

DISTRICT COURT, PARK COUNTY COLORADO 300 – 4 th Street Fairplay, Colorado 80440	▲ COURT USE ONLY ▲
<p>Plaintiffs: ELK FALLS PROPERTY OWNERS ASSOCIATION, a Colorado corporation; KATHRYN WELLS; THE PAUL VASTOLA AND SUZANNE G. NELSON LIVING TRUST, U/A DATED 8/10/01; ROBERT W. PHELPS; and KEVIN WELLS</p> <p>Defendants: VERA B. DUNWODY and DRAYTON D. DUNWODY, and FARM CREDIT OF SOUTHERN COLORADO, ACA, an agricultural credit association; and the BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF PARK, COLORADO</p> <p>Plaintiffs in Intervention: PETER J. BRAUN and RENAE J. BRAUN</p>	
Victor F. Boog, No. 2561 Amanda B. Cruser, No. 30601 Boog & Cruser, P.C. 3333 S. Wadsworth Blvd., Suite D201 Lakewood, CO 80227 303-986-5769 Fax 303-985-3297 <i>Attorneys for Defendants Vera B. Dunwody and Drayton D. Dunwody</i>	Case Number: 2010 CV 65 Div.: 1
RESPONSE TO MOTION FOR RECONSIDERATION TO VACATE THE INDISPENSABLE PARTIES ORDER AND DENY DEFENDANTS' VERIFIED MOTION TO JOIN INDISPENSABLE PARTIES OR CLARIFICATION OF INDISPENSABLE PARTIES ORDER	

Defendants, Vera B. Dunwody and Drayton D. Dunwody (the "Dunwodys"), submit the following Response to the Plaintiffs' Motion for Reconsideration to Vacate the Indispensable Parties Order and Deny Defendants Verified Motion to Join Indispensable Parties or Clarification of Indispensable Parties Order.

A. The Court Should Grant the Dunwody's Indispensable Parties Motion

1. Contrary to the statement in paragraph 6 of the Plaintiffs' Motion, this action does not "arise from an access dispute involving Elk Falls Subdivision Roads." None of the "Disputed Roads" is within the platted legal descriptions of the land included in Elk Falls-Blocks 1, 2, or 3. Whether persons should be joined as indispensable parties under C.R.C.P. 19(a), 19(c), and 105 is not subject to a majority vote or the wishes of a majority of Elk Falls Subdivision owners. Furthermore, the Elk Falls Property Owners' Association (the "EFPOA"), has never asked for or received written authorization from those members of the EFPOA it purports to represent in this action. Instead, the Board of Directors of the EFPOA **chose to initiate** this lawsuit on February 26, 2010, and thereafter chose to impose assessments against members of the EFPOA to fund this litigation regardless of whether such members desired to pursue the claims being asserted by the EFPOA. Members of the EFPOA were also advised that if any member of the EFPOA failed to pay an assessment levied to fund this litigation, such members' property in the Elk Falls subdivision would be subjected to an assessment lien. See attached Exhibit A.

As of this date, the owners of fourteen lots in the Elk Falls subdivision have signed disclaimers of interest in the "Disputed Roads." (See the Disclaimers attached to Defendants' Supplemental Motion to Join Persons Needed for a Just Adjudication Under C.R.C.P. 105, and the Disclaimers filed herewith as Exhibits B, C, D, E, F, G.) In addition, as stated in paragraph 8 of the Affidavit of Paul Vastola attached to the EFPOA's Motion as Exhibit 2, "[a] substantial majority of the homeowners who are not currently named in this lawsuit, do not wish to be named as Parties."

Such persons may not wish to be named as parties because they are aware that they have no factual or legal basis for asserting the claims made by the Plaintiffs in this action, and do not wish to be subjected to a claim for attorneys fees and costs under section 13-17-101, *et seq.*, C.R.S. Those persons who do not wish to be named as parties in this action either know or should know that:

a. the Disputed Roads are not public roads because they have never been dedicated to the public; have never been accepted by Park County by any official action or work in the way of improving or maintaining any portion of the Disputed Roads (see *Litvak v. Sunderland*, 143 Colo. 347, 353 P.2d 381 (Colo. 1960)); and the public has been prevented from using the Disputed Roads not only by the west gate (main gate) on South Elk Creek Road, but also by the electric arm gate established by the EFPOA on Upper Ranch Drive adjacent to Elk Falls-Block 2, Lot 51, now owned by Sam and Karen Shapiro;

b. they have no easements of record over and across the Disputed Roads by virtue of recorded subdivision plats or otherwise;

c. neither they nor their predecessors in title can establish prescriptive rights to the Disputed Roads by adverse use for 18 consecutive years because they and their predecessors in title had permissive use of the Disputed Roads as members of the Elk Falls Ranch Sportsmen's Club; or as shareholders of the Elk Falls Ranch Development Company; or pursuant to leases entered into between the EFPOA and the Elk Falls Ranch Development Company pursuant to which members of the EFPOA were entitled to use facilities on the Elk Falls Ranch Development Company property (see Affidavit of Wallace W. Williams, II filed herewith);

d. in the EFPOA's Minutes of Annual Meeting – July 10, 1983, a copy of which is attached hereto as Exhibit H, Pete Alderson, president of the EFPOA

reminded the membership that the Development Company still owns the roads leading to Jensen and Juniper Roads north of the main gate as far east as the "old county line" . . . ;

e. just because those portions of Jensen and Juniper Roads west of the "old county line" may be more convenient, does not make such portions of Jensen and Juniper roads ways of necessity (see *Collins v. Ketter*, 719 P.2d 731, 733 (Colo. App. 1986));

f. except for those owners of lots in Elk Falls-Block 3 whose only access is South Elk Creek Road, they have no factual or legal basis for asserting a right to use the Disputed Roads by preexisting use; and

g. they have no factual or legal basis for asserting a right to use the Disputed Roads by estoppel.

2. This Court's prior indispensable parties Order does not contradict the intent of CCIOA. As noted in paragraph 8 of the Defendants' Supplemental Motion to Join Persons Needed for a Just Adjudication Under C.R.C.P. 105, case law confirms that joinder of all residents in Lots 1, 2, and 3 of the Elk Falls subdivision as parties in this action is proper notwithstanding the appearance of the EFPOA. *Dunne v. Shenandoah Homeowners Association, Inc.*, 12 P.3d 340 (Colo. App. 2000). As noted therein, such decision is supported by avoidance of multiplicity of suits, the danger of inconsistent decisions, and the reluctance of the court to render a decision which will not finally settle the controversy before it. *Davis v. Maddox*, 169 Colo. 433, 457 P.2d 394 (1969). In support of its decision, the Court of Appeals also noted that members of the Shenandoah Homeowners Association had potentially conflicting interests with each other and with the Association itself. The same is true here, as acknowledged by the Plaintiffs in paragraph 11 of their Motion. C.R.C.P. 105 contemplates adjudication of all the rights of the parties in interest. See *Merth v. Hobart*, 129 Colo. 546, 551, 272 P.2d 273, 275 (1954); *Hopkins v. Board of*

County Commissioners, 193 Colo. 230, 236, 564 P.2d 415, 420 (1977); and the provisions of C.R.C.P. 57(j) and section 13-51-115, C.R.S., which also indicate that “all persons shall be made parties who have or claim any interest which would be affected by the declaration”

3. Contrary to the statement in paragraph 8 of the Plaintiffs’ Motion, the EFPOA has not instituted procedural safeguards so that none of the 141 Owners are prejudiced. Review of the discovery responses recently supplied by the EFPOA to the Dunwodys’ Requests for Admission, Interrogatories, and Requests for Production of Documents confirm that the EFPOA is ill prepared to support its claim that each of the 141 Owners has the right to use the Disputed Roads by virtue of prescriptive use, necessity, preexisting use, and estoppel. (See Plaintiff/ Counterclaim Defendant Elk Falls Property Owners Association’s Response to (Dunwody) Defendants’ Interrogatories to the Elk Falls Property Owners Association attached hereto as Exhibit I.) Notwithstanding the passage of more than 7½ months since the filing of the Complaint in this action, the EFPOA has acknowledged in response to Interrogatory Nos. 2, 4, and 5, that the “EFPOA is not currently in possession of all of the documentation relating to the complete title history of every current and past member of the EFPOA.” A more accurate statement based on the EFPOA’s C.R.C.P. 26(a)(1) disclosures and response to the Dunwody’s Requests for Production of Documents is that the EFPOA is not currently in possession of documentation relating to the complete title history of most, if not all, of the current members of the EFPOA. As a result, the EFPOA has been unable to identify the eighteen year period during which it is claimed each of the 141 Owners obtained rights across the Disputed Roads based on adverse use; or the facts supporting its claim that each of the 141 Owners obtained rights across the Disputed Roads based on pre-existing use and estoppel.

Instead, it relies upon the Verification of Paul Vastola to claim that “the Disputed Roads have been used adversely, notoriously and openly at least since 1965 by every EFPOA member and their invitees, and the general public,” and statements that “every current member of the EFPOA is entitled to use the Disputed Roads by pre-existing use and based on estoppel.” According to the Verification signed by Paul Vastola, all of the answers are “true and correct and based upon personal knowledge.” Unstated by Mr. Vastola is that the Elk Falls-Block 3 subdivision was not platted until 1968, and lots therein were first sold by the Development Co. in 1971, with additional sales in 1972, 1973, 1974, 1975, 1976, 1979, 1982, and thereafter. (See Affidavit of Vera B. Dunwody.) Mr. Vastola did not move to the Elk Falls subdivision until 1988, and his verification does not include any facts which would show affirmatively that he is competent to testify to the matters stated in the EFPOA’s Responses to the Dunwody’s Interrogatories. Similar deficiencies are exposed by the EFPOA’s Response to Interrogatory No. 3 regarding its claim that the Disputed Roads are public roads.

4. In paragraph 9 of the Plaintiffs' Motion, the Plaintiffs focus only on their own interests as opposed to those of the Defendants. The Plaintiffs' claims that the alleged 141 other Owners are not prejudiced by any final determination by this Court may well be true since such Owners: (a) have not authorized the EFPOA in writing to represent them in this action; (b) are not named parties in this action; and (c) may not be able to disclaim any interest in the Disputed Roads by reference to a recorded notice of lis pendens as required by C.R.C.P. 105(f)(3), since Plaintiffs may not have recorded a Notice of Lis Pendens and the Plaintiffs' Amended and Restated Complaint does not include a legal description of the Disputed Roads as required by C.R.C.P. 105(g). Absent compliance with C.R.C.P. 105(f)(3) and (g), there is no assurance that any future lawsuits by such Owners will be "barred" as claimed by Plaintiffs. The further claim that "if Plaintiffs prevail, all Owners will benefit," affirms the Plaintiffs' belief that "all Owners will benefit, even those owners Plaintiffs acknowledge do not support this litigation, do not want to pay for it, and **do not consistently use the Disputed Roads.**" (Emphasis added.)

5. The argument in paragraph 10 of the Plaintiffs' Motion that there is no benefit in joining the other 141 Owners because such a joinder would not "provide the Court with any additional useful information" is inaccurate in the extreme. The Plaintiffs do not want other owners joined because the Defendants would then be able to engage in discovery with respect to those claims made by each such owner, which discovery may not presently be available under C.R.C.P. 16.1. As confirmed by the Affidavits of Wallace W. Williams, II and Vera B. Dunwody filed herewith, the facts relevant to claims of unnamed Owners based on prescriptive use, necessity, preexisting use, and estoppel are not common to each and every Owner. As a result, each of the 141 Owners would not be making the same arguments or presenting the same evidence.

6. Paragraph 11 of the Plaintiffs' Motion, concedes that there are significant conflicts of interest among the members of the EFPOA, one of the reasons why the Court of Appeals in the *Dunne v. Shenandoah Homeowners Association, Inc.* case required joinder of those persons seeking to make claims. Plaintiffs' argument that there are attorney-client privilege concerns because some of the 141 Owners are friends with the Dunwodys and the Plaintiffs cannot effectively and ethically litigate when named Plaintiffs are sabotaging their efforts, and providing privileged information to the Dunwodys, is without merit. It is extremely unlikely that any of the Owners that are friends with the Dunwodys would choose to participate as Plaintiffs in this action, and they certainly would not choose to be represented by counsel for the EFPOA. Owners who do not want to be named as parties may choose to disclaim any interest in the Disputed Roads the EFPOA seeks to pursue on their behalf.

B. Response to Clarification Re Indispensable Parties Order

Assuming that the Court reaffirms the Defendants' Verified Motion to Join Indispensable Parties, the Defendants would suggest, consistent with C.R.C.P. 105, that the EFPOA be required to join every EFPOA member as a named Plaintiff except those Owners who disclaim any interest in the Disputed Roads. The Court need not make the numerous findings of fact requested by the Plaintiffs at this stage of the proceedings.

Dated this 22nd day of October, 2010.

BOOG & CRUSER, P.C.

*/s/ Victor F. Boog – original signature on file
at the offices of Boog & Cruser, P.C.*

Victor F. Boog, No. 2561

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of October, 2010, a true and correct copy of the foregoing **RESPONSE TO MOTION FOR RECONSIDERATION TO VACATE THE INDISPENSABLE PARTIES ORDER AND DENY DEFENDANTS' VERIFIED MOTION TO JOIN INDISPENSABLE PARTIES OR CLARIFICATION OF INDISPENSABLE PARTIES ORDER** was sent electronically via LexisNexis File and Serve, properly addressed to:

Frederick B. Skillern
Montgomery Little Soran & Murray PC
5445 DTC Parkway, Suite 800
Greenwood Village, CO 80111

Herbert C. Phillips, Esq.
Hayes, Phillips, Hoffman & Carberry, P.C.
675 Main St.
Fairplay, CO 80440

Michael W. Jones
Monica Lester
Hall & Evans LLC
1125 – 17th St., Suite 600
Denver, CO 80202

Kirk B. Holleyman
Kirk Holleyman, P.C.
1050 – 17th St., Suite 1750
Denver, CO 80265

*/s/ Bonnie J. Cowell – original signature on file
At the offices of Boog & Cruser, P.C.*
