

SUPREME COURT OF WASHINGTON

Riverview Community Group v. Spencer & Livingston

181 Wash. 2d 888 (2014) · Decided November 20, 2014

SUMMARY

The Washington Supreme Court held that an equitable servitude limiting land use may be implied from developers’ conduct, representations, and related writings, including a recorded plat, under equitable principles. The court also held that Riverview Community Group had organizational standing and that dismissal for failure to join individual homeowners was unwarranted. It reversed the dismissal and remanded for further proceedings concerning whether authorized parties burdened the property and what equitable or injunctive relief was appropriate.

CASE DETAILS

COURT	Supreme Court of Washington
WRITING FOR THE COURT	González, J.; Fairhurst, J.; McCloud, J.; Owens, J.; Stephens, J.; Wiggins, J.; J.M. Johnson, J. Pro Tem.
JURISDICTION	Washington
DECIDED	November 20, 2014
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Riverview sought equitable and injunctive relief to prevent redevelopment of a golf course into individual residential lots. The trial court dismissed the action under CR 12(b)(7) for failure to join indispensable parties and granted summary judgment for defendants on the issue whether an equitable servitude could be created by implication. The Court of Appeals reversed most of the standing and joinder rulings but affirmed summary judgment on the ground that requiring defendants to operate an unprofitable golf course would be inequitable. The Washington Supreme Court granted review.
STANDARD OF REVIEW	Summary judgment is reviewed de novo, with all inferences taken in favor of the nonmoving party. A CR 12(b)(7) dismissal for failure to join an indispensable party under CR 19 is reviewed for abuse of discretion, while underlying legal conclusions are reviewed de novo.
PRECEDENTIAL VALUE	Published Washington Supreme Court opinion; precedential

PARTIES

Riverview Community Group v. Spencer & Livingston, George Livingston, Sheila Livingston, S.O.S. LLC, other persons claiming an interest in the golf course property

TOPICS

real estate

equitable relief

injunctions

standing

civil procedure

PRACTICE AREAS

real estate

property remedies

civil procedure

QUESTIONS PRESENTED

1. Whether Riverview Community Group had organizational standing to seek equitable and injunctive relief on behalf of its members.
2. Whether the individual homeowners were real parties in interest or indispensable parties whose joinder was required under CR 17 and CR 19.
3. Whether Washington law permits an equitable servitude limiting the use of land to be created by implication, including through conduct, representations, and writings such as a recorded plat.
4. Whether summary judgment was proper on the ground that equitable relief requiring continued operation of the golf course would be inequitable.

HOLDINGS

1. Riverview had organizational standing to assert its members' interests because its members would otherwise have standing, the organization's purpose was germane to the dispute, and the requested equitable and injunctive relief did not require individual members to participate as parties.
2. The individual homeowners were not indispensable parties under CR 19 because Riverview sought only equitable and injunctive relief, the absent homeowners' interests would be adequately protected if Riverview prevailed, and no necessary injury to them was shown if the action failed.
3. Under Washington law, an equitable servitude limiting the use of land may be created by implication based on conduct, representations, and acts that would be unjust to repudiate, particularly when supported by a writing such as a recorded plat; the statute of frauds is not a bar to such equitable relief.
4. Summary judgment was improper because the record did not establish an adequate factual basis for concluding that the requested equitable relief would be inequitable.

KEY QUOTATIONS

"By its conduct and representations, the improvement company imposed on its remaining lots certain use restrictions which it may not now violate." (at 897)

"Taken together, we find that an equitable servitude may be implied." (at 898)

“Only if on remand Riverview establishes that someone with the power to encumber the golf course property did so will the question of an equitable remedy arise.” (at 900)

FACTUAL BACKGROUND

Spencer and Livingston developed the Deer Meadows Golf Course Complex and surrounding residential subdivisions in rural Lincoln County. The golf course was identified on a recorded plat, used in advertising, and promoted as an amenity intended to help sell nearby residential lots. After most lots were sold, Livingston closed the golf course and began platting it for residential development; homeowners formed Riverview Community Group based on their belief that representations by the developers promised the golf course would remain a permanent part of the community.

PROCEDURAL HISTORY

The trial court required Riverview to join additional property owners and then granted defendants summary judgment to obtain immediate appellate review. The Court of Appeals held that Riverview had organizational standing, that the individual landowners were not indispensable parties, and that Washington recognized equitable covenants, but affirmed the judgment based on the perceived inequity of requiring operation of a failing golf course. The Supreme Court affirmed those legal rulings, reversed the dismissal, and remanded for further proceedings because the record did not support the Court of Appeals' factual basis for denying relief.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The trial court was directed to conduct further proceedings consistent with the opinion, including determining whether persons with the power to encumber the golf course property made representations sufficient to create an equitable servitude and, if so, the appropriate equitable and injunctive relief.

CASES CITED

- Anderson v. Akzo Nobel Coatings, Inc., 172 Wn.2d 593, 600, 260 P.3d 857 (2011)
- Mulcahy v. Farmers Ins. Co. of Wash., 152 Wn.2d 92, 98, 95 P.3d 313 (2004)
- Gildon v. Simon Prop. Grp., Inc., 158 Wn.2d 483, 493-95, 145 P.3d 1196 (2006)
- Equal Emp't Opportunity Comm'n v. Peabody W. Coal Co., 400 F.3d 774, 778 (9th Cir. 2005)
- Walker v. Munro, 124 Wn.2d 402, 419, 879 P.2d 920 (1994)
- Haberman v. Wash. Pub. Power Supply Sys., 109 Wn.2d 107, 138, 744 P.2d 1032, 750 P.2d 254 (1987)
- Five Corners Family Farmers v. State, 173 Wn.2d 296, 304, 268 P.3d 892 (2011)
- Int'l Ass'n of Firefighters, Local 1789 v. Spokane Airports, 146 Wn.2d 207, 213-14, 45 P.3d 186, 50 P.3d 618 (2002)
- Crosby v. Spokane County, 137 Wn.2d 296, 306-07, 971 P.2d 32 (1999)
- Auto. United Trades Org. v. State, 175 Wn.2d 214, 225, 285 P.3d 52 (2012)

- Johnson v. Mt. Baker Presbyterian Church, 113 Wash. 458, 194 P. 536 (1920)
- Hollis v. Garwall, Inc., 137 Wn.2d 683, 691-93, 974 P.2d 836 (1999)
- Thorstad v. Fed. Way Water & Sewer Dist., 73 Wn. App. 638, 870 P.2d 1046 (1994)
- 1515-1519 Lakeview Boulevard Condo. Ass’n v. Apt. Sales Corp., 146 Wn.2d 194, 204, 43 P.3d 1233 (2002)
- Mountain High Homeowners Ass’n v. J.L. Ward Co., 228 Or. App. 424, 209 P.3d 347 (2009)
- Proctor v. Huntington, 169 Wn.2d 491, 500-01, 238 P.3d 1117 (2010)
- Teamsters Local Union No. 117 v. Dep’t of Corr., 145 Wn. App. 507, 512, 514, 187 P.3d 754 (2008)
- Pugh v. Evergreen Hosp. Med. Ctr., 177 Wn. App. 363, 366, 312 P.3d 665 (2013), review denied, 180 Wn.2d 1007 (2014)
- Warth v. Seldin, 422 U.S. 490, 500, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975)
- Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990)
- In re Estate of Wind, 27 Wn.2d 421, 426, 178 P.2d 731 (1947)

OPINION

GONZÁLEZ, J.

f 1 We are asked whether property developers’ representations about a property anchoring a *891development may impose an equitable servitude on that property. We find that such representations may impose a servitude if, among other things, they are made by someone with the authority to burden the property.

We are also asked whether the Riverview Community Group has the authority to pursue equitable relief based on the developers’ representations to its members. We find that it does. We reverse the dismissal of Riverview’s lawsuit and remand to the trial court for further proceedings consistent with this opinion. González, J. *891Facts ¶2 In the 1980s, Charles Spencer and George Livingston formed a partnership to develop and sell property in rural Lincoln County near the confluence of Lake Roosevelt and the Spokane River.

Over the next 20 years, this partnership and its successors built the Deer Meadows Golf Course Complex (including a golf course, restaurant, hotel, store, and club), platted several nearby parcels of property into subdivisions (the Deer Meadows and Deer Heights subdivisions), and sold lots to private land owners for homes and vacation properties. A plat identifying the golf course was recorded, and an image of the plat was used to help advertise the development.

A local newspaper quoted Spencer as saying he built the golf course complex “ ‘so it would help sell the residential lots around here,’ ” and the lots were advertised accordingly. Clerk’s Papers (CP) at 107. Over the next 20 years, ownership of the unsold lots and the golf course changed forms and hands several times.

After Spencer passed away and after most of the lots were sold, Livingston closed down the golf course complex and began the process of platting the course into new residential lots. ¶[3 Many of

those who had bought homes in the various subdivisions developed by Spencer and Livingston believed they had been promised that the golf course complex would remain a permanent fixture of their community, and they made the decision to purchase homes based in part on that promise.

Some of those homeowners formed the Riverview Community Group, which filed this lawsuit seeking to bar the defendants from selling off the former golf course as individual homes, among other things. Riverview argued that the golf course complex was the heart of the community and provided necessary amenities and that its members had bought their property reasonably believing it would remain a part of their development.

Riverview named as defendants the original Spencer & Livingston partnership, George and Sheila Livingston, the partnership's alleged successors, and anyone else claiming an interest in the golf course property. Riverview sought to impose an equitable servitude on the golf course property that would limit its use to a golf course or, if that was untenable, for other equitable relief.

It also sought injunctive relief. ¶4 The Livingstons responded that Riverview's attempt to bring any claims amounted to fraud on the court. They moved for dismissal under CR 12(b)(7) for failure to join indispensable parties under CR 19. S.O.S. LLC, later joined by Livingston, moved for summary judgment, arguing, among other things, that equitable servitudes were not available in Washington unless created in writing. ¶5 In 2012, the trial judge issued a memorandum decision granting the Livingstons' motion under CR 12(b)(7) for failure to join indispensable parties.

The decision gave Riverview a "reasonable period of time" to join the Deer Meadows property owners. CP at 212. The following month, the trial court issued an order stating that "the legal issue of whether an equitable servitude can be created by implication is a question of first impression in the State of Washington" and granted summary judgment in favor of the defendants to expedite review.

Id. at 248. ¶6 The Court of Appeals largely reversed the trial court's legal rulings, finding that Riverview had organizational standing and the individual property owners were not essential parties, and concluding that Washington recognized equitable covenants. *Riverview Cmty. Grp. v. Spencer & Livingston*, 173 Wn. App. 568, 295 P.3d 258 (2013).

However, it affirmed summary judgment on the grounds that it would be "irrational to require the defendants to rebuild and operate a failing business." Id. at 591. We granted Riverview's petition for review. *Riverview Cmty. Grp. v. Spencer & Livingston*, 178 Wn.2d 1009, 308 P.3d 643 (2013).

We affirm most of the Court of Appeals' legal rulings but find its dismissal was based on facts not found in the record. We affirm in part, reverse in part, and remand to the trial court for further proceedings. Analysis ¶7 We review summary judgment de novo, taking all inferences in favor of

the nonmoving party. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 600, 260 P.3d 857 (2011) (citing *Mulcahy v. Farmers Ins.*

Co. of Wash., 152 Wn.2d 92, 98, 95 P.3d 313 (2004)). We review CR 12(b)(7) dismissals for failure to join an indispensable party under CR 19 for abuse of discretion “with the caveat that any legal conclusions underlying the decision are reviewed de novo.” *Gildon v. Simon Prop. Grp., Inc.*, 158 Wn.2d 483, 493, 145 P.3d 1196 (2006) (citing *Equal Emp’t Opportunity Comm’n v. Peabody W. Coal Co.*, 400 F.3d 774, 778 (9th Cir.

2005)). Such dismissals “should be employed sparingly when there is no other ability to obtain relief.” *Id.* at 494 (citing 7 Charles Alan Weight, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1609, at 130 (3d ed. 2001)). 1. May Riverview Maintain This Action? ¶8 Cases should be brought and defended by the parties whose rights and interests are at stake.

See *Walker v. Munro*, 124 Wn.2d 402, 419, 879 P.2d 920 (1994) (citing *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 138, 744 P.2d 1032, 750 P.2d 254 (1987)). This principle is reflected in the court rules and in common law limitations on who can bring suit. *Id.*-, see also CR 17(a). S.O.S. *894LLC and the Livingstons argue that Riverview lacks standing to sue on behalf of its members, that it is not a real party in interest, and that the individual landowners are indispensable parties.

The Court of Appeals rejected these arguments. We affirm. ¶9 “Organizations have standing to assert the interests of their members, so long as members of the organization would otherwise have standing to sue, the purpose of the organization is germane to the issue, and neither the claim nor the relief requires the participation of individual members.” *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 304, 268 P.3d 892 (2011) (citing *Int’l Ass’n of Firefighters, Local 1789 v. Spokane Airports*, 146 Wn.2d 207, 213-14, 45 P.3d 186, 50 P.3d 618 (2002) (*Firefighters*)).

Riverview has satisfied this test. Several of its members have filed sworn declarations that establish the basis of a claim, satisfying the first element of the *Firefighters* test. The homeowners formed Riverview with the purpose of defending their interests, satisfying the second element.

Finally, Riverview can pursue this claim for equitable or injunctive relief without the participation of individual members. The relief requested — the imposition of an equitable servitude on the land and/or some sort of injunctive relief — does not require the participation of the individual members.¹ *895¶10 For similar reasons, we find the CR 17 and CR 19 arguments unavailing.

CR 17(a) provides that “[e]very action shall be prosecuted in the name of the real party in interest.” Given that we find organizational standing, this rule has been satisfied. Nor have the respondents otherwise established that the individual property owners in the subdivisions were indispensable parties under CR 19(a), and we agree with the Court of Appeals that the trial court was incorrect in concluding otherwise.

The Livingstons argue that the individual landowners in the developments are necessary parties because they could individually bring suit, raising the possibility of inconsistent results. Among other things, a party is indispensable when it “is needed for just adjudication.” *Gildon*, 158 Wn.2d at 494 (citing *Crosby v. Spokane County*, 137 Wn.2d 296, 306, 971 P.2d 32 (1999)). “[I]f an absent party is needed but it is not possible to join the party, then the court must determine whether in ‘equity and good conscience’ the action should proceed among the parties before it or should be dismissed.” *Id.* at 495 (quoting *Crosby*, 137 Wn.2d at 306-07).

Given that Riverview is seeking only equitable and injunctive relief, the other homeowners are not needed for a just adjunction. If it succeeds, the other property owners will be benefited. See *Auto. United Trades Org. v. State*, 175 Wn.2d 214, 225, 285 P.3d 52 (2012) (noting that an absent party’s ability to protect its interest is not impaired if that interest is adequately protected by existing parties).

If Riverview’s suit ultimately fails, we discern no necessary injury to the property owners who have not joined the cause. While we need not reach the second step, if we do, equity and good conscience do not cry out for dismissal, especially given that the Livingstons have not established that the Court of *896Appeals was incorrect that the various statutes of limitations on potential claims has or will soon run. f 11 We affirm the Court of Appeals on these intertwined issues and find Riverview may maintain this action.

2. May an Equitable Servitude Be Implied? ¶12 Next, we turn to whether, under Washington law, an equitable servitude limiting the use of land may be implied. Riverview argues that it may under either § 2.10 of the Restatement (Third) of Property: Servitudes (Am. Law Inst. 2000) or *Johnson v. Mt. Baker Presbyterian Church*, 113 Wash. 458, 194 P. 536 (1920).

We find that an equitable servitude and injunctive relief are available under *Johnson* and leave for another day whether § 2.10 of the Restatement correctly articulates the law in Washington State. ¶13 In *Johnson*, a Seattle property developer platted and developed a new neighborhood, the “‘Mt. Baker Park, an addition to the city of Seattle.’” *Id.* at 459.

The developers advertised the neighborhood as a “strictly high-class residence section” that “would not permit any buildings other than residences.” *Id.* Most of the deeds for lots in the neighborhood included boilerplate language limiting building to “‘single, detached residence[s],” which the court found increased the sale price of the lots by 15 to 20 percent.

Id. at 460-61. But not all of the deeds in the development contained the boilerplate restriction. *Id.* at 460. A church congregation acquired one of the apparently unrestricted lots, intending to build a church, and the litigation followed. *Id.* at 461.

The church acknowledged that it knew the development was intended to be limited to single family homes but argued that the other homeowners could not seek to enjoin it from building a

church unless it could “show some right, title, interest or easement in the so-called church lot,” which, it contended, would have to have been created in writing on the deed to avoid the statute of frauds.

Id. at 462. f 14 We disagreed. We declined to apply the statute of frauds because the homeowners’ relief did not rest on *897creation of an interest in the church’s land but on “equitable principles.” Id. at 464. We did not reach the issue of whether the covenant ran with the land to bind successors because the church was fully aware of the restrictions when it bought the property (i.e., all parties had notice of the restrictions).

Id. at 468-69. Instead, we held that “if this suit had been against the improvement company to enjoin it from making to appellant a deed without restrictions, such suit must have succeeded upon equitable principles.... By its conduct and representations, the improvement company imposed on its remaining lots certain use restrictions which it may not now violate.”Id. at 465-66.

Accordingly, “based on conduct, representations and acts which injustice, between man and man, may not be repudiated,” we affirmed an injunction preventing the congregation from building the church. Id. at 466, 459. ¶15 More recently, we observed that words on the face of a plat, such as “golf course” on one of the recorded plats here, can establish an equitable covenant limiting the use of land.

Hollis v. Garwall, Inc., 137 Wn.2d 683, 691-93, 974 P.2d 836 (1999) (citing Thorstad v. Fed. Way Water & Sewer Dist., 73 Wn. App. 638, 870 P.2d 1046 (1994)).² Even more recently, we have observed that “it is even possible for covenants to be enforced against those who have no cov*898enant appearing on their title.” 1515-1519 Lakeview Boulevard Condo. Ass’n v. Apt.

Sales Corp., 146 Wn.2d 194, 204, 43 P.3d 1233 (2002) (citing William B. Stoebuck, Running Covenants: An Analytical Primer, 52 Wash. L. Rev. 861, 908-10 (1977)). Taken together, we find that an equitable servitude may be implied.

Under Johnson, the statute of frauds is no barrier, at least when there is some writing, such as a plat, that supports the imposition of the burden.³ ¶16 Our decision that an equitable servitude may be implied is bolstered by a similar case from Oregon, Mountain High Homeowners Ass’n v. J.L. Ward Co., 228 Or. App. 424, 209 P.3d 347 (2009). Similarly to the case before us, the homeowners in Mountain High had bought homes in a development that contained a golf course complex.

Id. at 427. Also like the case before us, “prospective buyers who asked for assurances that the golf course would remain in place were told that the golf course would continue to be there and that there was no need to worry about it.” Id. Also like the case before us, the golf course fell on hard financial times and the owner shut down operations. Id. at 429.

After a full trial, the Oregon trial court imposed an equitable servitude on the golf course property, limiting its use to a golf course, and entered an injunction requiring the developer “to reconstruct, maintain, and operate the nine-hole golf course for 15 years.” *Id.* at 431.

The Court of Appeals ^{*899}affirmed. *Id.* at 438. It reasoned that the imposition of an equitable servitude and an enforcing injunction was justified because [d] efendant represented to buyers that Mountain High was and would continue to be a golf course community. That representation was made both expressly and impliedly. It was reasonably foreseeable that, in deciding whether to purchase land within Mountain High, a prospective buyer would rely on those representations and substantially change position as a result of that reliance.

The owners did, in fact, purchase property in Mountain High, substantially changing their positions as a result of defendant’s representations. It was reasonable for buyers to rely on the representations of the developer of Mountain High and the owner of the Mountain High golf course in making their decisions to purchase in the community.

Under all the circumstances, including the condition of the golf course property as of the date of trial in this case, it would be unjust for defendant to benefit from the successful marketing of Mountain High as a “golf course community” without the imposition of the servitude.

Accordingly, we conclude that the trial court did not err in declaring the existence of the equitable servitude. *Id.* at 438-39. We agree.⁴ ¶17 We find that Riverview has presented sufficient evidence to survive summary judgment under Johnson.

The evidence presented creates a material question of fact of whether those with the power to burden the property induced purchasers to purchase lots on the promise that the golf course would remain a permanent fixture of the community.

Under Johnson, both equitable and injunctive relief may be available. 113 Wash. at 464-65. ¶18 We acknowledge that there is force to the Court of Appeals’ conclusion that requiring the respondents to operate an unprofitable golf course would be inequitable. See *Riverview Cmty. Grp.*, 173 Wn. App. at 590 (citing *Proctor v. *900Huntington*, 169 Wn.2d 491, 500-01, 238 P.3d 1117 (2010)).

But we find nothing in this record that provides an adequate factual basis for the Court of Appeals’ disposition on this basis. Further, while Riverview’s complaint primarily seeks “[a] decree quieting title to an equitable servitude in defendants’ real property... that Deer Meadows and Deer Heights may continue as a... golf course community [with] an operating 18-hole golf course” and a consistent injunction, it did not limit its prayer for relief to those remedies.

CP at 20-23. Only if on remand Riverview establishes that someone with the power to encumber the golf course property did so will the question of an equitable remedy arise. At that point, the

parties will be free to present evidence and argument as to the nature and scope of any appropriate equitable and injunctive relief. See, e.g., *Mountain High*, 228 Or. App. at 440 (imposing a servitude limiting the use of the property in perpetuity but only imposing the injunction for a limited period of time).

Conclusion f 19 We affirm the Court of Appeals to the extent that it found Riverview had standing to maintain the suit, that dismissal under CR 17 and CR 19 was unwarranted, and that an equitable servitude may be created by implication.

We reverse the Court of Appeals' dismissal and remand to the trial court for further proceedings consistent with this opinion. Owens, Stephens, and Wiggins, JJ., and J.M. Johnson, J. Pro Tem., concur. We respectfully disagree with our dissenting colleagues that the standing inquiry turns on whether Riverview members will be called upon to testify. Dissent at 913 (citing *Firefighters*, 146 Wn.2d at 214; *Ironworkers Dist.*

Council of Pac. Nw. v. Univ. of Wash. Bd. of Regents, 93 Wn. App. 735, 741, 970 P.2d 351 (1999)). We have never held that "testimony is the equivalent of "participation" for the purposes of the third prong of the standing analysis we adopted in *Firefighters*, and the Court of Appeals has explicitly rejected that argument as "without merit." *Teamsters Local Union No. 117 v. Dep't of Corr.*, 145 Wn.

App. 507, 512, 187 P.3d 754 (2008); see also *Pugh v. Evergreen Hosp. Med. Ctr.*, 177 Wn. App. 363, 366, 312 P.3d 665 (2013), review denied, 180 Wn.2d 1007 (2014). In *Teamsters* the Court of Appeals "refuse[d] to adopt [the Department of Corrections]'s position that participation of an individual member as a witness abrogates the Union's standing to prosecute the employees wage claims." 145 Wn.

App. at 514. Denying organizational standing based on the fact members might be called upon to testify would not further the purpose of the third prong. As the United States Supreme Court explained in a case we discussed at great length in *Firefighters*, this third *895prong is prudential and exists because without it "the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Warth v. Seldin*, 422 U.S. 490, 500, 95 S. Ct.

2197, 45 L. Ed. 2d 343 (1975). Neither concern is present here, whether or not any of the members testify. We find unavailing the respondents' contentions that the parol evidence rule requires the court to turn a blind eye to the plats and other evidence Riverview has presented in support of equitable and injunctive relief.

The parol evidence rule limits extrinsic evidence of the parties' contractual intent. *Hollis*, 137 Wn.2d at 693 (citing *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990)). This case does not

turn on the meaning of the parties' contracts; this case sounds in equity, not contract. Similarly, we are not persuaded that the dead man's statute, ROW 5.60.030, is fatal to this case.

Under RCW 5.60.030, testimony of an interested party shall not be admitted "as to any transaction... or any statement made" by the deceased. The test of whether an act is a "transaction" within the meaning of the dead man's statute "is whether deceased, if living, could contradict the witness of his own knowledge." *In re Estate of Wind*, 27 Wn.2d 421, 426, 178 P.2d 731 (1947).

While the dead man's statute may bar some specific testimony from being offered on remand, there is ample evidence presented that does not depend on the testimony of interested parties, such as the recorded plat and various real estate flyers from the realty company describing Deer Meadows as a golf community. CP at 132-44. Without testimony by Riverview members about actions of deceased defendants, the dead man's statute does not apply.

We respectfully disagree with the concurrence/dissent that summary judgment should be affirmed on this record. See concurrence/dissent at 901, 907-08. Taken in context, the trial judge's oral observation at summary judgment that there was "nothing in writing" appears to us to mean there was no written instrument creating an encumbrance, not that there was no writing evidencing the creation of an equitable servitude.

Verbatim Tr. of Proceedings (Dec. 23, 2011) at 21. Whether encumbrance had to be created in writing was a major issue in the summary judgment hearing, enough so that plaintiff's counsel proposed entering a RAP 2.3(b)(4) order allowing immediate review. *Id.* at 14. While the respondents' counsel declined to join the motion, the trial court's order clearly echoes the language of RAP 2.3(b)(4), strongly suggesting that the judge was motivated at least in part to obtain an appellate ruling on whether equitable servitudes could be implied.

CP at 248. Also, there are other writings in this record, and there may be more found after further discovery, that provide at least some evidence that those with the power to encumber the property did so, as well as other evidence suggesting an encumbrance. E.g., *id.* at 97, 99, 100-02, 107, 151.

We recognize that the Oregon court has explicitly adopted the Restatement approach. We nonetheless find the case helpful.