IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

FOXVIEW HOMEOWNERS ASSOCIATION, a Washington non-profit corporation, Appellant, v. CYNTHIA A. FENBERG, a single woman, Respondent.	No. 37563-0-II UNPUBLISHED OPINION

Penoyar, A.C.J. — The Foxview Homeowners Association (the Association) sued Cynthia A. Fenberg, owner of lot 8, alleging numerous violations of Foxview's Covenants, Conditions, Restrictions, and Reservations (CCRRs). Fenberg counterclaimed, requesting a permanent injunction prohibiting the Association and its individual members from using an easement over lot 8 for pedestrian beach access. Finding that section 3.6 of the CCRRs did not grant the Association and its individual members an easement over Fenberg's property for pedestrian beach access, the trial court granted Fenberg a permanent injunction prohibiting such use.

On appeal, the Association challenges (1) the trial court's determination that the Association's individual members were not necessary parties to Fenberg's counterclaim, and (2) the trial court's ruling that CCRR section 3.6 did not create a pedestrian beach access easement over lot 8, as well as the trial court's order awarding Fenberg attorney fees on the counterclaim. We agree with the trial court that because the Association adequately represents its members' interests, individual members of the Association are not necessary parties to this dispute. Nonetheless, we remand for a trial on whether the plat and the CCRRs create an easement across

lot 8 for plat owners to reach an older easement across the railroad right-of-way and the tidelands.

FACTS

I. Foxview's History

In 1907, Ida E. Thompson, J.B. Thompson, and J.A. Hoshor owned a large parcel of property including land that is now Foxview. On September 30, 1907, they conveyed a strip of land along the west side of the property to the Port Townsend Southern Railroad Company. That deed reserved to the grantors the right to construct and maintain a crossing 20 feet wide opposite the center of the Sunset Beach Hotel. Also on September 30, 1907, Port Townsend Southern Railroad Company agreed to extend the crossing over the adjacent tidelands that the railroad owned. Foxview's plat map references these deeds and depicts the railroad right-of-way on the west side of the development.

On May 16, 1908, the Thompsons and Hoshor sold a portion of their property, including the Sunset Beach Hotel, to Lewis Tallman. The sale included a transfer of the right to use the southern 10 feet of the railroad crossing opposite the hotel. The southwest portion of Foxview is Tallman's property.

On January 28, 2002, Brentwood Homes, LLC, recorded a plat for Foxview. The plat contains nine lots as well as two common area tracts; tract A contains a storm water drainage facility and tract B is an on-site wetland. The plat also depicts a 15-foot access easement over lot 8 leading from a cul-de-sac to tract A. This easement ends at the edge of tract A, which abuts the railroad right-of-way. The railroad right-of-way abuts tracts A and B, but the location of the easement across the railroad right-of-way is not disclosed in the record.

On March 22, 2001, just before recording Foxview's plat, Brentwood recorded the

CCRRs for Foxview. On January 25, 2002, Brentwood recorded the second amendment to Foxview's CCRRs. Section 3.6 of the amended CCRRs addresses the scope of the 15-foot access easement over lot 8. Section 3.6 states:

> There exists a 15 ft [sic] wide [a]ccess [e]asement encumbering Foxview [l]ot 8. This roadway is a [l]imited [c]ommon [e]lement and provides limited access to the [s]torm [d]rainage [t]ract "A" and the on-site wetland [t]ract "B", [sic] *together with possible and/or potential pedestrian access to the adjacent railroad right-of-way and the beaches and tidelands of Puget Sound, pursuant to long-standing easements and/or agreements of record*. This access road is an expressed condition of plat approval by the City's Hearing Examiner. The maintenance and repairs of such access road shall be an obligation of [the Foxview Homeowners'] Association.

Clerk's Papers (CP) at 90 (emphasis added).

In addition, the plat contains the following language:

> Dedication . . . and further dedicate to the use of the public all the easements and tracts shown on this plat for all public purposes as indicated thereon, including but not limited to parks, open space, utilities and drainage unless such easements or tracts are specifically identified on this plat as being dedicated or conveyed to a person or entity other than the public, in which case we do hereby dedicate and convey such streets, easements, or tracts to the person or entity identified and for the purpose stated.

CP at 47 (capitalization omitted).

Rob M. Tillotson drafted the initial CCRRs for Foxview, as well as the first and second amendments. According to his declaration, when Tillotson drafted section 3.6, addressing the 15-foot access easement across lot 8, he believed that the "historical deeds for the property . . . reserved an easement over the railroad tracks and beach to provide access to Puget Sound." CP at 22. He believed that beach access would "increase the marketability of the lots within Foxview" and stated that he added "language to the new section 3.6 . . . to allow the lot owners in Foxview to also use the 15-foot access easement over [l]ot 8 for unfettered pedestrian access to

the beach." CP at 22. Tillotson further stated that he "used the term 'possible and/or potential' to describe that access because [he] did not want Brentwood . . . to be warranting that easement, though [he] believed that the easement rights were valid." CP at 22.

On January 7, 2004, Columbia State Bank, Brentwood's successor-in-interest, sold lot 8 to Fenberg. The deed conveyed the property (lot 8) subject to the "covenants, conditions, restrictions, and easements, if any, affecting title, which may appear in the public record, including those shown on any recorded plat or survey." CP at 141. Exhibit A to the deed stated that the deed was subject to the CCRRs and the amendment thereto. Fenberg proceeded to build a house on her property; during construction, numerous disputes arose between the Association and Fenberg over violations of various CCRR provisions.

On February 25, 2006, Fenberg asked the Association for permission to build a gate across the access easement; the Foxview Architectural Control Committee denied Fenberg's request. Fenberg built a gate across the access easement anyway and denied the Association and its members access over the road for any purpose other than storm water system maintenance.

II. Procedural History

On August 15, 2006, the Association sued Fenberg to enjoin the violations of various provisions of the CCRRs that Fenberg committed while she was constructing her home, including construction of the gate over the access easement without the Association's permission. Fenberg filed her answer along with a counterclaim seeking an injunction barring Foxview and its members from using the access easement over lot 8 to access the beach. In its reply to Fenberg's counterclaim, the Association included the affirmative defense that Fenberg "failed to join the members of the [homeowners'] [a]ssociation who are necessary parties" required to determine

their right to use the access easement over lot 8 for access to the beach. CP at 11.

On June 28, 2007, the Association moved for partial summary judgment on Fenberg's counterclaim, asking for a determination that the Association and its members had a pedestrian beach access easement over lot 8 that section 3.6 of the CCRRs created, and for an injunction requiring Fenberg to remove the gate blocking the easement. The trial court denied the Association's motion.

On November 9, Fenberg moved for partial summary judgment, asking the trial court (1) to determine that the "Association and its members do not have the right to utilize the access easement over [lot 8] for pedestrian access to the beach" and (2) allow her to maintain the gate she constructed over the access easement.[1] CP at 206. The trial court granted Fenberg's motion for partial summary judgment, finding that the Association and its members did not have the right to use the storm water drainage access easement for pedestrian beach access, and it granted her a permanent injunction.

The trial court awarded the Association attorney fees for the issues litigated at trial and awarded Fenberg attorney fees for the issues resolved at summary judgment. After offsetting those fees, the trial court awarded the Association a net judgment of $39,700.87.

The Association timely appeals the trial court's grant of summary judgment in favor of Fenberg on her counterclaim and the associated attorney fees.

[1] The trial court did not resolve whether Fenberg's gate violated the CCRRs as part of Fenberg's motion for partial summary judgment; instead, the trial court reserved this issue for trial on the merits. Ultimately, the trial court found that Fenberg had violated several covenants of the CCRRs and, although it allowed Fenberg's gate to remain, required that she provide the Association with the code for the gate in order to perform maintenance on the storm water drainage system. These rulings are not at issue on appeal.

ANALYSIS

I. Joinder of Necessary Parties Under CR 19(a)

A. Preservation

Fenberg first contends that the Association failed to preserve the joinder issue for appeal because it failed to raise this affirmative defense until Fenberg's summary judgment order was presented to the trial court for entry. We disagree. By asserting it as an affirmative defense in its reply to Fenberg's counterclaim, the Association has preserved the joinder issue for review.

B. Necessary Parties

The Association contends that the trial court erred when it found that Fenberg was not required to join the Association's individual homeowners in her counterclaim to enjoin the Association and its members from using the road over her property for pedestrian beach access. The Association contends that the individual lot owners are necessary parties because they claim an interest relating to the action and that resolution of the action without the members impairs their ability to protect their interests.[2] The Association adequately represents its member interests. *See* RCW 64.38.020(4). Thus, the individual members of the Association are not necessary parties required to be joined under CR 19(a).

[2] The Association does not suggest that double, multiple, or inconsistent obligations could result if the members are not joined.

Under CR 19(a), a trial court must determine which parties are "necessary" for a just adjudication.[3] A party is necessary if that party's absence "would prevent the trial court from affording complete relief to existing parties to the action or if the party's absence would either impair that party's interest or subject any existing party to inconsistent or multiple liability." *Coastal Bldg. Corp. v. City of Seattle*, 65 Wn. App. 1, 5, 828 P.2d 7 (1992). If a necessary party is absent, the trial court must determine whether joinder is feasible. CR 19(a). If a necessary party cannot be joined, the trial court must decide whether "in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." CR 19(b). The Association bears the burden to prove that the missing parties are necessary under CR 19. *See Matheson v. Gregoire*, 139 Wn. App. 624, 635, 161 P.3d 486 (2007).

The Association is a nonprofit corporation and each owner of a lot within the plat is a member of that association. RCW 64.38.020(4) authorizes homeowners' associations to

> [i]nstitute, defend, or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more owners on matters affecting the homeowners' association, but not on behalf of owners involved in disputes that are not the responsibility of the association[.]

Under RCW 64.38.020(4), the Association represents the interests of the individual homeowners in legal proceedings that arise by virtue of the homeowners' status as members of the Association. *See Town of Ruston v. City of Tacoma*, 90 Wn. App. 75, 82, 951 P.2d 805

[3] The parties dispute whether Fenberg's counterclaim sought an injunction, declaratory relief, or to quiet title. We need not resolve this dispute because, even if we assume that Fenberg actually sought declaratory relief in which joinder is jurisdictional, RCW 7.24.110; *Primark, Inc. v. Burien Gardens Assocs.*, 63 Wn. App. 900, 906-07, 823 P.2d 1116 (1992), the necessary party question still turns on whether the Association adequately represented the interests of the individual homeowners.

(1998) (joinder of the people of Ruston and Tacoma not necessary because both municipalities represent the interests of their citizens and were already parties). The Association suggests that Fenberg's counterclaim qualifies as a dispute that is not the Association's responsibility because Fenberg is seeking to "extinguish" the individual homeowners' property interest in the access easement. Appellant Reply Br. at 9. This argument lacks merit because Fenberg sought an injunction to prevent the Association and its members from using the access easement for purposes other than storm water system maintenance on the grounds that Foxview's CCRRs do not grant the individual homeowners the right to use the access easement for pedestrian beach access. Accordingly, only the individual homeowners' rights to use the access easement as the Association's members under the CCRRs were at issue. The injunction is only enforceable against the individual homeowner to the extent of the derivative interests the Association represented. *See Wimberly v. Caravello*, 136 Wn. App. 327, 334, 149 P.3d 402 (2006) (citing *All Star Gas, Inc. v. Bechard*, 100 Wn. App. 732, 737, 998 P.2d 367 (2000)).

Because individual homeowners' interests that exist independent of their homeowner association membership and the Foxview CCRRs are not impaired, as individual homeowners, they are not necessary parties to the action under CR 19(a).

II. Easement Created By Covenant

The Association contends that the trial court erred when it granted Fenberg summary judgment, finding that Foxview's CCRR section 3.6 did not grant members the right to use the road over Fenberg's property for pedestrian beach access.

A. Standard of Review

We review an order on summary judgment de novo, engaging in the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). We view all facts in the light most favorable to the nonmoving party. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). Summary judgment is appropriate only if reasonable persons could reach but one conclusion from all of the evidence. *Vallandigham*, 154 Wn.2d at 26.

B. Easements Created by Written Instrument (CCRR)

The Association argues that the recorded CCRRs gave each lot owner in Foxview the right to use the access road over lot 8 for pedestrian access to the beach. Fenberg responds that section 3.6 of the CCRRs did not create a pedestrian easement across Fenberg's lot because the language was not sufficiently specific to indicate a then present intent to create an easement.

An easement is an interest in land and is, therefore, subject to the statute of frauds. RCW 64.04.010; *Berg v. Ting*, 125 Wn.2d 544, 551, 886 P.2d 564 (1995). To satisfy the statute of frauds, an express easement must be created by written deed and must satisfy several requirements; in addition to being signed by the grantor and acknowledged, a deed must contain a sufficiently definite description of the servient estate. RCW 64.04.020; *Berg*, 125 Wn.2d at 551. A deed must also identify the grantee with specificity. *York v. Stone*, 178 Wash. 280, 284, 34 P.2d 911 (1934).

It is settled law that easements may be created by agreements or covenants. *Kalinowski v. Jacobowski*, 52 Wash. 359, 367, 100 P. 852 (1909) (quoting 14 Cyc. 1162). Although "[n]o particular words are necessary to constitute a grant, and any words which clearly show the intention to give an easement, which is by law grantable, are sufficient to effect that purpose," the language must be "sufficiently definite and certain in its terms." *Beebe v. Swerda*, 58 Wn. App. 375, 379, 793 P.2d 442 (1990). A covenant or agreement may operate as a grant of an easement if such an interpretation is necessary in order to carry out the parties' intent. 2 G. Thompson, *Real Property* § 320, at 53 (1980 repl.); *see also Zunino v. Rajewski*, 140 Wn. App. 215, 222, 165 P.3d 57 (2007) (citing *Carr v. Burlington N. Inc.*, 23 Wn. App. 386, 390-91, 597 P.2d 409 (1979)). The grantor's intent alone, however, is not sufficient to create an easement without words that "demonstrate a present intent to grant or reserve an easement." *Zunino*, 140 Wn. App. at 222.

Basic rules of contract interpretation apply when interpreting restrictive covenants. *Wimberly*, 136 Wn. App. at 336. We give a covenant's language its ordinary and common use and will not read a covenant so as to defeat a plain and obvious meaning. *Viking Props, Inc. v. Holm*, 155 Wn.2d 112, 120, 118 P.3d 322 (2005). We determine intent based on the language of the instrument if that language is not ambiguous, and we only resort to extrinsic evidence if ambiguity exists. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). In order to be ambiguous, a covenant must be uncertain or two or more reasonable and fair interpretations must be possible. *White v. Wilhelm*, 34 Wn. App. 763, 771, 665 P.2d 407 (1983) (quoting *Rydman v. Martinolich Shipbuilding Corp.*, 13 Wn. App. 150, 153, 534 P.2d 62 (1975)). If more than one reasonable interpretation of a covenant is possible, the law favors the

interpretation that avoids frustrating the reasonable expectations of those affected by the covenants' provisions. *Green v. Normandy Park Riviera Section Cmty. Club, Inc.*, 137 Wn. App. 665, 683, 151 P.3d 1038 (2007), *review denied*, 163 Wn.2d 1003 (2008). We may consider extrinsic evidence to discern the intent of the covenants only where the evidence gives meaning to words used in the covenants. *Hollis v. Garwall, Inc*., 137 Wn.2d 683, 695-96, 974 P.2d 836 (1999).

The evidence submitted reveals a series of transactions that may have resulted in the platted property having an easement across the railroad property to the beach. This appears to be the "possible and/or potential pedestrian access" that section 3.6 references. CP at 90. First, since this is the only evidence of any previous easements in the area, it seems likely that it was this possible existing easement to which section 3.6 refers. Next, the plat itself depicts the railroad right-of-way and references the deed to the railroad company reserving the 20-foot easement and the release from damages/deed extending this easement across the railroad and tidelands to the beach. Finally, we should not ignore what these old deeds and this new plat both reflect: access to the beach and the water is very important to landowners. This value is the only explanation for referencing these old deeds in the plat; they show potential buyers the basis for a claim for beach access.

Thus, one, and perhaps the only, reasonable reading of the disputed portion of section 3.6 is as follows:

> There exists a 15 ft wide access easement encumbering lot 8 [which] is a limited common element and provides limited access to possible pedestrian access to the adjacent railroad right-of-way and the beaches and tidelands of Puget Sound [. . . .]

We should protect the reasonable expectations of the dedicator and the buyers of this plat's lots. It seems clear that a reasonable person looking at this plat could conclude that the disputed language's intent was to create an easement for landowners across lot 8 to the spot where they might potentially have the right to cross to the beach. To require some additional "magic" language may frustrate this clearly, if ineptly, expressed intent. At a minimum, the evidence should have been sufficient to survive summary judgment. We remand for a trial on whether the easement across the railroad right-of-way and tidelands exists for the benefit of plat owners and whether the plat creates an easement across lot 8 for plat owners to reach this older easement.

III. Attorney Fees at Trial

The Association argues that the trial court improperly awarded Fenberg attorney fees below. Because the trial court erred when it granted Fenberg's motion for summary judgment, we vacate Fenberg's attorney fee award.

IV. Attorney Fees on Appeal

Fenberg and the Association both ask us for an award of attorney fees for costs incurred on appeal. CCRR section 15.13 states:

> In the event of legal action, the prevailing party shall be entitled to recover actual costs and reasonable attorney fees. For the purposes of this Declaration, "legal action" shall include arbitration, lawsuit, trial, appeals, and any action, negotiations, demands, counseling or otherwise where the prevailing party has hired an attorney. It is the intent of this provision to reimburse the prevailing party for all reasonable attorney fees and actual costs incurred in defending or enforcing the provisions of this Declaration, or the Owner's right hereunder.

CP at 78. "Where a party has succeeded on appeal but has not yet prevailed on the merits, the court should defer to the trial court to award attorney fees." *Riehl v. Foodmaker, Inc.,* 152

Wn.2d 138, 153, 94 P.3d 930 (2004). While the Association's claim has survived summary judgment, it has not yet been decided on the merits. Accordingly, we defer to the trial court to award attorney fees.

The trial court's grant of partial summary judgment is reversed, and we remand for trial to determine whether the plat and the CCRRs create an easement across lot 8 for plat owners to reach an older easement across the railroad right-of-way and tidelands.

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

Penoyar, A.C.J.

We concur:

Houghton, J.

I concur in the result only:

Quinn-Brintnall, J.