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MARY JEAN CAHAIL
SAN JUAN COUNTY WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SAN JUAN

BRADLEY F HENKE and JUDITH M HENKE,
Plaintiffs,
vs
OLY ROSE, LLC and ROCKRESORTS ROSARIO, LLC,
Defendants.

NO. 02 – 2 – 05188 – 1

Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment

I. INTRODUCTION

COMES NOW the defendants, Oly Rose, LLC and Rockresorts Rosario, LLC, by and through their attorney Mark Kaiman, and oppose the plaintiff's motion for partial summary judgment

II. FACTS

The Rosario Estates subdivision on Orcas Island was originally platted by the Falcon Corporation of Texas on June 26, 1958 A recreation area is represented on the plat, bounded by a concrete seawall and the water on one side, and a driveway

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ORIGINAL

with the platted lots beyond on the other. The original plat bears the following handwritten Dedication

> FALCON CORPORATION, a corporation organized and existing under the laws of the STATE OF TEXAS, owner in fee simple of the land hereon platted, does hereby, and through its officers, declare this PLAT of "ROSARIO ESTATES" and DEDICATES to the use of the LOT OWNERS all SIDE ROADS, ALLEYS, & DRIVEWAYS shown, together with free access to, and use of, the RECREATION AREA [capitalization in original]

In 1960, Falcon Corporation sold Rosario Estates to Gilbert Geiser The resort opened and began operating on Memorial Day, 1960. The plaintiffs initially purchased lot 51 of the plat in 1966 The plaintiffs sold that lot in order to purchase lot 17 of the plat in 1968. Lot 17, and the existing home on it, had previously been owned by Gilbert Geiser and his wife The plaintiffs later bought lot 52 in 1977, upon which they constructed a garage, and lot 4 in 1985 Lot 4 directly abuts the Recreation Area that is at the center of this dispute. All three lots owned by the plaintiff are contiguous.

The area labeled as "swimming pool" on the plat is actually a concrete lagoon approximately 1 5 feet deep The actual swimming pool was not built until 1961, and is commonly referred to as the "marina pool " The location of the marina pool is still within the Recreation Area, and is noted on the copy of the plat attached to this memorandum as Exhibit A The marina pool was in use when the plaintiffs purchased their property in 1966, and has been in continuous use by the resort guests and lot owners since that time

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Until recently, it was a longstanding practice of the Resort to charge lot owners a recreation fee of $4.00 per month that was billed on a quarterly basis This recreation fee has been collected since the 1960's. The plaintiff was aware of this practice, and paid the recreation fee as a matter of course

In July 1971, a Rosario Property Owners Association was formed with the plaintiff, Bradley Henke, elected to the original board of directors The Association was concerned with the use of the recreation area, and asked for clarification from Gilbert Geiser. Mr Geiser responded in a letter that was received by the Association on August 15, 1971 In his letter, Mr. Geiser stated what he believed to be the common understanding of the boundaries of the recreation area Geiser further stated that "[t]here seems to be a little misunderstanding as to the rights and privileges, and in my estimation the rights of property owners legally are limited to the use of this area, so described "

Geiser's letter went into some detail as to the permitted uses and various prohibitions on use of the tennis court property, the outdoor swimming pool adjacent to the Mansion Lodge, the therapeutic pool, sauna facility, and indoor pool. Property owners, including the plaintiffs, were limited to the use of the outdoor family pool. Mr Geiser also made clear that use of the Recreation Area did not include docking privileges or moorage

In 1994, Gilbert Geiser sold the resort to the Rosario Resort Partnership. In 1998, that partnership sold the resort to its current owner, Oly Rose LLC

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Rockresorts began managing the Rosario Resort for Oly Rose LLC in 2001. Shortly thereafter, the defendants found it necessary to revise the recreation fee structure that had been in place since the 1960's. The Resort's General Manager, Thomas Juilano, sent a letter to Rosario property owners in 2002 describing two spa and recreational programs· an annual membership for $420 00, or a summer membership for $250.00, plus various initial fees, renewal fees, and taxes

In their complaint for damages and declaratory and injunctive relief, the plaintiffs state that prior to Oly Rose LLC acquiring ownership of Rosario Resort, they had "free access to the pool facility along with the rest of the recreation area" despite clear evidence that the plaintiff's paid the $4.00 per month recreation fee in the past. The plaintiffs also allege that they have been excluded from the Recreation Area because of their refusal to comply with the new fee structure as detailed in Thomas Juliano's 2002 letter to property owners.

III. ISSUES PRESENTED

In the State of Washington, any easement must be conveyed by deed The granting instrument must adequately describe the servient tenement in order to comply with the statute of frauds. In order for an implied easement to be created by reference to a plat, the language, lines, and designations on the plat itself must show a clear intent by the dedicator to create an easement interest. Can the

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plaintiff show that these requirements have been met, or do the facts indicate that he has a mere revocable license to use the Recreation Area at Rosario?

IV. LEGAL ARGUMENT

The purpose of summary judgment is to avoid a useless trial where there is no genuine issue of material fact *Olympic Fish Products Inc. v. Lloyd* 93 Wn.2d 576, 602, 611 P 2d 739 (1980) Summary judgment is properly granted when the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law CR 56(c); *Folsom v. Burger King* 135 Wn 2d 658, 663, 958 P.2d 301 (1998). A fact is a material fact if it is one upon which the outcome of the litigation depends, in whole or in part. *Atherton Condominium Apartment Owners Assoc. Board of Directors v. Blume Development Co.* 115 Wn 2d 506, 516, 799 P.2d 250 (1990)

The court considers all facts submitted and all reasonable inferences from them in the light most favorable to the nonmoving party. *Wilson v. Steinbach* 98 Wn 2d 434, 437, 656 P.2d 1030 (1982) However, the nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or having its affidavits considered at face value. *Seven Gables Corp. v. MGM/UA Entertainment Co.* 106 Wn.2d 1, 13, 721 P 2d 1 (1986). After the moving party has submitted adequate affidavits, the nonmoving party must set forth specific facts

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that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists *Dwinell's Cent. Neon v. Cosmopolitan Chinook Hotel* 21 Wn App 929, 933, 587 P.2d 191 (1978)

In the case before the court, there are material facts at issue Therefore, summary judgment would not be appropriate

A. There is no express grant of an easement because the Dedication on the plat does not comply with the requirements of RCW 64.04.010 et seq.

An easement is the privilege to use the land of another, and conveys merely a use interest but not an ownership interest or estate in the land. There are four methods by which an easement can be created· 1) by express grant, 2) by prescription, 3) by implication; and 4) by necessity

RCW 64 04 010 requires that any conveyance of real estate, or any contract evidencing encumbrance on real estate shall be by deed. Pursuant to RCW 64.04.020, every deed shall be in writing, signed by the party to be bound, and acknowledged. Easements are an interest in land and subject to the statute requiring conveyances to be accomplished by deed *Berg v. Ting* 125 Wn.2d 544, 886 P 2d 564 (1995), *Kirk v. Tomulty* 66 Wn App 231, 831 P.2d 792 (1992). An express grant of easement is a conveyance within the meaning of the statute of frauds. *Berg* at 551; *Ormiston v. Boast* 68 Wn.2d 548, 550, 413 P 2d 969 (1966).

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In the case at bar, the plaintiffs cannot meet the threshold requirement of an express conveyance by deed. The purpose of a plat map is to be descriptive and informative, but it conveys no interest in land to anyone It cannot substitute for a deed The Falcon Corporation owned all of the property immediately prior to the filing of the plat in 1958, and continued to own the land immediately after filing. If no quantum of estate was conveyed, then the Dedication language on the plat cannot be an express grant of easement Washington's statutory language is clear and unambiguous on this issue The plaintiff has never been granted an easement in the Recreation Area.

B. The claimed easement is invalid and unenforceable because the Dedication does not provide an adequate legal description of the servient tenement.

In *Berg v. Ting*, an express grant of easement was recorded by deed, but the Washington Supreme Court ultimately found it to be invalid because it did not adequately describe the servient tenement, therefore violating the statute of frauds The Court rejected the respondent's argument that the grant was a "floating easement", and that its location need not be precisely established by the deed *In Netherlands Am. Mortgage Bank v. Eastern Ry. & Lumber Co* 142 Wn. 204, 252 P. 916 (1927), the court recognized the grant of a floating easement because the railroad could select its easement from among several locations, but all the servient tenements were adequately described by the granting instrument.

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Even if the Falcon Corporation's Dedication appeared on a deed that complied with RCW 64 04 010, it would be invalid because the description of the purported servient tenement is not sufficiently definite, and therefore violates the statute of frauds To comply with the statute of frauds, "a contract or deed for the conveyance of land must contain a description of the land sufficiently definite to locate it without recourse to oral testimony, or else it must contain a reference to another instrument which does contain a sufficient description " *Berg* at 551; citing *Bigelow v. Mood* 56 Wn 2d 340, 341, 353 P 2d 429 (1960); *Wilhelm v. Beyersdorf* 100 Wn.App 836, 844, 999 P.2d 54 (2000). The Dedication refers to the Recreation Area, but the alleged servient tenement is not defined. The words "Recreation Area" appear on a parcel that has no apparent legal description. In the language of the dedication itself, what property is to be within the servient parcel is unstated.

The plat includes part of Gov Lot 3, Sec 6 T-36 N-R-1-W WM and of Gov Lots 3, 4, and 5 and the NE 1/4 SW 1/4 of Sec. 31-T-37-N-R-1-W WM, which are five separate parcels From the plat map, it can be determined that there are portions of all parcels outside of the numbered lots, including land to the north of Lots 52, 17, and 4. It is impossible to tell from the plat what the alleged servient parcel would be: Lot 3 of Sec 6, Lots 3, 4, and 5, the NE 1/4 SW 1/4 of Sec. 31, or some combination thereof There is no metes and bounds description of the Recreation Area. There is nothing that would enable a court to determine the precise boundaries of the area burdened by an alleged easement

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While not controlling precedent, a decision from the North Carolina Court of Appeals can provide some guidance to this court In a remarkably similar fact pattern, the North Carolina court held that an alleged easement for the benefit of lot owners over land designated "Park Property" in a plat was void because the description of the allegedly servient parcel was defective. The court held that "the description for areas designated "Park Property" lying north and west of platted lots 353-370 is patently ambiguous, and thus no easement for use as a park burdens the property adjacent to those lots, either that property shown on the plat or beyond." *Stines v. Willyng* 81 N.C App 98, 99, 344 SE 2d 546 (1986)

In the present case, the record makes clear that the Dedication on the face of the plat lacks any adequate legal description of the Recreation Area.

C. The Dedication language on the plat does not create an easement implied by reference.

An implied easement by reference can be created when a plat on which streets have been laid out is referred to by a deed which conveys the property. The grantee is permitted to use the platted streets for the purpose intended *Howell v. King County* 16 Wn.2d 557, 134 P.2d 80 (1943); *Van Buren v. Trumbull* 92 Wn 691, 159 P. 891 (1916) An implied easement by reference is based on the presumption that the purchase is induced by the understanding that that the streets will be available for ingress and egress by grantee *Washington Real Property*

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Deskbook 2d.ed. (Wash. State Bar Assoc. 1986) §15.27. As with other types of implied easements, unity of title and severance are still required elements

The court's task in construing a plat is to determine the intent of the dedicator from the plat itself. *Selby v. Knutson* 77 Wn.App 189, 194, 890 P 2d 514 (1995). The court is not limited to considerations of words alone. Lines and designations appearing on the plat are also to be considered *Rainier Ave. Corp. v. City of Seattle* 80 Wn.2d 362, 366, 494 P 2d 996, *cert denied,* 409 US 983 (1972) Surrounding circumstances and extrinsic evidence will be considered only if the language of the plat is deemed ambiguous. *Selby* at 194-95 A written instrument is ambiguous when its terms are uncertain or capable of being understood as having more than one meaning. *Selby* at 195.

In the case at bar, there is nothing in the language of the plat itself that shows a clear intent to create an easement interest. Unlike a plat upon which the dedicator might label various areas within the subdivision as 'utility easement' or 'sewer easement', the Recreation Area represented on the plat bears no label that supports an inference in favor of the plaintiff's interpretation The term 'Recreation Area' on its own does not connote an easement interest

There are no lines or other types of graphical designations on the plat which could show that the Recreation Area was intended to be distinguished as an easement. For example, a plat could use dotted lines to delineate easements, and solid lines to delineate individual lots. Not only does the 1958 Rosario Estates plat

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contain no express language, there are also no graphical representations supporting the contention that the Falcon Corporation had any intention of creating an easement interest in the Recreation Area for the benefit of plat lot owners.

Howell, 16 Wn.2d 557, and *Van Buren,* 92 Wn. 691, are factually distinguishable from the present case because they concern themselves with easements allowing the grantee access to public roads after statutory street vacations The necessity of ingress and egress are a far cry from an easement for recreational and pleasure purposes The Supreme Court of Texas considered the issue of an implied easement for recreational purposes in *Drye v. Eagle Rock Ranch Inc.* 364 S W.2d 196 (1963) In that case, parties purchased lots in a subdivision in Hays County, Texas, believing that they had recreation privileges over the entire 1000 acre Eagle Rock Ranch. The deeds conveying the lots contained no reference to an easement for pleasure or recreation on the 1000 acre tract

The Texas court pointed out that which is also true in the case before this court: there is no such thing as a private dedication "The purpose and effect of a common law dedication is to create a right of user in the public, or at least in some particular class of the public, and not in some particular person or persons Strictly speaking, there is no such thing as the dedication of property to a private use." *Drye* at FN6

In addition to holding that the dedication was defective, the Texas court held that the lot owners did not acquire easements by implication in their deeds, despite

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the fact that use of the ranch property for recreation had induced buyers to purchase lots at the Eagle Rock Ranch subdivision Inducement to purchase notwithstanding, the court was not persuaded by the lot owners, and recognized a "historic reluctance of the common law courts to recognize easements to wander about land and use it for pleasure and recreational purposes even when there were written grants." *Drye* at 209.

Here, as in the Texas case, the language of the Dedication on the face of the plat fails to create any easement implied by reference.

D. The plaintiffs have never had an affirmative easement to use the Recreation Area. The "free access to and use of" language of the Dedication created a license.

Generally speaking, an easement is perpetual, unless, for example, the grantee's use unreasonably exceeds or deviates from the original grant A license authorizes doing some act or series of acts on the property of another and permits acts which would otherwise be trespass, but is distinguished from an easement because there is no passing of an estate in land, and a license is revocable. *Washington Real Property Deskbook 2d.ed. (Wash. State Bar Assoc. 1986) §15.52; Bakke v. Columbia Valley Lbr. Co.* 49 Wn.2d 165, 298 P.2d 849 (1956)

Since the 1960's, Rosario Resort has charged the Rosario lot owners a monthly recreation fee for the privilege of using the resort property and facilities. The lot owners did not receive the use of the Recreation Area solely by virtue of the

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purchase of their property, but were required to pay ongoing monthly dues The lot owners never had the exclusive right of use of the Recreation Area, and they always shared use of the property with resort guests and others, and even members of the public who were not guests of the resort, but who happened to be temporarily visiting, or moored at the dock. The facilities and activities in the Recreation Area have been installed, removed, maintained, re-modeled, and re-directed solely at the instigation and discretion of the defendant. The affirmative easement alleged by the plaintiff meets none of the requirements for the creation of an easement, but has all the characteristics of a license

The plaintiff has never held any greater interest in the Recreation Area than a license to use it, conditional on payment of a user fee.

V. CONCLUSION

There is a material issue of fact before this court. do the plaintiffs have an easement to use the Recreation Area at Rosario, or do they have some lesser quantum of estate such as a license? This question is before this court because of the ambiguity of the plat Dedication There are also significant questions about the intent of the dedicator, did the Falcon Corporation intend to create an easement or a license? These questions of fact are material because they are the heart of this controversy, and the outcome of this litigation depends on how they are answered. Washington case law and statutes indicate that an easement was not created For

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all of the foregoing reasons, the defendant respectfully requests that this court deny the plaintiff's motion for partial summary judgment.

Date: October 3, 2003

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