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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** **DEFENDANTS' TRIAL MEMORANDUM**

COME NOW, Defendants, OLY ROSE, LLC and ROCKRESORTS ROSARIO, LLC, by and through their attorney, JOHN O LINDE, and respectfully submits Defendants' Trial Memorandum

I Introduction

Defendant Oly Rose, LLC, is the owner of Rosario Resort and the real property described on Exhibit "A" attached hereto Oly Rose purchased the subject real property and other lands from Rosario Resort Limited Partnership in October 1998 Defendant Rockresorts Rosario, LLC has contracted with Oly Rose, LLC to manage and operate Rosario Resort, the resort located on the property owned by Oly Rose and described on attached Exhibit "A" Neither Oly Rose nor its

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predecessor were involved in the platting of Rosario Estates, neither were they involved in the sale of lots within the Plat of Rosario Estates

Plaintiffs filed their complaint seeking damages, declaratory and injunctive relief alleging, among other things, that Defendants have (1) damaged Plaintiffs' view; (2) maintained a fence that interferes with Plaintiffs' use of lands owned by Oly Rose, LLC, (3) maintained a tent or other temporary structure on land owned by Oly Rose, LLC without Plaintiffs' consent or permission, and (4) requested fees from Plaintiffs for Plaintiffs' use of recreation facilities owned by Oly Rose, LLC and maintained and operated by Rockresorts Rosario, LLC

Defendants take the position that Plaintiffs holds only a license for permissive use of portions of Defendants' property, not an easement, and that Plaintiffs' exercise of that license is subject to payment of a fee

II Facts

On July 7, 1958 the San Juan County Board of Commissioners approved the Plat of Rosario Estates The plat was subsequently recorded in Volume 2 of Plats, pages 3 and 3A The face of the plat indicates that it is a subdivision of part of Government Lot 3, Section 6, Township 36 North, Range 1 West, W M. and of Government Lots 3, 4 and 5, and the Northeast Quarter of the Southwest Quarter all in Section 31, Township 37 North Range 1 West, W.M The legal description appended at Page 3A describes with particularity the land included within the plat as being the numbered lots shown on the face of the plat and the roadways, alleys and driveways within and adjoining those platted lots

The survey map placed of record also depicts a number of features located in areas identified as being "not platted " Those features include the "big house," the "swimming pool," the "shop and office," the "round house," the "P.H "

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(powerhouse), and the "honey-moon cottage " An area marked "parking area" is shown and identified and the label "recreation area" is depicted in the area between the swimming pool and the "concrete sea wall "

The dedication contained on the face of the plat "dedicates to the use of lot owners all side roads, alleys, and driveways shown, together with free access to, and use of, the recreation area " The plattor, Falcon Corporation of Texas, immediately began to sell lots within the plat In many, but not all, of the contracts entered into by Falcon Corporation a reference was made to a recreational fee imposed by the plattor This fee was introduced at the very inception of the plat although the language used was not entirely consistent At times the contract requires a purchaser to "pay $4 00 per month for dues for such use of the dock and recreation area" (Lot 4) Another time the purchaser would be required to pay "the sum of $4 00 per month as recreational area maintenance charge " (Lot 22-W), or " to pay the sum of $4.00 per month for dues for such use of the recreation area " (Lot 7), or "to pay the sum of $4 00 per month for use of the dock and recreation area as shown on the Plat of Rosario Estates" (Lot 10), or " pay the sum of $8.00 per month for water and recreation privileges Such other privileges as Seller may from time to time provide are also included in this agreement " (Lot 19) Or, " to pay Seller or his assigns the sum of $4 00 per month as recreation area maintenance charge " (Lot 20-W), or "to pay the sum of $4 00 per month for dues for such use of the dedicated recreation area and its facilities " (Lot 21-W), or "to pay the sum of $4.00 per month for maintaining the recreation area " (Lot 29-W) Or, on occasion, saying nothing about the recreation area and include a catchall statement including "such other privileges as Seller may from time to time provide are also included" (Lot 16)

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Falcon Corporation sold its holdings, including approximately 1,000 acres described as "Parcel A" and those lots not already sold in the Plat of Rosario Estates described as "Parcel B" unto to Gilbert H Geiser and Gleda B. Geiser, husband and wife, and Richard Walker and Lilianne J. Walker, husband and wife, by deed dated March 31, 1960. The Geisers eventually gained control of the assets and began to develop Rosario Resort The Geisers also continued the sale of real property previously subdivided by Falcon Corporation. This time some degree of consistency was achieved when the Geisers developed a form "contract for sale of real estate" for use beginning in 1961 Paragraph 7 of that form provided. "Purchasers shall pay to Sellers, so long as Purchasers shall have an interest in said property, the sum of $_____ per month for the maintenance of the recreation area, said payments to become due on the 1st day of each and every month immediately upon execution of this contract "

The Geisers engaged in development of the unplatted property acquired from Falcon Corporation eventually creating the Plats of Rosario Estates No. 2, Rosario No 3, Rosario Palisades, Rosario Shores, and Rosario Palisades No 2. In addition, numerous unplatted parcels were sold by the Geisers during their ownership. Not all of the contracts for the sale of lots in the new plats developed by the Geisers included a reference to a recreation area but those that utilized the standard form as well as others that included a reference to a recreation area included a monthly obligation to pay for the right of use.

Plaintiffs purchased Lot 17 in the Plat of Rosario Estates in 1968, which lot was improved with an existing home In 1977, Plaintiffs bought Lot 52 and finally in 1985 - Lot 4. In taking title to Lot 4 from the original purchaser, Plaintiffs took "subject to restrictions, covenants, limitations, reservations, and easements of

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record " The initial conveyance from Falcon Corporation to Plaintiffs' predecessor in interest included the following language "Purchaser agrees to pay the sum of $4.00 per month for dues for such use of the dock and recreation area "

Based upon an informal agreement Plaintiffs were allowed to pay the $4.00 per month dues for only one of the three lots they owned The recreation dues were billed on a quarterly basis and had been collected during the Geisers' ownership of the Resort from 1960 through 1980 In 1980 the Resort changed hands In 1984 the Geisers retook possession and resumed operation of the Resort and the collection of the recreation fee Following the death of Gilbert Geiser, Sarah Geiser continued to operate the Resort until the same was sold to Rosario Resort Limited Partnership. The Limited Partnership subsequently changed hands and ultimately the Resort and remaining collateral real property was conveyed to Defendant Oly Rose, LLC in October 1998

Oly Rose, LLC and its predecessors sought to upgrade the Resort and after collecting the recreation fee for a time suspended that fee while trying to develop a new fee structure for enhanced recreation facilities

This dispute arose when the Plaintiffs refused payment and declined to participate in the maintenance of recreational facilities being offered by the Resort. Plaintiffs' position being that they were entitled to use of the Resort's property and facilities for free and that the Plaintiffs held an easement which precluded the Defendants from utilizing a substantial portion of their property without Plaintiffs' consent or approval

III. Issue

DO PLAINTIFFS HOLD AN EASEMENT ON LAND OWNED BY OLY ROSE, LLC WHICH ALLOWS PLAINTIFFS TO UTILIZE DEFENDANTS' LAND AND FACILITIES WITHOUT COST AND WHICH PRECLUDES DEFENDANT OLY

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ROSE, LLC FROM FULLY UTILIZING THE LAND IT ACQUIRED OUTSIDE OF THE PLAT OF ROSARIO ESTATES IN OCTOBER 1998?

IV Legal Argument

A. **A Grant of Easement Must Describe a Specific Servient Estate.**

Under RCW 64 04 010, "Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed " Every deed "shall be in writing, signed by the parties to be bound thereby, and acknowledged " RCW 64 04 020 An easement is an interest in land *Perrin v. Derbyshire Scenic Acres Water Corp*, 63 Wn.2d 716 (1964) An express grant of easement is a conveyance within the meaning of the Statute of Frauds *Ormiston v. Boast*, 68 Wn 2d 548 (1966).

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 " *Bigelow v. Mood*, 56 Wn 2d 340 (1960) In the case of an easement, a deed of easement is not required to establish the actual location of an easement but is required to convey an easement which encumbers a specific servient estate *Smith v. King*, 27 Wn.App 869 (1980)

Here, the contracts and deeds running to the Plaintiffs contain no grant of easement Plaintiffs rely upon the "dedication" language on the face of the plat as a basis for their easement rights Where a deed references a map of the land conveyed, the map and the deed are to be construed together, and the map becomes, in legal effect, a part of the description *Saterlie v. Lineberry*, 92 Wn.App 624 (1988) A review of the face of the Plat of Rosario Estates clearly

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demonstrates that there is no easement described thereon for a "recreational area" or any other common area.

B **Oly Rose, LLC is a Bonafide Purchaser for Value.**

Oly Rose, LLC entered into an arms length transaction with Rosario Resort Limited Partnership and paid fair compensation for the properties acquired Plaintiffs claim an interest in Defendants' land based upon an alleged easement Easements being interests in land they are subject to the statute requiring conveyances to be accomplished by deed *Berg v Ting*, 125 Wn 2d 544 (1995). The legislative purpose for enacting RCW 65 08 070 was "to give greater stability to land titles, by authorizing prospective purchasers or encumbrancers to rely upon the title as disclosed by the record " *Adams v. Mignon*, 197 Wash 293 (1938) Oly Rose, LLC took without actual or constructive notice of the easement claimed by Henke, and therefore it took free of the claimed encumbrance

C. **The Claimed Easement is Invalid and Unenforceable Because the Plat Dedication Does Not Provide an Adequate Legal Description of the Servient Estate.**

The purpose of a plat map is to be descriptive and informative, but it conveys no interest in land to anyone It is not a substitute for a deed although it can be read together with a deed. In the case at bar, the plat map does not provide the Plaintiffs with the description of an easement that his contract and deed also do not include

In *Berg v. Ting, supra*, an express grant of easement was recorded by Deed but ultimately found to be invalid because it did not adequately describe the servient tenement and therefore violated the Statute of Frauds The Court rejected Respondent's argument that the grant was a "floating easement," and that its

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location need not be precisely established by deed A floating easement is recognized but only where all servient tenements are adequately described by the granting instrument *Netherlands Am Mortgage Bank v. Eastern Ry. and Lumber Co*, 142 Wn 2d 204 (1927)

Even if the plat dedication were included on a deed that complied with RCW 64.04.010, it would still be invalid because the description of the purported servient estate is not sufficiently definite and thus in violation of the Statute of Frauds The dedication refers to the "recreation area" but the alleged servient tenement is not defined The words "recreation area" appear on page 3 of Volume 2 of Plats, but not within the area described as being the platted land and otherwise without any legal description whatsoever. There are no "recreational areas" within the plat defined for use of lot owners. Expert surveyors will testify that it is impossible to locate a "recreational area" given the information contained on the face of the plat. They will offer that same opinion even when given the opportunity to utilize the Plaintiffs' documents of conveyance along with the face of the plat

The plat includes portions of several government lots and quarter sections. Even with a precise definition of the area of the plat, it is impossible to tell the definition of the residual parcel let alone what might be the "recreation area " The recreation area has no metes and bounds description nor does it contain references to monuments that would define the area

Expert surveyors familiar with platting both now and at the time the Plat of Rosario Estates was recorded will describe how "common areas," "parks," and "recreation areas" are required to be described. They will also give examples of plats prepared by the same surveyor who prepared the Plat of Rosario Estates and which include areas properly defined as being common areas or parks.

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D **The Dedication Language on the Face of 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 the streets will be available for ingress and egress by grantee. *Washington Real Property 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 consideration 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

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supports an inference in favor of the Plaintiffs' 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 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.

Cases cited by Plaintiffs in their Memorandum in Support of Summary Judgment (*Howell*, 16 Wn 2d 557, and *Van Buren*, 92 Wn 692), 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

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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 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

E. **The Plaintiffs Have Never Had an Affirmative Easement to Use the Recreation Area.**

The Plaintiffs claim an easement to use a "recreation area" that is wholly undefined In addition, the extent of the easement claimed is indefinite Precisely what rights would Plaintiffs have even if the area were defined. Easements for recreating are generally not favored at common law and are classed as licenses and not interests in land. Some degree of definiteness in the scope or extent of an interest is essential to its recognition as a property interest The Restatement of Property addressed the issue as follows: "An example of a privilege of the first sort (definite) is the right of way with prescribed boundaries, of the second (indefinite), the privilege of strolling at pleasure through a field when a use has not the degree of definiteness necessary to the creation of an easement, the privilege to

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make it can be nothing more than a license " Five Restatement, Property 2910, §450.

The language contained in paragraph 7 of the contract for sale of real estate devised by the Geisers strongly suggests that the right created was a license or, at best, an easement in gross, personal to the purchaser and not transferable. Paragraph 7 provided that "Purchasers shall pay to Sellers, so long as Purchasers shall have an interest in said property, the sum of $_____ per month " Nothing is said to imply that the right runs with the land A license authorizes the doing of 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*, 2.d Ed., §15 52.

None of the contracts from Falcon Corporation or from Geiser granted specific rights to a "recreation area" or included a grant of easement to a "recreation area " In every case, where the contract made reference to a "recreation area", it was in reference to an obligation to pay dues or a maintenance fee for use. Since 1958, owners in Rosario Resort have been charged a monthly recreation fee The lot owners did not receive the use of the recreational area solely by virtue of the 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, always sharing the same with Resort guests and others. The Geisers filed subsequent plats, previously identified, and in many of the conveyances of lots from those plats, individuals were given an opportunity to pay dues or a maintenance fee and receive the benefit of the right to use recreational facilities provided by the Resort This, notwithstanding the fact that none of those

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plats made reference to a "recreation area." The extension of licenses to property owners was done to create a feeling of community and to invite lot purchasers to make use of the Resort. The Geisers referred to it as being a "club atmosphere."

The facilities and activities in the recreation area as defined by the Plaintiffs have been installed, removed, maintained, remodeled and controlled solely by the Defendants The Plaintiffs have never had any greater interest in the recreational facilities provided by Defendants' predecessor than a license it to use it conditioned upon payment of a user fee

V. Conclusion

The recreation facilities available at Rosario Resort were all developed by the Geisers or their successors in interest. The grounds of the Resort were utilized by the Resort owner without consultation with or seeking approval from Plaintiffs or other owners within the Plat of Rosario Estates. Structures and facilities were built within the area now claimed by Plaintiffs to be the subject of their easement rights all without comment or objection until this action was commenced The Defendants and their predecessors in interest pay the taxes on the lands in question and control the land's use and development.

The easement claimed by Plaintiffs is nowhere defined in writing. There is no description of the rights included in the term "recreation area" and most significantly there is no description of the area over which an easement is claimed. The Defendants seek the right to control and develop their property They ask that Plaintiffs' claims be dismissed with prejudice and without costs

Respectfully submitted this 23rd day of January 2004.

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Exhibit "A"

LEGAL DESCRIPTION

(160621001) (Mansion)

That portion of Government Lot 3, Section 6, Township 36 North, Range 1 West, W.M., and that portion of Government Lots 4 and 5 Section 31, Township 37 North, Range 1 West, W.M., described as follow:

Beginning at the southeast corner of Lot 18 as shown in the Plat of Rosario Estates recorded at Volume 2 of Plats at page 3, records of said county; thence along the easterly boundary of said Lot 18 and continuing along the easterly boundaries of Lots 19, 20E and 21E to the southeast corner of Lot 22E; thence along the easterly boundary of Lot 22E North 6°10' West 38.7 feet; thence northwesterly 45 feet, more or less, to the most southerly corner of Lot 10 of said plat; thence continuing northeasterly along the southeasterly boundaries of Lots 1 through 10 to the southeast corner of said Lot 1; thence along the northeasterly boundary of said Lot 1, 75.1 feet, more or less to a point on a line parallel with and 75.0 feet northerly of the north margin of a 40-foot wide easement road as shown on the face of "Sucia" as described at Volume 1 of Condominiums at page 1, said records; thence leaving said boundary and along said parallel line North 82°30' East 130.38 feet; thence North 87°57'40'' East 90.38 feet; thence perpendicular to said north margin South 2°02'20'' East 115.0 feet to the southerly margin of said 40-foot wide easement; thence along said southerly margin North 87°57'40'' East 258.78 feet to the northwest corner of that parcel of land described at Auditor's File No. 51101; thence along the westerly boundary of said parcel described at Auditor's File No. 51101 southeasterly to a point on the line of ordinary high tide; thence southwesterly along said line of ordinary high tide to a point on the northerly boundary of Lot 18B of said Plat of Rosario Estates, that bears South 66°09' East from said true point of beginning; thence leaving said line of ordinary high tide and along said northerly lot boundary North 66°09' West to said point of beginning.

EXCEPTING THEREFROM that portion described as follows:

A part of Government Lot 6, Section 31, Township 37 North, Range 1 West, W.M., described as follows:

Beginning at a stake at the west corner of the tract, which is 171.6 feet north and 25 feet east of the meander corner common to fractional Sections 6 and 31 on the west side of Cascade Bay (said M.C. being on a fir stump 7.3 feet east of a concrete monument); thence north 65°28' east 72.8 feet to a stake; thence south 38°00' east 58.5 feet to a stake and on in the same

direction 30 feet, more or less, to the line of ordinary high water; thence with same southwesterly to a point south 30°34' east of the beginning stake; thence north 30°34' west 30 feet, more or less, to a stake on top of the bank and on in the same direction 58.2 feet more to beginning stake at west corner known as "Round House". Subject to easement for existing concrete walk across the tract and together with a perpetual easement across adjoining property for road purposes, such easement to be across existing roadway or any relocated roadway.

TOGETHER WITH the Tidelands of the Second Class situate in front of, adjacent to, abutting upon that portion of the U.S. Government Meander Line of Government Lot 5 as conveyed by the State of Washington by Tideland Deed, recorded January 20, 1906, in Volume 10 of Deeds, at page 130 records of San Juan County, Washington.

TOGETHER WITH the Tidelands of the Second Class situate in front of, adjacent to, o, abutting upon Government Lot 5 lying between the line of mean low tide and the line of extreme low tide as conveyed by the State of Washington by Deed, recorded February 3, 1912, in Volume 12 of Deeds, at page 615, under Auditor's File No. 12709, records of San Juan County, Washington.

Situate in San Juan County, Washington.

(160621001) (Mansion)

Vacated Lots 18A, 18B, 18C, 18D, 18E, 20E and 21E as Vacated pursuant to San Juan County Board of Commissioners Resolution No. 90-1986, May 20, 1986 of ROSARIO ESTATES, according to the Plat thereof, recorded in Volume 2 of Plats, at page 3, in the office of Auditor of San Juan County, Washington.

Situate in San Juan County, Washington.