IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SEAWEST SERVICES ASSOCIATION, a Washington nonprofit corporation, Respondent, v. JIM COPENHAVER and SUZANNE, COPENHAVER, husband and wife, and the marital community comprised thereof, Appellants.	)	NO. 65577-9-I DIVISION ONE UNPUBLISHED OPINION FILED: January 30, 2012

Lau, J. — A contract implied in fact exists when a defendant requests work, plaintiff expects to be paid, and defendant knows plaintiff expects payment for the work. Because the undisputed record demonstrates that Jim and Suzanne Copenhaver paid Seawest Services Association for water services and related assessments since 2001 as limited members who own a water share, we conclude that as a matter of law, a contract implied in fact obligates the Copenhavers to pay for water services and assessments. The trial court properly granted partial summary judgment in Seawest's

favor. And because the Copenhavers' challenge to the easements' scope lacks merit, we also affirm partial summary judgment in Seawest's favor on this issue. But we reverse and vacate the attorney fees award because the relevant bylaws provide no basis for fees against limited members.

FACTS

The main facts are undisputed. The Copenhavers own Island County, Washington real property. Frank and Marion Gaudin (Gaudin) originally owned the Copenhaver property. On July 15, 1978, Gaudin executed a real estate contract with John E. Grady III (Grady Sr.) to sell real property for development. Gaudin retained the property that the Copenhavers later purchased. On August 2, 1978, Grady Sr. assigned a one-half interest in the property acquired from Gaudin to his son, John E. Grady, Jr. (Grady Jr.). Grady Sr. assigned his entire interest in the property to Grady Jr. in 1984.

On August 8, 1979, Gaudin conveyed a 20-foot "Well Site and Water System Utility Easement" on the Copenhaver property to Grady Sr. to provide an "easement and right of way for the installation, operation and maintenance of a well and water line." Gaudin separately conveyed to Grady Sr. a 100-foot circular "Easement for Construction and Maintenance of Well and Establishment of Pollution Control Setback" on the Copenhaver property for "constructing and maintaining a well, pump, treatment facility and storage tank and for the purpose of establishing a well pollution control set back." In consideration, Grady Sr. agreed to provide Gaudin the "right to six (6) water

hook-ups or shares for six (6) individual dwellings" from the planned water system. The easements allow "the right to draw water from the well on the Copenhaver real property and to use a portion of the property designated in the easements for ingress and egress to the well site and also to maintain all of the necessary buildings and equipment customarily associated with the operation of the water association."

On September 7, 1979, in an effort to prevent water contamination, Gaudin executed a declaration of covenant providing that any owner of the Copenhaver property would not, among other things, maintain cesspools, sewers, septic tanks, chicken houses, or rabbit hutches on the easements on the Copenhaver property. This covenant was to "run with the land and shall be binding on all parties having or acquiring any right, title, or interest in the land . . . ." In 1983, the 1979 easements were reexecuted and rerecorded to correct legal descriptions in the earlier recorded easements.

On February 18, 1983, Grady Sr. incorporated Seawest Services Association, a nonprofit corporation. Seawest "is organized solely to manage the affairs of the homeowners association of the development[1] known as SEAWEST in Island County, Washington." Only the property owners living within the Development are members of a homeowners' association. See RCW 64.38.010(1).[2] It is undisputed the

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[1] We refer to the Seawest development as "the Development."

[2] RCW 64.38.010(1) provides: "'Homeowners' association' or 'association' means a corporation, unincorporated association, or other legal entity, each member of which is an owner of residential real property located within the association's jurisdiction, as described in the governing documents, and by virtue of membership or ownership of property is obligated to pay real property taxes, insurance premiums,

Copenhavers live outside this Development and are not a part of a homeowners' association.

In addition to managing the Development, one of Seawest's purposes is to "acquire, construct, maintain, and operate a domestic water system and distribute water therefrom to the development and other real property which the Association may elect to serve." The initial Seawest water system was completed in 1984. Seawest owns, operates, and manages this Class A water distribution system located on the Copenhaver property. The Seawest water system serves 17 homes within the Development, and 11 homes outside the Development, including the Copenhavers' home. Seawest's articles of incorporation establish two classes of members—"full members," who own property within the Development and "limited members," who receive utility services from Seawest but whose property is outside the Development. Under the articles, each property serviced by the water system, including properties owned by full and limited members, is liable for assessments associated with the Seawest water system. The articles were originally filed with the secretary of state in 1983, but not recorded. They were refiled in 1987 and 1991 with no material changes.

On October 26, 1984, Grady Sr. assigned the two easements to Seawest "for and in consideration of an inducement to sell real property to others," so that Seawest could provide water services to the Development and to properties outside the

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maintenance costs, or for improvement of real property other than that which is owned by the member. 'Homeowners' association' does not mean an association created under chapter 64.32 or 64.34 RCW."

Development, including the Copenhaver property. Gaudin "acknowledg[ed] and approv[ed]" the easements' transfer to Seawest.[3]

Gaudin sold the Copenhaver property to Patrick Shelley in January 1987 "subject to any unpaid assessments as imposed by Seawest Services Association." This conveyance included "one water hookup right in the well and water system of SeaWest Services Association, a non-profit corporation."

Shelley sold the Copenhaver property to Lawrence Gaines in April 1989 "subject to any unpaid assessments or charges, and liability to further assessment or charges for which a lien may have arisen (or may arise) as imposed by Seawest Services Assoc." By 1990, the Washington Department of Social and Health had approved 28 water shares for the Seawest water system. By then, Gaudin had conveyed all six reserved water shares, including one to Gaines, who then owned the Copenhaver property.

Gaines sold the Copenhaver property to Eldon and Marcia Smith in 1992. The Smiths sold the property to the Copenhavers in February 2001. The Copenhavers' commitment for title insurance, dated January 5, 2001, showed the easements recorded against the Copenhaver property, including the water system on the Copenhaver property. It excepted from coverage, among other things:

> Assessments, if any, levied by Sea[w]est Services Association.
> . . . .
> Assessments or charges and liability to further assessments or charges, including the terms, covenants, and provisions therefore, disclosed in instrument; Imposed by: Seawest Services Association.

[3] Due to confusion about the system's ownership, on April 2, 1991, Grady Jr. conveyed and quit claimed the water system and his easement rights to Seawest.

On January 22, 2001, Seawest advised the title company that the Copenhaver property held a water share with Seawest, which imposes a minimum $25 per month charge billed quarterly. When the sale closed, the Copenhavers paid $75 owed by Smith to Seawest for water.

Disputes arose between the Copenhavers and Seawest over water system backwash and Seawest's maintenance and operation of the system. In January 2009, the Copenhavers unilaterally removed the shared combination lock on the chain gate across the access road to the water system and replaced it with a new lock, blocking Seawest's access to the system. They blocked the access road by installing boulders, digging holes, planting trees, and driving metal fence posts and running tape between the fence posts, forcing maintenance workers to back out onto a main road. They refused permission to install an electric generator recommended for power outages. Despite paying all water usage charges from Seawest during the previous eight years and paying a $3,950 assessment in 2007 for water system upgrades, they refused any further payment for water use or assessments.

On April 8, 2009, Seawest sued the Copenhavers for a declaratory judgment, injunctive relief, and a prescriptive easement. The Copenhavers' counterclaim alleged, among other things, that Seawest "caused backwash discharge waters and noxious substances to be deposited upon the land of the defendants . . . ." The Copenhavers later voluntarily dismissed the counterclaims.

The trial court granted partial summary judgment to Seawest, finding the

Copenhavers were Seawest limited members and owed Seawest for "(1) water furnished by the plaintiff to defendants, (2) excess water fees, (3) assessments, and (4) reasonable attorney's fees and court costs involved with the collection of any unpaid amounts for water, excess water, and assessments."[4] The court awarded $91,567.05 in attorney fees to Seawest under its bylaws.

In a separate order, the court found that the undisputed evidence showed the easements allow Seawest

> without any permission or consent from the Copenhaver real property, to own, install, manage, maintain and upgrade a water system on the Copenhaver real property, including, without limitation, all normal and customary uses pertaining to a Washington Class A water system, or its functional equivalent due to changes in subsequent law or classification.

The court further found Seawest was entitled to

> build, repair, maintain and/or install additional wells, buildings, facilities (including without limitation storage tanks and accessory equipment) within the two easement areas, including without limitation the right to have and operate electrical generators and propane tanks on the Copenhaver real property within the two recorded easements.

The Copenhavers appeal.

ANALYSIS

Equitable Estoppel

The Copenhavers first argue that Seawest should be equitably estopped from claiming that the Copenhavers are limited members of Seawest. They rely on a single written statement by former Seawest president Marvin Ford that Copenhaver "is not a

[4] The court incorporated its oral rulings into its written orders. The court entered separate orders on the membership issue and the easement scope issue.

member of Seawest Home Assn."[5] Seawest counters that Ford fails to establish the three necessary elements to invoke equitable estoppel.

Whether equitable estoppel applies is a question of law we review de novo. Bank of Am., NA v. Prestance Corp., 160 Wn.2d 560, 564, 160 P.3d 17 (2007). The doctrine is disfavored. Wilheim v. Beyersdorf, 100 Wn. App. 836, 849, 999 P.2d 54 (2000). Equitable estoppel must be proved by clear, cogent, and convincing evidence. It requires "(1) an admission, statement or act inconsistent with the claim asserted afterward; (2) action by the other party in reasonable reliance on that admission, statement or act; and (3) injury to that party when the first party is allowed to contradict or repudiate its admission, statement or act." Wilheim, 100 Wn. App. at 849.

To support its equitable estoppel claim, the Copenhavers rely on a 2001 form letter from an escrow assistant for Island Title Company sent to Marvin Ford, then Seawest Services Association's president. This form letter asked Ford to answer four preprinted questions about Smith, the previous owner, because "[w]e need the . . . information to complete our closing." In response to whether there were annual dues and assessments, Ford wrote that Smith "is not a member of Seawest Home Assn."

The next question asks about "[d]elinquent dues/assessments not included in the annual amount above." Ford replied, "No annual dues[6] has a water share—min. 25.00 month billed quarterly." In response to the next question about "any additional

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[5] The trial court struck Ford's oral statements under the deadman's statute, RCW 5.60.030. The Copenhavers assign no error to this ruling.

[6] It is undisputed that only homeowner association members (i.e., full members) must pay dues.

charges," Ford replied, "Owes 75.00 for 4th qt. ending 12/31/2000 Please inform information on new owner." When asked about the fiscal year, he wrote "1/1/2000 to 12/31/2001." The Copenhavers fail to meet the "inconsistent with a claim afterward asserted" element because Ford's statement that the property owner is not a homeowner association member is true. The parties never disputed whether the Copenhavers are homeowner association members. The record shows Seawest consistently maintained that the Copenhavers are limited members by virtue of a water share and use of the services provided by the Seawest system. Read in context, Ford's responses quoted above correctly informed the title company that the property owner was not a homeowner association member but holds a water share with minimum $25 billed quarterly. The Copenhavers do not dispute they paid $75 for the fourth quarter owed on the water share before closing.

The Copenhavers also establish no reasonable reliance on Ford's statement.[7] To establish this element, the Copenhavers claim they "would not have purchased property . . . controlled financially in any way by a homeowner's association." Appellant's Br. at 7. Seawest is not a homeowner's association that financially controls the Copenhaver property. Seawest, for purposes of limited members like the Copenhavers, is an association that maintains a water system that provides water to their property and levies assessments for the operation and maintenance of the water system.

[7] Ford made the above quoted statements in response to the title company's request for closing information, not in response to questions from the Copenhavers about limited membership.

The form letter never asked whether the Copenhavers were Seawest members. So they cannot reasonably claim that they relied on the letter to determine whether they would purchase the property based on a Seawest membership requirement. Shows v. Pemberton, 73 Wn. App. 107, 113, 868 P.2d 164 (1994) (rejecting equitable estoppel when reliance was unreasonable). The record also shows the Copenhavers regularly received mailings from Seawest addressed to them as a "member" or "shareholder." The Copenhavers also regularly paid, without objections, "assessment base," "water maintenance," or "water use" charges. We conclude the Copenhavers fail to show by clear and convincing evidence that they reasonably relied on statements Ford made to the title company that are inconsistent with a later claim of limited membership in Seawest.

Limited Member

The Copenhavers next argue that no covenants establish their Seawest limited membership and no implied contract makes them limited members.[8] Seawest counters the Copenhavers had actual and constructive notice of limited membership, they are bound by a common scheme of development, and an implied contract establishes limited membership.[9]

[8] On appeal, the Copenhavers assign no error to any trial court evidentiary rulings.

[9] In a footnote, the Copenhavers mistakenly assert that Seawest argued implied contract for the first time in their summary judgment reply brief. The record shows that the Copenhavers devote an entire section in their response brief below to the implied contract issue because "Seawest's real argument is for implied contract." (Formatting omitted.)

We review a summary judgment order de novo, engaging in the same inquiry as the trial court.[10] Quadrant Corp. v. Am. States Ins. Co., 154 Wn.2d 165, 171, 110 P.3d 733 (2005). We construe facts and reasonable inferences from those facts in the light most favorable to the nonmoving party. Michak v. Transnation Title Ins. Co., 148 Wn.2d 788, 795, 64 P.3d 22 (2003). Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); Jones v. Allstate Ins. Co., 146 Wn.2d 291, 300-01, 45 P.3d 1068 (2002). A court will grant such a motion if, after considering the evidence in the light most favorable to the nonmoving party, reasonable persons could reach but one conclusion. Reynolds v. Hicks, 134 Wn.2d 491, 495, 951 P.2d 761 (1998). Here, the record establishes that the Copenhavers are Seawest limited members premised on a contract implied in fact and contract implied in law. "The burden in proving a contract, whether express or implied, is on the party asserting it . . . ." Cahn v. Foster & Marshall, Inc., 33 Wn. App. 838, 840, 658 P.2d 42 (1983). "Unjust enrichment" (i.e., contract implied in law) is formed on notions of justice and equity whereas "quantum meruit" (i.e., contract implied in fact) is founded in the law of contracts, a legally significant distinction.[11] Young v. Young, 164 Wn.2d 477, 486, 191 P.3d 1258 (2008) (citations omitted).

[10] The court concluded the Copenhavers were Seawest limited members based on a common scheme of development. We may affirm on any basis the record supports. Truck Ins. Exch. v. Vanport Homes, Inc., 147 Wn.2d 751, 766, 58 P.3d 276 (2002).

[11] For clarity, we use the terms "contract implied in fact" and "contract implied in law."

Contract Implied in Fact

A contract implied in fact is

> "an agreement depending for its existence on some act or conduct of the party sought to be charged and arising by implication from circumstances which, according to common understanding, show a mutual intention on the part of the parties to contract with each other. The services must be rendered under such circumstances as to indicate that the person rendering them expected to be paid therefor, and that the recipient expected, or should have expected, to pay for them."

Young, 164 Wn.2d at 485 (quoting Johnson v. Nasi, 50 Wn.2d 87, 91, 309 P.2d 380 (1957)). A contract implied in fact is based on "facts and circumstances showing a mutual consent and intention to contract." Chandler v. Wash. Toll Bridge Authority, 17 Wn.2d 591, 600, 137 P.2d 97 (1943). "[T]he elements of a contract implied in fact are (1) the defendant requests work, (2) the plaintiff expects payment for the work, and (3) the defendant knows or should know the plaintiff expects payment for the work." Young, 164 Wn.2d at 486. "Although the terms of an implied in fact contract may not be expressed in words, or at least not fully in words, the legal effect of an implied in fact contract is the same as that of an express contract in that it too is considered a 'real' contract or genuine agreement between the parties." Miles v. Carolina Forest Ass'n, 167 N.C. App. 28, 36, 604 S.E.2d 327, 333 (2004) (citations omitted).

Whether mutual assent exists is normally a question of fact, but we may determine the question as "a matter of law where reasonable minds could reach but one conclusion." Keystone Land Dev. Co. v. Xerox Corp., 152 Wn.2d 171, 178 n.10, 94 P.3d 945 (2004); see also Kilthau v. Covelli, 17 Wn. App. 460, 462, 563 P.2d 1305

(1977) (whether implied in fact contract exists is a question of fact; "Kilthau's request for the performance of valuable services, Covelli's performance of those services, and Kilthau's acceptance of the performance presumptively creates an implied contract . . . ."). Taken in the light most favorable to the Copenhavers, the record amply demonstrates they had actual and constructive knowledge that they were Seawest limited members and liable for water charges and assessments. The Copenhavers' actions are also consistent with this knowledge. In addition to the facts outlined above, the following undisputed facts show the Copenhavers knew about their water share and Seawest limited membership:

1. Since 2001 when they purchased the property, the Copenhavers have paid, without objection, water charges and paid a $3,950 assessment related to water system upgrades.

2. All owners who held Seawest water shares are responsible for paying assessments. The Copenhavers stopped all payments (including water charges) and claimed they were not Seawest limited members for the first time when this litigation ensued.[12]

3. The Copenhavers received quarterly water bills that show charges for "water base," "water usage," and "assessment base."

4. The Copenhavers regularly received mailings from Seawest addressed to

[12] On appeal, the Copenhavers do not dispute their obligation to pay water usage charges. Our review of the record and summary judgment briefs shows the Copenhavers never conceded this point. The trial court's judgment ordered the Copenhavers to pay past due water charges.

them as "member" or "shareholder."

5. The October 10, 2006 letter from Seawest addressed to "Seawest water shareholders" produced by the Copenhavers in discovery shows that the Copenhavers received notice about proposed extensive water system upgrades and the assessments necessary to fund the improvements. The letter explained in part:

> The Articles of Incorporation for Seawest Services allow the Board to assess for services provided and expenses. The increased maintenance fees we instituted a few years ago have just kept our system financially in the black. In order to make the improvements less painful to our shareholders we will be adding an assessment of $50 per quarterly water bill to begin the engineering of the new system. The assessment will begin in the 4th quarter so you will see it on your December bill. . . . By no means does this mean that the assessments will only be $50 per quarter—it could increase dramatically. Each quarter the board will redetermine if the assessment is keeping up with the financial requirements. We do not want to borrow money to complete the project if we can avoid it. We are trying to plan ahead by beginning the collection now before the engineering has begun.

Seawest President Fred Darvill signed this letter.

6. The Copenhavers' November 19, 2008 letter to Fred Darvill stated in part, "You did mention that as an association member I did receive notice of meetings where the topics of discharging water problems were discussed. . . . I hope that you, as well as those who make decisions for our association, recognize the merits of open and engaged discussion. . ." (Emphasis added.) While denying he received meeting notices concerning the discharge water problems, he requested as a limited member copies of minutes and/or association documents and other Seawest documents from Darvill.

7. The 1979 and 1983 easements from Gaudin to Grady for a water system on

Copenhaver's property provided Gaudin the right to six "water hook-ups or shares." (Emphasis added.)

8. Testimony from Clive Defty, the sole owner of King Water Management Company, which manages, maintains, repairs, and operates water systems for the benefit of over 130 Washington nonprofit corporations such as Seawest, stated the terms "water hook ups or shares" are synonymous with the term "membership" and that property owners may not obtain water from a nonprofit corporation without being a member of the nonprofit corporation.

9. The Gaudin-Shelly deed provided "one water hookup right in the well and water system of Seawest Services Association," and stated the property was "[s]ubject to any unpaid assessments as imposed by Seawest Services Association." (Formatting omitted.)

10. The Shelley-Gaines deed stated it was "[s]ubject to any unpaid assessments or charges, liability to further assessments or charges, for which a lien may have arisen (or may arise) as imposed by Seawest Services Assn.

11. The commitment for title insurance issued to the Copenhavers noted that the policy did not cover "[a]ssessments or charges and liability to further assessments or charges, including the terms, covenants, and provisions thereof, disclosed in instrument; Imposed by Seawest Services Association." Seawest assessments were also mentioned in several other documents (e.g., HUD [Department of Housing and Urban Development] settlement statement, purchase and sale agreement and Island

County letter to Seawest about the $75 check).

12. The Island Title escrow document discussed above stated the Copenhaver property had a water share.

13. A 1991 agreement recorded on other property stated:

> [W]hen Grady, Gaudin, or any transferee of any such water share does elect to have water service from the water system, the owners of the tract or lot so served will be limited members of the Association, subject to the obligation to pay dues and assessments related to operation and maintenance of the water system, in the same manner as the other properties served by the water system, pursuant to the terms and provisions of the Bylaws of the Association.

(Formatting omitted.) We conclude the record establishes as a matter of law an implied contract in fact. The facts and circumstances here show the parties' mutual intent to contract with each other—the Copenhavers agreed to pay water charges and assessments as limited members of Seawest and Seawest expected the Copenhavers to pay water charges and assessments for services rendered. See Miles v. Carolina Forest Ass'n, 167 N.C. App. 28, 604 S.E.2d 327, 334 (2004) (implied in fact contract to pay assessments where homeowners "were on clear notice that . . . benefits were being incurred"); Seaview Ass'n of Fire Island v. Williams, 69 N.Y.2d 987, 510 N.E.2d 793, 794 (1987) (holding that when lot purchaser has knowledge that homeowners' association provides facilities and services to community residents, "resulting implied-in-fact contract includes the obligation to pay a proportionate share of the full cost of maintaining those facilities and services"); Perry v. Bridgetown Cmty. Ass'n, Inc., 486 So.2d 1230, 1234 (Miss.1986) ("A landowner who willfully purchases property subject to control of the association and derives benefits from membership in the association

implies his consent to be charged assessments and dues common to all other members."). Given our disposition of the limited membership issue, we need not address Seawest's "common scheme of development" claim.

Contract Implied in Law

In the alternative, the record supports a contract implied in law. The essential elements of unjust enrichment are "'a benefit conferred upon the defendant by the plaintiff; an appreciation or knowledge by the defendant of the benefit; and the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value.'" Young v. Young, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008) (quoting Black's Law Dictionary 1535–36 (6th ed.1990)); see also Lynch v. Deaconess Med. Ctr., 113 Wn.2d 162, 165, 776 P.2d 681 (1989) (stating elements as "the enrichment of the defendant must be unjust; and . . . the plaintiff cannot be a mere volunteer."). In such situations, a "quasi contract" or "contract implied in law" exists between the parties. Young, 164 Wn.2d at 484 (quoting Bill v. Gattavara, 34 Wn.2d 645, 650, 209 P.2d 457 (1949)). The conclusion that retention without restitution would be unjust is a conclusion of law, not a finding of fact. Town Concrete Pipe of Wash., Inc. v. Redford, 43 Wn. App. 493, 502, 717 P.2d 1384 (1986).

Undisputed evidence discussed above shows that the Copenhavers and their predecessors in interest have utilized the Seawest system and have paid, without objection until litigation ensued, all water use, water maintenance, and assessment

base charges to Seawest. The record supports a contract implied in law.

In Lake Limerick Country Club v. Hunt Mfg. Homes, Inc., 120 Wn. App. 246, 84 P.3d 295 (2004), Hunt purchased a home within a development. A recorded "Declaration of Restrictions" required membership in a homeowners' association and provided that all lot owners were subject to the association's articles and bylaws. Lake Limerick 120 Wn. App. at 249-50. The articles allowed the association to levy and collect assessments and the bylaws required all members to pay annual membership dues. Lake Limerick, 120 Wn. App. at 250. Hunt objected to paying dues, but Division Two of this court found an implied in law contract:

> Hunt acquired property that carried with it the right to enjoy certain common facilities. Even if Hunt elected not to exercise that right, Hunt was benefited because its property was worth more as a result. Hunt would be unjustly enriched if it could retain that benefit without paying for it, and thus the law will imply a contract to pay dues imposed according to [the Association's] obligation to act "fairly and within the scope of the corporate functions outlined in its charter and bylaws."

Lake Limerick, 120 Wn. App. at 261 (quoting Rodruck v. Sand Point Maint. Comm'n, 48 Wn.2d 565, 577, 295 P.2d 714 (1956)).

As in Lake Limerick, the Copenhavers would be unjustly enriched if they could retain benefits provided by Seawest without paying for them. The Copenhavers acquired property that carried with it a water share. They knew that no property owner is entitled to receive water without membership in Seawest. They argue that because their property is burdened by two easements, no injustice results from not paying assessments. We disagree. Nothing in the easement agreements shows the original

parties intended to provide free water if the burdened property owners elected to use a water hook-up. The Copenhavers cite the Gaudin-Shelley deed that states Seawest is "solely responsible for the construction, maintenance, financing and repair" on the water system. This provision does not preclude Seawest from charging its full and limited members assessments.

We conclude the undisputed record supports a contract implied in law. The Copenhavers would be unjustly enriched at the expense of Seawest if they were allowed to retain the benefits of the water system without paying for it. Like in Lake Limerick, receiving services from an association without paying for them would be unjust.

Easement Scope

The Copenhavers argue that the court improperly expanded the scope of the two easements beyond what the original parties intended by allowing Seawest to install a generator, propane tanks, and fences within the easements. Seawest responds that the court properly interpreted the easements as permitting it to install additional facilities to ensure the water system's proper operation. We agree.

The interpretation of an easement is a mixed question of law and fact. Veach v. Culp, 92 Wn.2d 570, 573, 599 P.2d 526 (1979). "What the original parties intended is a question of fact and the legal consequence of that intent is a question of law." Sunnyside Valley Irr. Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). The extent of the right acquired in an easement is derived from the granting instrument; the

duty of the court is to "ascertain and give effect to the intention of the parties, which is determined by a proper construction of the language of the instrument." Schwab v. City of Seattle, 64 Wn. App. 742, 751, 826 P.2d 1089 (1992).

An easement is an irrevocable interest in land. Bakke v. Columbia Valley Lumber Co., 49 Wn.2d 165, 170, 298 P.2d 849 (1956). In determining an easement's scope that is created by express grant, we look to the original grant language to determine the permitted uses. Brown v. Voss, 105 Wn.2d 366, 371, 715 P.2d 514 (1986). Here, the easement contained no words of limitation. Only if an easement is ambiguous can the court look beyond the document's wording. Sunnyside, 149 Wn.2d at 880.

> It can be assumed the parties had in mind the natural development of the dominant estate. Accordingly, the degree of use may be affected by development of the dominant estate. The law assumes parties to an easement contemplated a normal development under conditions which may be different from those existing at the time of the grant. Normal changes in the manner of use and resulting needs will not, without adequate showing, constitute an unreasonable deviation from the original grant of the easement.

Logan v. Brodrick, 29 Wn. App. 796, 799-800, 631 P.2d 429 (1981) (citations omitted).

Here, the 20-foot "well site and water system utility easement" contains broadly defined uses: "installation, operation and maintenance of a well and water line." The 100-foot circular easement also contains a broadly defined purpose: "constructing and maintaining a well, pump, treatment facility and storage tank and for the purpose of establishing a well pollution control setback."

The Copenhavers assert the court erred by permitting Seawest to install new

facilities, including a generator and propane tanks, claiming the 100-foot circular easement may be used only for a "pollution control setback." Appellant's Br. at 41. But the undisputed record indicates the Washington Department of Health recommended the installation of an electrical generator and a propane fuel source to maintain and update the treatment facility. Seawest notified all "Seawest Water Shareholders," including the Copenhavers, by letter dated October 10, 2006, about necessary water upgrades. The record amply shows Seawest needs a backup electrical generator if the water system loses electrical power—a frequent occurrence on Whidbey Island. Darvill testified electricity is "vital to the operation of [the water] filter system" and necessary to run the booster pumps. The current Seawest president testified, "The purpose of the emergency generator is to maintain the pressure of the water system to meet water customer expectations and to maintain the integrity of the water distribution lines and prevent potential contamination due to loss of pressure in the lines." This upgrade was also necessary to meet WAC 246-290-420 requirements that water providers address abnormal operating conditions such as fires, floods, unscheduled power outages, and system failures.

The easement language that allows treatment facility construction and maintenance provides no limitation. Although the Copenhavers suggest the purpose statement limits construction within the easement to four specifically enumerated structures: "a well, pump, treatment facility and storage tank," no language prohibits further construction. Furthermore, a "treatment facility" encompasses a back-up power

generator, propane tanks, and fences.

When the original parties entered the easement agreements, they contemplated that Seawest would build and maintain the water system to benefit the Development and other properties outside the Development such as the Copenhaver property. Updates such as a generator for power failure or propane tanks are within the dominant estate's "natural development." Logan, 29 Wn. App. at 800. They are also within the easement's express terms. Nothing allows the Copenhavers to restrict access to the easements or water system. "[T]he owner [of the servient estate] may not legally do something, such as blocking the use of the easement, that is inconsistent with its proper use." 17 William B. Stoebuck & John Weaver, Washington Practice: Real Estate: Property Law § 2.9, at 115 (2d ed. 2004) (citing Mahon v. Haas, 2 Wn. App. 560, 468 P.2d 713 (1970)). The court properly concluded the easements permit Seawest to upgrade the water system as necessary and to freely access the easements.[13]

Attorney Fees

The Copenhavers argue the court erred by awarding attorney fees to Seawest on the membership issue because Seawest's bylaws allow fees for collecting unpaid

[13] The Copenhavers challenge "the trial court's conclusion that Seawest may discharge its backwash effluent within the pollution control setback." Appellant's Br. at 45. Because the Copenhavers voluntarily dismissed their counterclaims below before Seawest's summary judgment motion, we decline to address this claim. RAP 2.5; Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports, 103 Wn. App. 764, 768, 14 P.3d 193, 14 P.3d 193 (2000) (this court will not normally review an assertion not pursued at summary judgment).

dues and assessments against owners only within the development but not against limited members. Seawest maintains the court properly awarded it attorney fees and that it is entitled to fees on appeal because its bylaws provide for them. We review a trial court's attorney fees award for an abuse of discretion. Chuong Van Pham v. Seattle City Light, 159 Wn.2d 527, 538, 151 P.3d 976 (2007). A court abuses its discretion if it awards fees "on untenable grounds or for untenable reasons." Chuong, 159 Wn.2d at 538 (citing State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

"Washington generally follows the 'American rule' on attorney fees, which provides that attorney fees are not recoverable by the prevailing party as costs of litigation unless the recovery is permitted by contract, statute, or some recognized ground of equity." Leingang v. Pierce County Med. Bureau, Inc., 131 Wn.2d 133, 143, 930 P.2d 288 (1997). The interpretation of bylaws is a question of law. Langan v. Valicopters, Inc., 88 Wn.2d 855, 858-59, 567 P.2d 218 (1977) (bylaws interpreted as a contract).

Three Seawest bylaws sections apply:

> 1.2 Definitions. Unless otherwise specified, all terms, words, or phrases shall have the same meaning in these Bylaws as such terms have in the Articles of Incorporation. The terms "owners" and "members" as used herein shall be synonymous.
>
> . . . .
>
> 5.2 Duration of Lien and Personal Obligation of Assessment. Pursuant to recorded covenants, each owner of a tract within Seawest, by acceptance of a deed therefor or execution of a contract to purchase, relating to a tract within Seawest, whether or not it shall be so expressed in such document, is deemed to covenant and agree to pay to the Association, annual dues and assessments, which may be a charge upon such tract. Each assessment, together with

> interest, and any costs and attorney's fees which may be reasonable incurred to collect said assessments, shall be a continuing lien against the tract assessed and shall also be the personal obligation of the person who is the owner of such property at the time when the assessment fell due.
>
> . . . .
>
> 5.5 Effect of Nonpayment of Assessment: Remedies of the Association. Dues and assessments not paid within thirty (30) days after the due date shall bear interest from the due date at the rate of twelve percent (12%) per annum. The Association may bring an action at law or in equity against the owner personally obligated to pay the same, or foreclose the lien against the tract, and interest, costs, and reasonable attorney's fees of any such action shall be added to the amount of such assessment. Except expressly as provided otherwise in a written agreement with the Association, no owner may waive or otherwise escape responsibility to pay such dues or assessments provided for herein by nonuse of any easement area, any common areas, the water system, or by abandonment of the owner's tract.

(Emphasis added and formatting omitted.)

Seawest specifically argues that under section 1.2, the terms "owners" and "members" are synonymous. It then argues that any reference to "owner" also means "member," which in turn includes "limited member" per the articles of incorporation. From this, Seawest asserts sections 5.2 and 5.5 provide that any action to collect assessments against the owner, i.e., member and limited member personally obligated to pay the same, entitles Seawest to an award of attorney fees. We disagree. Sections 5.2 and 5.5 when read together expressly limit attorney fees against an "owner of a tract within Seawest." There is no dispute that the Copenhavers are not an "owner of a tract within Seawest." And section 5.2's fee provision does not apply to all "owners" and therefore all "members" as Seawest contends—even assuming the terms "owner" and "member" are synonymous. The fee provision is limited to owners (or members) "of a tract within Seawest." Section 5.2. Our task is to harmonize all provisions, not to

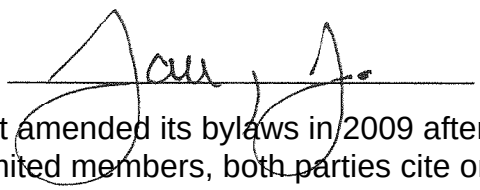
read this limiting phrase out of the provision. We cannot change or ignore the provision in the guise of construing it. Pub. Employees Mut. Ins. Co. v. Sellen Constr. Co., 48 Wn. App. 792, 796, 740 P.2d 913 (1987) ("The court cannot ignore the language agreed upon by the parties, or revise or rewrite the contract under the guise of construing it.").

We question whether the trial court awarded fees to Seawest under CR 11 because it made no required findings to support the sanctions. An order imposing CR 11 sanctions must specify the offending conduct, explain the basis for the sanction imposed, and quantify any amounts awarded with reasonable precision. The trial court must make a finding that either the claim is not grounded in fact or law, the attorney or party failed to make a reasonable inquiry, or the paper was filed for an improper purpose. Biggs v. Vail, 124 Wn.2d 193, 876 P.2d 448 (1994); N. Coast Elec. Co. v. Selig, 136 Wn. App. 636, 151 P.3d 211 (2007).

We conclude the trial court erred by awarding attorney fees to Seawest premised on the bylaws.[14]

CONCLUSION

For the reasons discussed above, we affirm the trial court's partial summary judgment order in Seawest's favor but reverse its attorney fees award.



[14] We also note that even though Seawest amended its bylaws in 2009 after this dispute arose to include attorney fees against limited members, both parties cite only to Seawest's 2001 bylaws in their appellate briefs. Accordingly, we review only the 2001 bylaws.

WE CONCUR: