Supreme Court No. 93194-1
[Court of Appeals No. 47022-5-II]

SUPREME COURT OF THE STATE OF WASHINGTON

MARK C. LEWINGTON, a Washington Resident; DANIEL P. OSTLUND and MARIE F. OSTLUND, Husband and Wife and Washington Residents; and ELIZABETH T. WIGHT, a Washington Resident,

Petitioners,

v.

FRANK I. PARSONS and NANCY A. PARSONS, Husband and Wife and Washington Residents,

Respondents.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This case concerns a neighbor dispute over the meaning of a restrictive covenant that limits homes in the Narrowmoor Third Addition of Tacoma to "two stories in height." It is the second time Division II of the Court of Appeals has interpreted this particular covenant, having reviewed the same language more than twenty-five years ago in *Lester v. Willardsen.*[1] Both cases involved attempts to enjoin other homeowners from adding a story to their one-story homes with daylight basements. Both times the Court of Appeals reached the same conclusion: the homeowners were not violating the "two stories in height" restriction.

Petitioners assert that review of this case is warranted because the Court of Appeals did not apply the legal standard for interpreting restrictive covenants set forth in *Riss v. Angel*, 131 Wn.2d 612, 934 P.2d 669 (1997). What Petitioners mean is that the court did not adopt their interpretation of the covenant. The Court of Appeals was keenly aware of the shift in covenant interpretation law adopted in *Riss*. That shift was the primary reason the court did not apply collateral estoppel to bar relitigation of the covenant language after it had already been decided in *Lester*. Opinion at 8-10.

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[1] No. 12172-7-II (Aug. 23, 1990) (unpublished opinion, copy at CP 348-53), *review denied*, 116 Wn.2d 1004 (1991) ("*Lester* Opinion").

The Court of Appeals did not ignore or misapply precedent; it carefully considered the covenant language and evidence consistent with Washington law, and it unanimously concluded that Respondents' basement is not a "story in height" under the Narrowmoor covenant. Opinion at 10-20. Petitioners present no valid basis for Supreme Court review under RAP 13.4. The Court should deny their petition.

II. IDENTITY OF ANSWERING PARTY

Respondents Frank ("Iain") and Nancy Parsons (collectively, "the Parsons"[2]) ask this Court to deny the Petition for Review.

III. COUNTER-STATEMENT OF THE CASE

A. The Narrowmoor Third Addition Covenant.

The Narrowmoor area of Tacoma's West End was developed in four additions called Narrowmoor First, Second, Third, and Fourth Addition, respectively. CP 145-157. The four subdivisions have largely identical covenants recorded on the face of each plat. *Id.*

This litigation centers on Covenant A of the Narrowmoor Third Addition, written in 1947, which states:

> Except as otherwise herein specifically stated, no structure shall be erected, placed or permitted to remain on any residential building plat other than one detached single

[2] Although the proper plural form is Parsonses, for ease of reference, "Parsons" is used throughout this answer.

family dwelling not to exceed *two stories in height*, and a private garage.

CP 236 (emphasis added). This covenant applies to all properties in the Narrowmoor Third Addition. *Id.*

B. In *Lester v. Willardsen*, The Court Of Appeals Determined That Basements Are Not A "Story In Height" Under The Narrowmoor Covenant.

Nearly 30 years ago, a class of Narrowmoor Third Addition homeowners litigated the meaning of Covenant A against another property owner under similar facts. The plaintiffs in *Lester* sought to enjoin construction of a second story on the Willardsens' home, which was one story with a daylight basement. CP 294-95 (¶¶ 1.2, 1.4), 298 (¶ 6.2), 300-01 (¶¶ 10.1, 10.2, 12.1). The plaintiffs made the same argument advanced by Petitioners here—that the covenant drafter intended to include daylight basements as a "story in height."[3] Division II rejected that interpretation, concluding there was "no support for a finding that the drafters intended a daylight basement to constitute a story." *Lester* Opinion at 4 (CP 351). This Court denied review. *Lester v. Willardsen*, 116 Wn.2d 1004 (1991).

[3] *Lester* was a class action. Every Narrowmoor Third Addition property owner received notice of the suit and was either a member of the plaintiff class or opted out, declining to seek enforcement of the covenant. *See* CP 284-85, 315-36. Among the opt-outs were the Ostlunds' predecessor-in-interest and petitioner Wight, who called the lawsuit "frivolous" in her opt-out notification. CP 330.

C. The Parsons Purchase And Remodel Their Home In The Narrowmoor Third Addition.

In 2014, the Parsons purchased their home in the Narrowmoor Third Addition, consisting of a one-story house with a daylight basement. CP 229-30, 279-80. At the time, the Parsons did not contemplate that their basement might be considered a "story in height" under the covenant; they believed that "stories in height" meant above-ground floors. CP 229-30, 280. This belief was bolstered by the Parsons' pre-purchase tour of the Narrowmoor area, during which they saw several multi-story homes with basements. CP 230-31, 280; CP 238-62 (photographs).

Prior to closing, the Parsons spent significant time with an architect and the City of Tacoma's planning department in anticipation of renovating the existing house to add a low-profile second story.[4] CP 230, 280, 383. The addition is primarily an extension of the existing house to the northeast. CP 231, 383. Only a small portion is above the footprint of the preexisting building. *Id.* The majority of the addition is located directly on foundation, with no basement beneath it. *Id.* The Parsons' addition also incorporates a low-profile roof that minimizes view impacts.

[4] Petitioners continue to mischaracterize the Parsons' project as a "three-story addition". Petition at 2 & 6. That is a misrepresentation of the facts, as the Court of Appeals pointed out to Petitioners at oral argument, and Petitioners' counsel acknowledged. Oral Argument Audio Recording, at minutes 13:50-14:48 (Dec. 10, 2015), *available at* http://www.courts.wa.gov/appellate_trial_courts/appellateDockets/index.cfm?fa=appellateDockets.showOralArgAudioList&courtId=a02&docketDate=20151210.

Id.; *see also* CP 233, 264-71. All told, the height of the Parsons' new roofline is 4.62 feet above the height of their old roof. *Id.* The renovated home complies with the local 25-foot zoning height limitation and was approved by the City of Tacoma. *Id.*

While the two neighbors living uphill from the Parsons (petitioners Mr. Lewington and the Ostlunds) submitted photographs that they allege show their damaged views, the portions they complain of are not actually located above the Parsons' existing basement. *See, e.g.*, CP 551-53. Instead, the photographs show a two-story building on ground level. *Id.* Indeed, had the Parsons chosen to demolish the existing home and rebuild on a concrete slab, they could have built to the same height specifications without any basement at all. CP 233.

D. Petitioners File Litigation To Enjoin The Parsons' Remodel.

In the months prior to construction, the Parsons met with the petitioners and discussed their plans to remodel. CP 231-32, 280-82. Their interactions were generally pleasant, with only Mr. Ostlund raising any concerns. *Id.* After the Parsons explained that they intended to minimize view impacts and would be installing a low-profile roof on the new upper story, Mr. Ostlund left Nancy Parsons a voicemail in which he told her, "no worries," and said that he was "excited to have them come to

the neighborhood." CP 281. By the time the Parsons received the letter from Mr. Lewington's attorney threatening litigation, construction was well underway, and the Parsons could not alter their building plans without incurring significant expense. CP 232, 282. The Parsons also believed they were in compliance with the Narrowmoor covenant. *Id.*

Petitioners filed suit to enjoin the Parsons from adding a second story. CP 1-6, 57-63. On summary judgment, the superior court found that the language "two stories in height" unambiguously included daylight basements (despite the contrary holding in *Lester*), and—without any substantive analysis or consideration of alternate remedies—enjoined the Parsons' construction. CP 547-48; RP 28. The Parsons appealed. CP 554-57.

E. The Court Of Appeals Holds That The Parsons Have Not Violated The Covenant.

In a twenty-page, unpublished opinion, the Court of Appeals unanimously held that the Parsons' basement was not a "story in height" under Covenant A and reversed the superior court's injunction. In doing so, the court gave careful consideration to Washington's rules of covenant interpretation, including the change announced in *Riss v. Angel*, and provided a detailed analysis of the covenant. The Court of Appeals' decision is discussed more fully below.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

Petitioners' basis for requesting review is their allegation that the Court of Appeals' decision conflicts with *Riss v. Angel* and subsequent cases "implementing" *Riss*. Petition at 3. There is no conflict. The Court of Appeals was well aware of *Riss* and applied the proper standard. The fact that the court did not adopt Petitioners' covenant interpretation or views about the collective interests of the Narrowmoor community does not mean the court did not apply the law. Supreme Court review of this case is not warranted under RAP 13.4, and the Court should deny the petition.

A. The Court Of Appeals Applied The Proper Standards Of Covenant Interpretation, Including *Riss v. Angel*

1. *Riss* Was The Primary Reason The Court Did Not Apply Collateral Estoppel.

Perhaps even more than in a typical covenant case, the Court of Appeals was acutely aware of the interpretation standard adopted in *Riss*. The Parsons had asserted in this case that collateral estoppel barred relitigation of Narrowmoor's "two stories in height" restriction because the exact same issue had already been decided in *Lester*. *See, e.g.*, Br. of Appellants at 30-34. The Court of Appeals' primary basis for declining to apply collateral estoppel was the "significant change in the law of restrictive covenants" as announced in *Riss*. Opinion at 7-10. The court

explained this shift in the law and acknowledged that reconsideration of the covenant under the modified standard "could readily cause a different result." *Id.* at 9-10. The Court of Appeals' entire analysis of the covenant was against this backdrop.

2. The Court Of Appeals Performed A Detailed Analysis Of The Covenant In A Manner Consistent With Washington Law And *Riss.*

After addressing collateral estoppel, the Court of Appeals detailed the covenant interpretation standards again in its analysis of the covenant. Opinion at 10-11. The court expressly stated that it was placing "special emphasis on arriving at an interpretation of the restrictive covenants that protects the homeowners' collective interests, rather than that which favors the free use of land." *Id.* at 11. Consistent with Washington law, the primary focus of the court's inquiry was the intent of the drafter. *See id.* at 10 & 12-17; *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wn.2d 241, 250, 327 P.3d 614 (2014); *Riss*, 131 Wn.2d at 621-23.

The Court of Appeals provided a thorough analysis of Covenant A's meaning. The court's discussion included, but was not limited to, the plain and ordinary meaning of the covenant language; a comparison of Covenant A to other Narrowmoor covenant provisions, including Covenants D and E; whether the drafter intended Covenant A to protect views, or create uniformity in the Narrowmoor neighborhood, or

both; and extrinsic evidence in the form of the building and zoning laws in effect when the covenant was drafted. *Id.* at 10-17.

In reviewing extrinsic evidence, the Court of Appeals properly considered the contemporaneous laws when Covenant A was drafted in 1947. As it correctly observed, Washington courts presume that a drafter crafts restrictive covenants consistently with relevant laws in existence at the time, unless the covenants indicate a contrary intent. Opinion at 15 (citing *Reynolds v. Ins. Co. of N. Am.*, 23 Wn. App. 286, 290-91, 592 P.2d 1121 (1979); *Fischler v. Nicklin*, 51 Wn.2d 518, 522, 319 P.2d 1098 (1958); *Wagner v. Wagner*, 95 Wn.2d 94, 98-99, 621 P.2d 1279 (1980); *In re Kane*, 181 Wash. 407, 410, 43 P.2d 619 (1935)). In contrast, Petitioners' proffered evidence of what *current* Narrowmoor residents believe the drafter intended is not competent evidence. *Bloome v. Haverly*, 154 Wn. App. 129, 138-39, 225 P.3d 330 (2010) (property owners' personal beliefs as to scope and meaning of restrictive view covenant inadmissible to determine meaning of the covenant).

Here, Tacoma's 1939 Building Code had an unambiguous, straightforward method for determining if a basement is a "story":

> If the finished floor level directly above a basement or cellar is more than six feet (6') above grade such basement or cellar shall be considered a story.

CP 291. It is undisputed that the Parsons' basement is not a story under this definition. Opinion at 17-18; CP 366-81. The Parsons' architect likewise noted that a home design such as the Parsons' is commonly referred to as a two-story home with a daylight basement. CP 383 (¶ 6).

The Court of Appeals correctly concluded that the 1939 Building Code supplies the definition of "story" under the covenant rather than the city's Zoning Ordinance. Although the definition of "story" in each of the regulations is virtually identical,[5] the Building Code provides the language to clarify when a partially subterranean level (either a basement or cellar) is considered a "story" for purposes of building design and construction—the precise concern here. CP 89, 291; *see* Opinion at 16-17.

Moreover, as acknowledged by the Court of Appeals, the Zoning Ordinance refers to the Building Code in addressing height restrictions:

> Section 12. Height Limitations. The height of buildings shall conform with the requirements of the Building Code of the City of Tacoma.

CP 96; Opinion at 17. This suggests even more strongly that the Building Code would be the appropriate reference point in establishing height limitations for structures in a subdivision. *See id.*

[5] The Zoning Ordinance defines a story as "[t]hat portion of a building included between the surface of any floor and the surface of the floor next above...", CP 89, while the Building Code defines a story as "that portion of a building included between the upper surface of any floor and the upper surface of the floor next above...." CP 291.

In short, the Court of Appeals was fully aware of the *Riss* standard when it interpreted the Narrowmoor covenant and made clear it was applying that standard. The fact that Petitioners disagree with the outcome of the court's analysis does not mean that analysis conflicts with *Riss*.

B. The Court Of Appeals' Decision Does Not Conflict With Other Authority.

The Court of Appeals' decision likewise does not conflict with the other authority discussed by Petitioners, namely, *Bauman v. Turpen*, 139 Wn. App. 78, 160 P.3d 1050 (2007), and *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wn.2d 241, 327 P.3d 614 (2014). Those cases involved different facts than the ones presented here. This Court has "cautioned that the interpretation of a particular covenant is largely dependent upon the facts of the case at hand." *Wilkinson*, 180 Wn.2d at 253. To the extent any other case is helpful in interpreting the Narrowmoor covenant, *Day v. Santorsola*, 118 Wn. App. 746, 76 P.3d 1190 (2003), is the most on point.

Day similarly involved a subdivision on a hillside where the defendants wanted to build a two-story house with a daylight basement. *Day v. Santorsola*, 118 Wn. App. 746, 749, 76 P.3d 1190 (2003). The subdivision in *Day* had distinct covenants relating to restrictions on building heights and restrictions on tree heights that are remarkably

similar to Covenants A and D of the Narrowmoor Third Addition—including the language "not to exceed stories in height." *See id.* at 750; *see also* Br. of Appellants at 26-28 (comparing the precise language).

The *Day* court held that the disputed covenant was more properly categorized as a height restriction rather than a view restriction, explaining that, unlike the restrictive covenant pertaining to trees which specifically identified view protection as its purpose, the dwelling restriction contained no similar language. *Id.* at 756. As the court observed:

> Had the developer intended to make view a specific consideration with respect to the permissible height of houses, it could have included a provision similar to the one regarding the height of shrubs and trees.

Id. The court pointed out that the covenant had a very specific reference to allowable height ("two stories *in height*") and noted that several other similar homes had been approved. *Id.* at 756-58; *cf.* CP 239-62 (showing numerous Narrowmoor homes that exceed two stories in height under Petitioners' interpretation of the covenant).

Petitioners here ignore *Day* and continue to rely on *Bauman*, a case with substantially different facts and covenants. For example, in *Bauman*, each restrictive covenant was lot-specific based upon each parcel's location on the hillside (there were no restrictions on the uphill lots).

139 Wn. App. at 83. The *Bauman* court specifically distinguished its ruling from the *Day* ruling:

> We held that the record in *Day* supported the trial court's findings and conclusions that view preservation was not the primary purpose of the two-story restriction because the drafter expressly limited the height of vegetation to preserve the views but did not include similar language in the home restrictions.

Id. at 90.

The same distinction is true here. Covenant A applies to all lots in Narrowmoor Third Addition (including uphill lots) and does not reference views, while Covenant D specifically references view protection and only applies to certain lots (those west of Fairview Drive). CP 236. There is no conflict between this case and *Bauman.*

Petitioners likewise fail to establish any conflict with *Wilkinson. Wilkinson* involved invalidation of a covenant amendment that prohibited the rental of homes in the community for less than 30 days. 180 Wn.2d at 245. In interpreting the original covenant, the court declined to adopt a more restrictive reading where the covenant limited only the type and appearance of buildings that may be constructed. *Id.* at 254. Rather than presenting a conflict, the Court of Appeals' decision is actually consistent with *Wilkinson* by applying the Narrowmoor covenant as written, as

opposed to inferring other purposes (such as view protection) that are not expressed in the instrument.[6]

The decision here is also consistent with *Wilkinson* in avoiding absurd results. Courts "reject 'forced or strained' interpretations of covenant language if they lead to absurd results." *Wilkinson*, 180 Wn.2d at 255 (quoting *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 122, 188 P.3d 322 (2005)). Petitioners' interpretation that basements, regardless of their relationship to grade, are "stories in height" defies common sense. *See Knappett v. Locke*, 92 Wn.2d 643, 645, 600 P.2d 1257 (1979) (recognizing an absurd result where proposed interpretation of city ordinance would result "in a basement being classified as a 'story' even if the basement is otherwise almost wholly underground").

Even under Petitioners' interpretation of the covenant, the Parsons could have demolished their existing home and constructed the house directly on a concrete slab or foundation, which would not have changed their final roof elevation. CP 233 (¶ 18), 273-76; *see Lester* Opinion at 4 (CP 351). That sort of result provides no real benefit to the community interests Petitioners purport to protect (it only results in lost basement

[6] Further, the *Wilkinson* language relied on by Petitioners concerning the "settled expectation of landowners" is actually from the Court's discussion regarding amendments to restrictive covenants, which the Court also declined to allow in that case. *Id.* at 256.

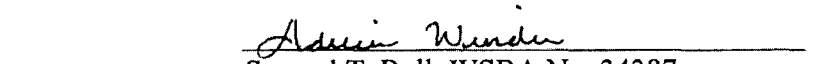
space). An absurd interpretation of the covenant is not in the collective interests of the Narrowmoor community.

V. CONCLUSION

After careful review, the Court of Appeals unanimously concluded that the Parsons' basement does not qualify as a "story in height" under the Narrowmoor covenant. The court's decision does not conflict with *Riss v. Angel* or any other decision identified by Petitioners. The Court of Appeals expressly applied this Court's rules for covenant interpretation as modified by *Riss*. It conducted a thorough analysis and, as the court stated, placed special emphasis on reaching an interpretation that protects Narrowmoor homeowners' collective interests. Petitioners simply disagree with the court's conclusions. Petitioners show no valid basis for this Court's review under RAP 13.4, and their petition should be denied.

RESPECTFULLY SUBMITTED this 5th day of July, 2016.

FOSTER PEPPER PLLC



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CERTIFICATE OF SERVICE

I certify that I am a citizen of the United States of America and a resident of the State of Washington. I am over the age of eighteen, and I am competent to be a witness herein.

On July 5, 2016, I caused the following document to be served as noted:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

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Jan Howell

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Lewington, et al. v. Parsons, et al.; Supreme Court No. 93194-1
[Court of Appeals No. 47022-5-II]

Please find attached Respondents' Answer to Petition for Review. Thank you.

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