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No. 98447-2

IN THE SUPREME COURT
STATE OF WASHINGTON

(Court of Appeals, Division I, Case No. 77830-7, 77401-8, 78430-7)

BELLEVUE FARM OWNERS ASSOCIATIONS, et al,

Respondents,

v.

CHAD STEVENS,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. STATEMENT OF THE CASE

In 2012-2014, the Petitioner, Chad Stevens, filed thirteen counterclaims, alleging that eighteen prevailing Respondents had violated the conditions, covenants and restrictions ("CCRs") of Bellevue Farm Owners Association ("BFOA"). After six years of stalling, Mr. Stevens lost on summary judgment or voluntarily dismissed with prejudice all of his counterclaims against the eighteen prevailing Respondents. The jury also reached a plaintiffs' verdict against Mr. Stevens on the willful timber trespasses he committed. The lone remaining counterdefendant, Glen Corson[1], was required to remove a boundary line fence. The Court of Appeals therefore recognized that all plaintiffs (except Glen Corson) were prevailing parties entitled to their legal fees under the CCRs. Review by this Court is not warranted under RAP 13.4 for the following reasons.

First, the Court of Appeals' 96-page unpublished opinion followed this Court's decision in *Wilkinson v. Chiwawa Cmtys. Ass'n*, 180 Wn.2d 241, 327 P.3d614 (2014). The Petition for Review fails to inform this Court that the BFOA CCRs from 1997 were not changed, and no new restrictions were imposed. On the contrary, the rights of all owners

[1] Glen Corson is the only plaintiff below who did not prevail on every counterclaim. Instead, Mr. Corson prevailed on nine of the twelve counterclaims he was sued on.

(including Mr. Stevens) were expanded in July 2012, when a lawful decision was made to allow tenants to utilize the private owners' waterfront, provided that proof of insurance, complete indemnification and privacy protections were in place. Simply put, though Mr. Stevens' Petition for Review claims that tenants were suddenly prohibited from using the waterfront in 2012, the actual reality is that tenants were previously restricted from usage of the private owners' waterfront parcel, and it was the vote in July 2012 that formally opened up the waterfront for the tenants of responsible owners, specifically, those owners who complied with the rules set forth in the 1997 CCRs and the revocable license agreements. The Trial Court and the Court of Appeals both recognized that BFOA and the prevailing plaintiffs adhered to *Wilkinson v. Chiwawa*, because no new restrictions were imposed on tenants, and instead, appropriate lawful conditions consistent with the existing 1997 CCRs and the general plan were adopted which allow tenants to use the owners' waterfront.

Likewise, the prohibition on a commercial alcohol distillery embodied in Article 5g was also entirely consistent with the 1997 CCRs and the BFOA general plan of development, which always restricted commercial business activity, and which created a private and secluded

community of single family homes. The Petition for Review falsely pretends that an alcohol distillery is an allowed business, when in fact, the 1997 CCRs clearly prohibit any and all such business activity, and instead require that no activity which disturbs the privacy and seclusion of homeowners is allowed. The 1997 CCRs are very clear in this regard, and only allow two businesses to be conducted on the lot owned by Mr. Stevens: a small restaurant or "bed and breakfast," which was required to be located near the road, far away from other residents' homes, for the precise reason that Article 1 of the CCRs requires that the privacy and seclusion of all homeowners must be maintained. It was Mr. Stevens who was proposing a commercial use that would violate the 1997 CCRS, and both the trial court and the Court of Appeals held that the prohibition on a commercial alcohol/winery facility was lawful, consistent with the existing CCRs, and thus, in full compliance with *Wilkinson v. Chiwawa*.

Furthermore, the Court of Appeals decision did not overturn Washington's common law of agency, as petitioner hyperbolically asserts. The Petition for Review attempts to portray an off-island manager's statements in 1999 as though they would be binding on new purchasers of real estate in 2005, 2009 and 2010. Omitted from the Petition is the undisputed fact that all BFOA owners for many years were not physically

present on San Juan island at all, because they lived in Seattle, Palo Alto, Los Angeles and Newport Beach, and the boundary line between private yards and the private owners' waterfront was not marked with any sort of boundary line fence. Thus, owners from 1998 through September 2012 would not have any way of knowing or observing whether a tenant (as opposed to an owner's guest) was trespassing on private waterfront land. Nothing in the Court of Appeals' decision abrogates the common law of agency in Washington.

Finally, prevailing party fee shifting was correctly awarded by the Court of Appeals for the simple reason that all plaintiffs below, except Glen Corson, prevailed on all thirteen counterclaims, including the counterclaims that alleged violations of the CC&Rs and thus triggered the CC&R fee shifting provision. They didn't just substantially prevail; they completely prevailed.[2]

---

[2] Hoopoe LLC, another plaintiff that also prevailed on all counterclaims, was already awarded and paid more than $200,000 in legal fees by the Petitioner. The Owner Plaintiffs actually prevailed on a larger number of counterclaims than Hooopoe LLC, and, as the Court of Appeals held, are entitled to their legal fees under Article 9 of the CCRs for the same reasons.

II. ARGUMENT

A. The Court of Appeals Correctly Affirmed the Trial Court's Summary Judgment Dismissal of Mr. Stevens's Equitable Estoppel Defense.

In its 96-page unpublished opinion, the Court of Appeals upheld the summary judgment dismissal of Mr. Stevens's affirmative defenses of equitable estoppel, abandonment, and laches that he asserted in response to the enforcement of real property covenants he was violating. Mr. Stevens seeks review of the Court of Appeals' decision upholding the dismissal of his equitable estoppel defense, but not the dismissal of his abandonment or laches defenses. *See*, *Petition for Review at p. 13*.

Mr. Stevens asserts the Court of Appeals' holding is contrary to agency law and to the Court of Appeals' decision in *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229 (2009). Mr. Stevens is wrong. The dismissal of Mr. Stevens's disfavored equitable estoppel defense does not warrant review by this Court; it does not conflict with any decision of this Court, nor any published decision of the Court of Appeals, nor does it involve a matter of substantial public interest. RAP 13.4(b)(1), (2), and (4).

Mr. Stevens's attempts to support his claim that "Washington has long held that basic agency law governs the relationship between a

homeowners' association and its owners" with a single citation to a case that says nothing of the sort. In *Brewer v. Lake Easton Homeowners Ass'n*, 2 Wn. App.2d 770 (2018), the Court of Appeals held that a homeowners' association was validly formed and rejected an owner's challenge to the association's authority to manage a water system. In doing so, the *Brewer* Court evaluated whether even if the association was not valid the challenging owner had ratified its actions through accepting its benefits. In conducting its analysis, the *Brewer* Court stated in dicta that the "relationship between a homeowners' association and a homeowner is akin to that of a principal and agent" and noted that a principal can ratify the unauthorized acts of an agent through acceptance of benefits, which in that case, the objecting homeowner had done.[3] Ratification through acceptance of benefits, however, is not at issue in this case; Mr. Stevens's citation does not support his statement.

Likewise, the Court of Appeals' decision in this case does not conflict with its decision in *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229 (2009), as the Court of Appeals itself cogently

[3] 2 Wn. App. 2d at 778.

explained.[4] *Deep Water* was a tort case involving a claim of tortious interference against a developer who was president of an HOA. The *Deep Water* court concluded that the HOA was vicariously liable for torts committed by its developer president.

Unlike *Deep Water*, however, this is not a tortious interference or negligence case in which the tort concept of vicarious liability applies. *See, 16 David K. DeWolf & Keller W. Allen*, WASHINGTON PRACTICE: TORT LAW AND PRACTICE § 4:1, at 178-79 (4th ed. 2013) ("The doctrine of vicarious liability allows the negligence of the actual wrongdoer to be imputed to another who otherwise has no direct participation in the tort"). Rather it pertains to the enforceability and alleged abandonment of recorded real property covenants *that each owner in the subdivision has an individual right to enforce*. This case has nothing to do with agency law.

Thus, the Court of Appeals correctly noted that "Deep Water Brewing did not address the issue of whether statements by a homeowner association president can constitute the abandonment of a restrictive covenant by the community as a whole or whether the president's non-

[4] Court of Appeals Opinion at 44-48.

enforcement of that covenant between 1994 and his departure from the community in 2005 [] can be imputed to Owner Plaintiffs who purchased their lots years later. We deem that case to be of little analytical help here."[5]

The Court of Appeals appropriately applied the law of real covenants, not tort law, to resolve this real covenant case. And the law of real covenants sets the bar for nonenforcement by equitable estoppel very high, especially when the claim of estoppel is based on the actions of a single owner in a multi-owner subdivision, as Mr. Stevens's defense was:

> [E]ven if [former president] Brad Augustine's statements can be imputed to BFOA, Stevens has not demonstrated how those statements can be imputed to every Owner Plaintiff, including many who purchased property in Bellevue Farm after Brad Augustine left the community.[6]

The Court of Appeals' recognition that Mr. Stevens's evidence of equitable estoppel fell well below the clear, cogent and convincing standard does not contradict any decision of this Court, does not contradict its own opinion in *Deep Water, supra*; and does not implicate any matter of substantial public interest warranting review by this Court.

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[5] Court of Appeals' Opinion at 45 (parenthetical omitted).

[6] [6] Court of Appeals' Opinion at 48.

B. The Court of Appeals' Decision Follows This Court's Decision in *Wilkinson*.

Under Washington law, a majority can amend covenants if the amendment is consistent with the general plan of development and related to an existing covenant. *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wn.2d 241, 256 (2014). Here, the Court of Appeals found that an amendment clarifying that "agricultural purposes" did not include the production and sale of alcoholic beverages to the public easily satisfied this standard.

Article 5 of the 1997 CCRs restricts usage of all lots to single family homes, no commercial uses other than farming, no reception of business clients, and no advertising:

> a. Except as specifically provided in Article 6 below, **use of the individual lots shall be limited to private single-family residential use**, together with a guest house and appurtenant outbuildings. . . .
>
> b. **No commercial use of any residential lot will be permitted** other than for agricultural purposes. However, use of the property for business purposes (such as a home office) shall not be considered commercial use **provided the work does not involve the regular reception of business clients and provided that the residence location shall not be advertised in any fashion as the business location of such person. . . .**

CP 651 (emphasis added).

The Article 5g language adopted in August 2012 is entirely consistent with the 1994 Short Plat and the 1997 CCRs, which prohibit commercial uses and state expressly that the entire 54 acre neighborhood is for single family residential usage, and that any activity which would or could interfere with or disrupt the privacy and seclusion and property values of all owners collectively is prohibited. Thus, for example, advertising, signage and traditional "retail" activities are prohibited. The only exceptions for lot 3 were allowing a "small restaurant" to be operated near the highway and far away from homes, or, even quieter, a "bed and breakfast" near the highway and far away from the other owners' homes. The pertinent portion of Article 5(g)(ii)(a)-(c) clarified that the ***industrial manufacturing, processing and sale of liquor, wine, beer, hard cider and other alcoholic beverages are not "agricultural purposes."*** CP 3281. Article 5g is consistent with BFOA's 1994 Short Plat and 1997 CCRs, and thus, the Court of Appeals properly followed *Wilkinson v. Chiwawa*.

Petitioner argues that the Court of Appeals' holding is wrong because, in his view and despite all evidence to the contrary, selling booze to the public is agriculture. But the express language of the Plat and Articles 1, 4, 5 and 6 of the CCRs prohibit any owner from opening a commercial winery. Ray Brandstrom, who sold Lot 3 to Stevens, testified

to the restrictions he agreed to in 1997 as part of his purchase of 30 acres of vacant land and admitted that he could pursue only two businesses, a "small restaurant" and/or a "B&B," and that he was not allowed to open a commercial distillery/winery business. CP 4848-51.

Mr. Brandstrom underscored that this change to the 1997 CC&Rs was done in such a way as to protect the privacy and seclusion of other owners:

> [W]e designated only a small semi-circle portion of Lot 3 near Roche Harbor Road, for the potential small restaurant or bed & breakfast so that it would have the lowest amount of impact possible on the other owners . . . and to best protect the privacy and seclusion of [BFOA]. . . . Aside from the viability concerns, I believe a winery/tasting room would cause a serious disruption to the quiet residential neighborhood . . . and in any event, a winery was not one of the two allowed small businesses for the upper semi-circle on Lot 3.

CP 4849-51.

All current and former owners understood that the Plat and 1997 CCRs prohibit a commercial winery. CP 731-32, 751-52, 1784,2547, 3638-39, 3654-55, 3670-71, 3685-86, 3701-02, 3726-27, 3741-42, 3775-76, 3790-91, 3805-06, 3823-24, 3838-39, 3853-54, 3868-69, 3883-84, 3913-14, 4028-29, 4058-59, 4257-98, 4848-51, 4924, 4963, 5236.

Article 5g was not new or "surprising." BFOA simply sought to clarify that a commercial distillery business is not one of the agricultural activities allowed at Bellevue Farm. Privacy and seclusion are paramount in BFOA's CCRs. The only commercial use permitted is agricultural. Advertising, customers and employees are not allowed. The only exception is that a small restaurant or B&B could be pursued, far away from other owners, and County approval would have to be obtained. Stevens purchased Lot 3 subject to the CCRs and was on notice of these restrictions when he took title in 2005. He cannot now claim surprise that the Plat and CCRs prohibit him from operating a commercial distillery.

"Agriculture" and "agricultural activities," as defined in the San Juan County Code (SJCC), do not include a commercial winery, cidery or distillery. *See* SJCC §§18.20.010 and 18.10.010. Instead, those activities relate to farming and raising animals, which are allowed by Article 5g. Article 5g applies the ordinary meanings of commercial and agricultural uses to identify permitted agricultural uses and prohibited commercial uses. Article 5g, as the Court of Appeals correctly held, is consistent with the Easement, the Plat, and the CCRs. Stevens — and all Owners — can build barns consistent with agricultural uses. But no Owner is allowed to

engage in noisy, smelly, customer-intensive commercial activities such as a commercial distillery business.

Petitioner's own evidence establishes that the original owners understood that distilling alcohol was not a permissible use under the Bellevue Farm CCRs. In deposition testimony, original CCR declarant Brad Augustine testified that:

> Most distilleries that I'm aware of have commerce that takes place. So as an example, there's a distillery on – I believe it's Bazalgette Road, on the way to Roche Harbor from White Point, where I live, and there is actual commerce. They actually can buy bottles of distilled alcohol. **That would be illegal under the covenants, conditions and restrictions of Bellevue Farm.** CP 1779 (B. Augustine Dep., at 75:14-25).

According to Mr. Augustine, neither could Stevens buy grapes or apples offsite and then bring them onto Bellevue Farm for processing. *See* CP 1784 (B. Augustine Dep. 153:4-22.)

No reasonable definition of "agricultural purposes" includes the processing of raw materials into alcohol. Considerable processing must be undertaken to convert agricultural products to alcoholic beverages. *See, e.g.*, Theodoros Varzakas and Constantina Tzia, Handbook of Food Processing: Food Safety, Quality, and Manufacturing Processes, at 319-50 34 (2016). Processing and fermentation is considered a secondary food

processing operation. *See id*. "Agricultural uses or purposes" – as those terms are used in state and local law for other purposes – do not include distilleries, breweries or wineries. The Washington Department of Revenue's definitions for "agricultural products" and "commercial agriculture purposes" do not include the *processing* of crops into alcoholic beverages. *See* WAC 458-30-200(2)(d)&(n). Neither does the San Juan County Code. *See* SJC §18.30.040 ("agricultural use" does not include processing crops or grain into alcoholic beverages).

Thus, it was appropriate for BFOA to clarify what was meant by "agricultural purposes." Under the general plan of development articulated in the CCRs, BFOA determined that commercial agricultural purposes included growing crops but it did not include the additional commercial step of processing the crops into alcohol. The post-amendment CCRs still permit Stevens agricultural uses, as they did before. Stevens has the right to grow apples, grapes, grains, hops or other agricultural products on his lot. He may engage in cider-making or wine-making for his own personal use. See new Article 5(g)(i)(b)(1) ("making hard cider or wine" as a recreational activity is now permitted). CP 3280. What he cannot do now, and what he could not do under the original anti-commerce provisions of the original CCRs, is open a commercial winery, brewery or distillery on

his property. CP 3280-82. These were not permissible agricultural purposes in 1994 or 1997, and they are not agricultural purposes under amended Article 5.

This is where Mr. Stevens's reliance on *Wilkinson* is misplaced, and where the Court of Appeals properly applied the rule of that case. In *Wilkinson*, the original CC&Rs allowed all residential uses, including short term rentals. 180 Wn.2d at 252-254. Thus, an amendment banning short-term rentals conflicted with the general plan of development and had no relation to existing covenants. But here, as the Court of Appeals correctly held, article 5(g) was consistent with the general development plan and clearly related to article 5(b) because it defined what is and is not an agricultural purpose, and Mr. Stevens conceded this point below.[7]

C. Supreme Court Review of a Run-of-the-Mill Fee Shifting Decision is Not Warranted.

Mr. Stevens prevailed on no claims—and received no judgment—against BFOA and the Owner Plaintiffs. He received a lone judgment against Gen Corson, who was the only counterdefendant who went to trial. Thus, the Court of Appeals correctly held that BFOA and the Owner Plaintiffs (excluding Corson) are entitled to their fees for the

[7] Court of Appeals Opinion at 51.

counterclaims they defeated wherein Mr. Stevens invoked the CC&R fee shifting provisions. As between BFOA/Owner Plaintiffs and Mr. Stevens there is no question of who "substantially" prevailed; BFOA/Owner Plaintiffs "completely" prevailed. Here is the end result of this action for BFOA and the Owner Plaintiffs after nearly six years of litigation:

- Lauren and William Barrett obtained a judgment against Mr. Stevens and a dismissal with prejudice of counterclaims 1, 2, 7, and 10, each of which alleged they violated the CC&Rs, and also a dismissal with prejudice of Counterclaim 3, which alleged that the waterfront boundary line fence was a "spite fence" under RCW 7.40.030. Mr. Stevens obtained no judgment against them.

- Web Augustine obtained a judgment against Mr. Stevens and a dismissal with prejudice of counterclaims 1, 2, 7, and 10, each of which alleged he violated the CC&Rs, and also a dismissal with prejudice of Counterclaim 3, which alleged that the waterfront boundary line fence was a "spite fence" under RCW 7.40.030. Mr. Stevens obtained no judgment against him.

- Timothy and Christine Doherty obtained a judgment against Mr. Stevens and a dismissal with prejudice of counterclaims 1, 2, 7, and 10, each of which alleged they violated the CC&Rs, and also a dismissal with prejudice of Counterclaim 3, which alleged that the waterfront boundary line fence was a "spite fence" under RCW 7.40.030. Mr. Stevens obtained no judgment against them.

- Dana Pigott: same result.

- BFOA: same result.

- Tom and Dianne Tucci: same result.

- Rodney and Mary Margaret Smith: same result.
- Matt and Veronica Straight: same result.
- Kim Kyllo-Corson: same result.
- Mark Baute and Gigi Birchfield: same result.
- Jantana and Baruch Kuppermann: same result.

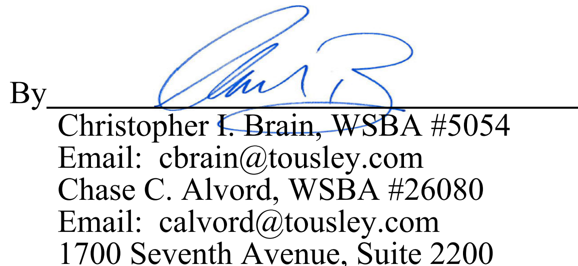
The Court of Appeals correctly held that all of them are entitled to their attorney fees because they completely prevailed on all claims that came with a right to fee shift. Mr. Stevens prevailed on no such claims. There is nothing exceptional about the Court of Appeals decision that warrants review.

III. CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Review.

DATED this 11th day of August, 2020.

TOUSLEY BRAIN STEPHENS PLLC



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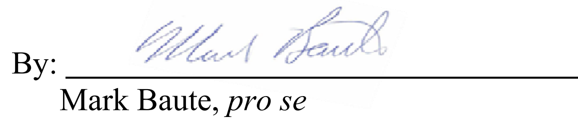

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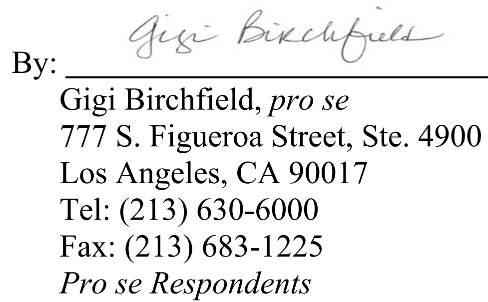

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CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties registered on the CM/ECF system. All other parties (if any) shall be served in accordance with the Federal Rules of Civil Procedure.

I certify under penalty of perjury under the laws of the United States and the state of Washington that the foregoing is true and correct.

EXECUTED this 11th day of August, 2020, at Seattle, Washington.

Jane A. Mrozek, Legal Assistant

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TOUSLEY BRAIN STEPHENS PLLC

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