COLORADO COURT OF APPEALS 2 East 14th Avenue, 3rd Floor Denver, CO 80203	
El Paso County District Court Honorable Larry E. Schwartz Case No. 2008CV2923, Division 5 Ctrm. 501	
Plaintiffs-Appellees: Charles Warne, Bridget Warne, Brandon Cuffe, Norman Villanueva, Nancy Villanueva, Howard Surber, Luana Surber, Travis Helton and Karen Helton v. **Defendants-Appellants:** Woodmen Hills Covenant Management Board and Woodmen Hills Metropolitan District	**COURT USE ONLY**
Attorneys for Appellants: SUSEMIHL, MCDERMOTT & COWAN, P.C. Jason W. Downie, Atty Reg. # 27256 Geoffrey L. Lindquist, Atty Reg. # 38290 660 Southpointe Court, Suite 210 Colorado Springs, CO 80906 Phone: 719-579-6500 Fax: 719-579-9339 Email: jdownie@smmclaw.com	Case Number: 2009CA1987
REPLY BRIEF	

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DEFINITIONS

For purposes of this Reply Brief, Appellants, Woodmen Hills Metropolitan District and Woodmen Hills Covenant Management Board will be referred to as "WHMD" and "WHCMB", respectively. The Appellees will be referred to as the "Homeowners". All other terms including Declaration, Declarant, Amendment to Declaration, D.R. Horton / Melody Contract, Covenant Management Board Contract and property owners will have the same meaning as set forth in WHMD's and WHCMB's Opening Brief. (Opening Br. at 3-5.)

STATEMENT OF THE CASE AND RELEVANT FACTS

In the Homeowners' Answer Brief, the Homeowners set out lengthy statement of the case and factual background sections (Answer Br. at 1-8). However, Homeowners fail to cite to the record regarding many factual allegations. For example, paragraph 2 of page 6 of the Answer Brief contains factual allegations with no citations to the record or any affidavit (Answer Br. at 6, ¶ 8). Further, all of the Homeowners citations in their factual background section are to factual allegations set forth in their complaint when they cite to R. at 2, 3, or 4 (Answer Br. at 4-8). WHMD and WHCMB, in their Answer (R. at 29-40) denied many of these factual allegations. WHMD and WHCMB point out that their Answer (R. at 29-40) was to Homeowners' Second Amended Complaint (R.

at 19-28) and not to Homeowners' initial Complaint (R. at 1-8).

Because of the Homeowners' incomplete and/or misleading citations, WHMD and WHCMB urge the Court to consider its statement of the case and factual allegations (Opening Br. at 1-5) instead of Homeowners' statement of the case and factual allegations.

ARGUMENT

1. The trial court erred in not requiring the Homeowners to join all other property owners burdened by the Declaration in this declaratory relief action involving issues whether certain recorded documents are valid and enforceable by WHMD and WHCMB.

Standard of Review: Because the facts are undisputed and this issue involves matters of law, the standard of review is *de novo*. *In re Estate of Sheridan*, 117 P.3d 39, 41 (Colo. Ct. App. 2004). Additionally, the interpretation of a statute is a question of law. *Robles v. People*, 811 P.2d 804 (Colo. 1991).

Homeowners argue that their declaratory relief action does not affect others (Answer Br. at 10). However, the opposite is true. The Declaration, Amendment to the Declaration, D.R. Horton / Melody Contract, and Covenant Management Board Contract burden 185 residential lot owners (R. at 219, 223, 230, and 236-237). Further, the Homeowners' claims for relief include claims that several of these documents are void or voidable, that the Declaration has no enforcement

mechanism, and that the Amendment to the Declaration controls. The Homeowners saw it fit to reprint their entire prayer for declaratory relief in the Answer Brief (Answer Br. at 10-11). It is WHMD and WHCMB's position that the sweeping relief claimed by the Homeowners in their Complaint and Amended Complaints requires the joinder of the property owners.

The Homeowners further argue that it is the WHMD and WHCMB who are asking for relief permanently affecting the property rights of the property owners when asking the Court to declare the Amendment to the Declaration invalid (Answer Br. at 12). However, looking back at the Homeowners' prayer for relief, one can see that it is the Homeowners who first asked for declaratory relief (i) that the Amendment to the Declaration was the controlling document for all of the "Owners" as defined in the Complaint, which includes not just the Homeowners or Plaintiffs in this action, but all the property owners in Woodmen Hills Filing Number 8 and a Portion of Filing Number 9, and (ii) that the Amendment to the Declaration has no mechanism for covenant enforcement against the same "Owners," which again includes all the property owners in Woodmen Hills Filing Number 8 and a Portion of Filing Number 9. (R. at 21, 23-25; Answer Br. at 10-11).

Additionally, it is the Homeowners who have argued that the entire Declaration is a set of guidelines and has no legal means for enforcement (Answer Br. at 21). The Homeowners sweeping claims for relief will affect all property owners who are subject to the Declaration.

The Homeowners also argue that WHMD and WHCMB have brought a multitude of suits against property owners covered by the Declaration (Answer Br. at 13). However, the Homeowners only cite to one example – El Paso County, County Court Case No. 08C19593 that has been consolidated with the current action (Answer Br. at 3). The Homeowners again try to distort the facts regarding the WHCMB and WHMD suing other property owners after the district court denied its motion to join all property owners (Answer Br. at 3, 13). In fact, Case No. 08C19593 was filed on July 17, 2008 (R. at 121-125) – well before the district court's Order Regarding Joinder which was signed by the trial court judge on September 18, 2008 (R. at 140).

Again, for the reasons noted above and for the arguments set forth in the Opening Brief, WHMD and WHCMB ask that this Court reverse the district court's order regarding joinder.

2. The trial court erred in granting summary judgment in favor of the Homeowners because the Declarant had the power and right to assign enforcement to the WHMD and WHCMB, the Declarant had a right to enforce the Declaration at the time it assigned that right to WHMD and WHCMB, and the WHMD has the power and authority to assess a covenant fee pursuant to Colo. Rev. Stat. § 32-1-1001(1)(j)(I).

Standard of Review: Because the facts are undisputed and this issue involves matters of law, the standard of review is *de novo*. *In re Estate of Sheridan*, 117 P.3d 39, 41 (Colo. Ct. App. 2004). Further, the interpretation of written contracts is a question of law. *Keith v. Kinney*, 140 P.3d 141, 146 (Colo. Ct. App. 2005). Additionally, the interpretation of a statute is a question of law. *Robles v. People*, 811 P.2d 804, 806 (Colo. 1991).

Homeowners continue to use a term, 'declarant control', that is not a defined term in the Declaration (Answer Br. at 15, 22). It seems from the arguments set forth in the Answer Brief that the Homeowners believe the only powers that the Declarant ever had were espoused in Article VI of the Declaration and that those powers lapsed.

Nothing could be farther from the truth. The Homeowners fail to respond to WHMD and WHCMB's arguments that the Declaration names the Persons who may enforce the Declaration in Article I, § 3 (R. at 201; Opening Br. at 16). This specific provision provides that the Declarant is one of the Persons that the

Declaration binds and benefits (R. at 201) and that this provision is in force until the expiration or termination of the Declaration.

Further, the Homeowners failed to respond to any arguments regarding a declarant's right to assign covenant enforcement powers to a metropolitan district pursuant to C.R.S. § 32-1-1004(8)(a). Hence, the Homeowners must agree with WHMD and WHCMB's interpretation of the statute.

Plaintiffs cite a case, *Miller v. Curry*, that is wholly irrelevant to the issues in the present case. *Miller v. Curry* deals with a developer's apparent attempt to reserve development rights in a declaration. *Miller v. Curry*, 203 P.3d 626, 628-629 (Colo. Ct. App. 2009). The Colorado Common Interest Ownership Act requires that a declarant reserve development rights and include a "time limit within which each of those rights must be exercised." C.R.S. § 38-33.3-205(1)(h). This Court held that the declaration's provision providing for an indefinite term could not be considered a time limit. *Miller*, 203 P.3d at 631-632. The Declaration in this matter specifically excludes the community from the provisions of The Colorado Common Interest Ownership Act. Moreover, "development rights" pursuant to C.R.S. § 38-33.3-103(14) has a very specific meaning which

does not have anything to do with covenant enforcement or assigning a powers to enforce a declaration.[1]

Plaintiffs apparently argue that the holding in *Miller v. Curry* should be expanded to not allow the assignment of the Declaration. Defendants are unaware of any contract law principle or statutory provision that requires a 'time limit' in which a contract must be assigned. Further, and most importantly, the Declaration includes a provision stating when the Declaration's term ends. Article VII, Section 1 states that the Declaration remains in full force and effect until December 31, 2050 unless there is a termination vote by the property owners (R. at 215).

The Homeowners also spend time arguing that a *self-help* provision was the only enforcement mechanism in the Declaration affording the Declarant the power to enforce the Decalaration (Answer Br. at 19; R. at 216) and that the Declaration is just a set of guidelines with no legal recourse (Answer Br. at 21). The Homeowners seem to confuse *self help*, a legal term of art, with the general enforceability of a contract or real property declaration through the legal process. In contrast to their argument that *self help* is the only way the Declaration can be enforced and that the Declaration is a set of unenforceable guidelines, the

[1] C.R.S. § 38-33.3-103(14) states "Development rights" means any right or combination of rights reserved by a declarant in the declaration to: (a) Add real estate to a common interest community; (b) Create units, common elements, or limited common elements within a common interest community; (c) Subdivide units or convert units into common elements; or(d) Withdraw real estate from a common interest community.

Declaration includes an enforcement section in Article VII, Section 5 (R. at 216). This section was previously discussed in the Opening Brief (Opening Br. at 16).

The Homeowners also state that they were kept out of the loop regarding the WHMD's efforts to begin covenant enforcement (Answer Br. at 22). To the contrary, WHMD, as a Title 32 Metropolitan District, strictly adheres to state law concerning any official action taken at its meetings. Further, Article V of the Declaration contains informs property owners that the property covered by the Declaration is within the boundaries of a metropolitan district and that the property is subject to the ordinances, regulations, and various fees and charges in affect or that may be adopted by the district (R. at 213).

For these reasons and the arguments set forth in Opening Brief, WHMD and WHCMB request that this Court reverse the trial court's Order granting summary judgment in favor of the Homeowners.

CONCLUSION

Because of the Homeowners' sweeping claims for declaratory relief regarding various recorded documents burdening 185 residential lots, all property owners should be joined as parties in this action.

Further, since the Declarant still had rights regarding the Declaration, and is allowed to contract regarding covenant enforcement with the WHMD, the trial

court's order granting summary judgment should be reversed. Further, pursuant to Colorado law, the WHMD is allowed to charge monthly fees regarding covenant enforcement.

DATED this 12th day of March, 2010.

SUSEMIHL, MCDERMOTT & COWAN, P.C.
Original signature on file at the offices of
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Response to Order to Show Cause was filed and served electronically through LexisNexis File & Serve this 12th day of March, 2009, on the following:

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