novo. Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). "[S]ummary judgment is appropriate where there is 'no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.' " Elcon Constr., Inc. v. E. Wash. Univ., 174 Wn.2d 157, 164, 273 P.3d 965 (2012) (second alteration in original) (quoting

[2] In their notice of appeal, the Ulrichs designated both the trial court's order granting the Gurbuzes' motion for summary judgment and the order denying reconsideration. However, the Ulrichs do not assign error to or present any argument addressing the latter order. Therefore, we do not consider whether the trial court erred by denying reconsideration. RAP 10.3(a)(4) and RAP 10.3(6) (requiring appellant's brief to include assignments of error and "argument in support of the issues presented for review"); see also Riley v. Iron Gate Self Storage, 198 Wn. App. 692, 713, 395 P.3d 1059 (2017) (declining to consider challenge to denial of motion for reconsideration where appellant did not present any argument or supporting authority in his appellate brief).

CR 56(c)). "In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact." Young v. Key Pharms., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the moving party satisfies this initial burden, the burden shifts to the nonmoving party to bring forth specific facts to rebut the moving party's contentions. Elcon Constr., 174 Wn.2d at 169. "The nonmoving party may not rely on speculation, argumentative assertions, 'or in having its affidavits considered at face value; for after the moving party submits adequate affidavits, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists.' " Becker v. Wash. State Univ., 165 Wn. App. 235, 245-46, 266 P.3d 893 (2011) (quoting Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986)). Additionally, "[w]e may affirm on any basis supported by the record." Bavand v. OneWest Bank, 196 Wn. App. 813, 825, 385 P.3d 233 (2016).

As discussed, it is undisputed that the Ulrichs' only remaining claim at summary judgment was one for injunctive relief, i.e., an order compelling the Gurbuzes to lower or remove their chimney. "To establish the right to an injunction, the party seeking relief must show (1) that he or she has a clear legal or equitable right, and (2) that he or she has a well-grounded fear of immediate invasion of that right." Hollis v. Garwall, Inc., 137 Wn.2d 683, 699, 974 P.2d 836

(1999); see also Metzner v. Wojdyla, 125 Wn.2d 445, 450, 886 P.2d 154 (1994) (no showing of substantial damage from violation of a restrictive covenant need be shown to enjoin a violation). In other words, to survive summary judgment, the Ulrichs needed to establish, or at least raise a genuine issue of material fact as to whether, the Gurbuzes' chimney violated the view covenant. For the reasons below, they did not.

"The interpretation of a restrictive covenant is a question of law." Pritchett v. Picnic Point Homeowners Ass'n, 2 Wn. App. 2d 872, 879, 413 P.3d 604 (2018). Here, the view covenant provides that chimneys may extend above the ridge height "to the extent required by the applicable Building Code." The trial court did not determine whether the Gurbuzes' chimney exceeded the minimum height required by the building code. Instead, the trial court concluded that even if it did, the Ulrichs were not entitled to equitable relief based on a balancing of the equities. Because our review is de novo, we need not—and do not—defer to the trial court's reasoning. Instead, we conclude that because the Ulrichs failed to raise a genuine issue of material fact as to whether the Gurbuzes' chimney violated the view covenant, summary judgment was proper.

Specifically, it is undisputed that "applicable Building Code" refers to Issaquah's building code, including model codes incorporated therein. It also is undisputed that under the International Residential Code (IRC), which Issaquah

has adopted, the general rule is that "[c]himneys shall extend not less than 2 feet . . . higher than any portion of a building within 10 feet." IRC § R1003.9 (2015 ed.); see also Issaquah Municipal Code (IMC) 16.04.020 (adopting the 2015 IRC with amendments that are not material here); IMC 16.04.010 § 101.5 (providing that model codes are considered part of the requirements of the city code).

The Ulrichs contend, as they did below, that because the Gurbuzes' fireplace is a gas fireplace, the IFGC, which Issaquah has also adopted, see IMC 16.04.070, governs. They also contend that under the IFGC, the Gurbuzes' chimney need satisfy only the fireplace manufacturer's requirement that the vent extend a minimum of 16 inches above the roof penetration.

The Ulrichs' contentions fail. The interpretation of a municipal code, such as Issaquah's building code (and the model codes incorporated therein), is a question of law we review de novo. Sprint Spectrum, L.P./Sprint PCS v. City of Seattle, 131 Wn. App. 339, 346, 127 P.3d 755 (2006). Yet the Ulrichs provide no reasoned legal analysis and cite no authority to support their assertions that (1) the IRC applies only to "chimneys that vent real wood burning fireplaces" and (2) "the IFGC requires that one follow [only] the manufacturer's instructions for installing a chimney for a gas appliance." Instead, they rely solely on two declarations from their expert, Coulter. But the second of Coulter's declarations

was not before the trial court at summary judgment, and thus we do not consider it. See RAP 9.12 ("On review of an order granting . . . a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.").

As for Coulter's first declaration, the analysis therein is flawed. Coulter explained,

> This code compliance path is required by IRC Section R102, Applicability, wherein it is stated that a specific code requirement takes precedence over a general requirement, and IRC Section M1307.1, Appliance Installation, wherein the code specifically states that the installation of appliances shall conform to the conditions of their listing and label and the manufacturer's installation instructions.

Coulter then pointed out that the manufacturer's installation instructions for the Gurbuzes' fireplace require that its vent extend a minimum of only 16 inches above the roof.

But Coulter's analysis is based on an incomplete reading of IRC Section R102.[3] That section states, "Where there is a *conflict* between a general requirement and a specific requirement, the specific requirement shall be applicable. Where, in any specific case, different sections of this code specify

[3] The Gurbuzes correctly point out that Issaquah did not adopt the chapter of the 2015 IRC in which Section R102 is found. See IMC 16.04.020. But Issaquah's building code contains a conflict resolution provision that is, as relevant here, identical to IRC Section R102. See IMC 16.04.010 § 102.1.

different . . . requirements, *the most restrictive shall govern*." IRC § R102.1 (2015 ed.) (Emphasis added). Here, the Gurbuzes vented a fireplace, for which the manufacturer required a *minimum* 16-inch roof clearance, through a chimney that the IRC required to extend at least two feet above any point within 10 feet. There is no conflict between these requirements, as compliance with both can be achieved by complying with the more restrictive one—the one applicable to chimneys. Thus, we are not persuaded that the building code permitted the Gurbuzes' chimney to extend only 16 inches above the roof. We also are not persuaded that the IRC applies only to chimneys that vent wood burning fireplaces, a legal conclusion for which neither the Ulrichs' brief nor Coulter's declaration provides any support.

In short, it is undisputed that the IRC's two-foot requirement is the general rule for chimneys, and the Ulrichs fail to persuade us that a less restrictive requirement governs here. Because the Ulrichs also point to no evidence that the Gurbuzes' chimney exceeds the IRC's two-foot requirement, the trial court did not err by summarily dismissing the Ulrichs' claim for injunctive relief. Cf. Sunnyside Valley Irrigation Dist. v. Dickie, 111 Wn. App. 209, 220, 43 P.3d 1277 (2002) (party requesting injunctive relief bears burden of establishing right to injunction).

The Ulrichs disagree and assert that the Gurbuzes did not need a chimney

at all and could have left their fireplace side vented as their contractor initially had done. But the Ulrichs cite to no authority for the proposition that the Gurbuzes were not allowed to choose how to vent their fireplace. Nor do they point to any language in the view covenant that persuades us to interpret it as allowing chimneys only when strictly necessary. Furthermore, McCullough declared that the CHARC's design requirements required the Gurbuzes to construct a chimney. Although the Ulrichs dispute this, they rely solely on evidence that was not before the trial court at summary judgment and, thus, not properly before this court. RAP 9.12. For these reasons, the Ulrichs' assertion that the Gurbuzes did not need a chimney does not raise a genuine issue of material fact.

The Ulrichs raise a number of additional arguments in support of reversal but none are persuasive. First, they argue that the trial court erred by deferring to the Association's determination that the Gurbuzes' chimney, once lowered from its original height, complied with the view covenant. But our review is de novo, and we conclude, without deferring to the Association, that the Gurbuzes were entitled to summary judgment. Thus, we do not address whether the trial court's deference was in error. Wash. State Farm Bureau Fed'n v. Gregoire, 162 Wn.2d 284, 307, 174 P.3d 1142 (2007) (declining to reach issues not necessary to effectively dispose of a case).

The Ulrichs also argue that, contrary to the trial court's observation in its

written ruling, the Ulrichs did raise their gas-versus-wood theory before the CHARC. They contend that the trial court should have taken this into account when balancing the equities. But again, the Ulrichs rely solely on evidence that was not before the trial court at summary judgment and, thus, not properly before this court. RAP 9.12. Furthermore, equity balancing would be relevant only if the Ulrichs had raised a genuine issue of material fact as to whether the Gurbuzes violated the view covenant.

Finally, the Ulrichs argue that on multiple occasions, the Gurbuzes were instructed to—but did not—lower their chimney to the minimum height required by the building code. But the Ulrichs' argument is premised on the correctness of their interpretation of the building code. Because the Ulrichs fail to persuade us that their interpretation is correct, their argument fails.

FEES ON APPEAL

Both parties request fees on appeal. They each rely on RCW 64.38.050, which provides, "Any violation of the provisions of [Chapter 64.38 RCW (HOA Act)] entitles an aggrieved party to any remedy provided by law or in equity. The court, in an appropriate case, may award reasonable attorneys' fees to the prevailing party."

The Ulrichs are not the prevailing parties in this appeal. Thus, we decline to award them fees on appeal.

As for the Gurbuzes, although they are the prevailing parties on appeal, they do not explain what alleged violation of the HOA Act would serve as a basis for a fee award under RCW 64.38.050. Instead, they argue that they are entitled to fees because the Ulrichs specifically invoked the HOA Act to argue that *they* were entitled to fees. But the Gurbuzes point to no authority that persuades us that they are entitled to fees under RCW 64.38.050 merely because the Ulrichs themselves asserted an entitlement under that statute. Accordingly, we decline to award the Gurbuzes fees on appeal.[4]

We affirm.

Coburn, J.

WE CONCUR:

Mann, C.J.

Dwyer, J.

[4] Although the Ulrichs assign error to the trial court's fee award, they do not devote any argument to that assignment of error. Thus, we consider that assignment waived and do not disturb the trial court's fee award. Riley, 198 Wn. App. at 713 ("If an appellant's brief does not include argument or authority to support its assignment of error, the assignment of error is waived.").