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No. 392996
Douglas County Superior Court Cause No. 21-2-00050-09,
Consolidated with 21-2-00053-09

COURT OF APPEALS,
DIVISION III
OF THE STATE OF WASHINGTON

TWIN W OWNERS' ASSOCIATION,

Petitioner,

vs.

ANDREW MURPHY and JENNIFER MURPHY,

Respondents.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, Twin W Owners' Association,[1] respectfully petitions for review of the Opinion identified in **Section B** below.

B. COURT OF APPEALS DECISION

The Association seeks review of the Division III Published Opinion in this matter, filed May 16, 2023. A copy of the Opinion is in the **Appendix** at pages A-1 through A-10. The Opinion affirms several superior court orders (the "Orders") that render invalid and unenforceable certain amendments to the Association's CCRs, approved by fewer than 100% of the Association's members, which seek to monitor and regulate short-term vacation rental businesses (STVRs).

The Association also asks this Court to overturn the opinion upon which Division III and the superior court based

their respective Opinion and Orders: *Wilkinson v. Chiwawa Communities Association*, 180 Wn.2d 241, 327 P.3d 614 (2014). *Wilkinson* is incorrect and harmful for at least two reasons. First, *Wilkinson* holds that STVRs cannot, under any circumstances, constitute commercial business use of residential property. *Id*. at 253–53. This holding hamstrings homeowner associations, like the Association here, as well as local municipalities, preventing them from regulating STVRs on the same level with other commercial lodging uses of residential property, such as bed-and-breakfasts.

Second, *Wilkinson* changed the law of CCR analysis in Washington, rejecting the long-held "consistent with the general plan of development" standard in favor of a "new" versus "modification" rubric that is prone to error and rejected by other jurisdictions.

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[1] In the interest of full candor to the tribunal, the current president of Twin W Owners' Association is Ben Harnetiaux. Ben is the son of now-retired attorney, Bryan P. Harnetiaux.

While perhaps valid in 2014, *Wilkinson* is now an incorrect and harmful anachronism. This Court should accept review in this action to overrule it. In so doing, this Court can conclude, based on the undisputed facts before it, that the STVRs at issue here are commercial business uses and therefore subject to regulation under the Association's business restriction CCRs, which the Association can properly amend with less than 100%-member approval.

C. ISSUE PRESENTED FOR REVIEW

ISSUE: The Association sought to amend its CCRs to regulate and monitor STVR businesses. Unable to amend the business use restrictions in its CCRs without violating this Court's holding in *Wilkinson* that STVRs are not commercial business use of residential property, the Association amended its residential use restrictions to regulate STVRs. The superior court held these amendments to be invalid and unenforceable "new" CCRs under *Wilkinson*, a holding that Division III affirmed. After *Wilkinson* was decided in 2014, local, state, and

national authorities, including Washington state, in response to the groundswell of STVR businesses, passed laws defining STVRs as "commercial uses" and holding STVRs to the same commercial business standards as bed-and-breakfasts, hotels, and other lodging businesses. The questions presented for review are:

1. Should this Court accept review of Division III's Opinion under RAP 13.4(b)(4) because post-*Wilkinson* legislation renders *Wilkinson* incorrect and harmful, and the (in)applicability of *Wilkinson* in light of such legislation involves an issue of substantial public interest that should be determined by this Court?

2. Should this Court accept review of Division III's Opinion under RAP 13.4(b)(4) because the ability of owner associations like the Association to regulate STVR businesses is an issue of substantial public interest that should be determined by this Court?

3. Should this Court accept review of Division III's Opinion under RAP 13.4(b)(3) because post-*Wilkinson* ordinances enacted by local governments that define, regulate, and prohibit STVRs as "commercial" uses of residential property implicate a significant question of law under the Constitution of the State of Washington?

If the Court answers any of these questions in the affirmative, it should accept review and grant the relief the Association requests.

D. STATEMENT OF THE CASE

The Association is an RCW 64.38 homeowners' association formed in 2002, consisting of 94 properties along the Columbia River. CP 52. Its CCRs exist for a specific, defined purpose: "to create and maintain a protected rural life style." CP 15. In 2004, the Association recorded amended CCRs, which contain broad-concept residential usage restrictions, prohibiting "unreasonable interference" with other lots as well as "noxious" and "offensive" activity. CP 15, 16.

The CCRs also restrict business uses, prohibiting on-premise sales and nuisance businesses:

> 2.12 Businesses. No store or business shall be carried upon said premises or permitted thereon which involves on-premises sales, or which constitutes a nuisance.

CP 18.

The term "nuisance" is undefined, and the CCRs neither permit nor prohibit rental use, either short- or long-term. The express language of the CCRs provides that a 60% majority is all that is required to either "approve" or "amend" the CCRs:

> 3.1 Approval. When these covenants require owner approval such approval shall be by sixty percent (60%) vote, with one vote per lot (a "Lot").
>
> 3.2 Amendment. Amendment of these covenants shall be by sixty percent (60%) vote, with one vote per Lot. Amendments shall be in writing and recorded in the same manner as these covenants.

Id.

In 2020, responding to complaints from Lot owners regarding noise, garbage, property damage, and other 'nuisances' attributable to STVRs (CP 10–11), the Association voted to amend its CCRs to "define and regulate" STVRs. CP 76. The STVR Amendments were approved by a vote of more than 60%, but fewer than 100%, of Lot owners. CP 54.

Because this Court's 2014 decision in *Wilkinson* prohibits consideration of STVRs as commercial business use of residential property, the Association was not able to draft its STVR amendments as amendments to its business restriction CCRs; rather, the STVR amendments were crafted as amendments to the broadly-worded 'reasonable use' and 'offensive activity' residential restrictions:

> 2.21 Short-Term Rental Properties. Pursuant to Section 1.1 (Preamble), Section 1.2 (Preamble), Section 2.1 (Reasonable Use), and Section 2.4 (Offensive Activity), the rental of Lots for periods of less than thirty days at a time to any person ("Short-Term Rental"), other than the rental of an accessory dwelling unit, shall be subject to the following regulations intended to protect the other Lot owners from unreasonable interference with their use and enjoyment of their Lots.

CP 36, 79.

Intentionally unlike the amendments at issue in *Wilkinson*, the Association's STVR amendments do not prohibit STVRs outright. Instead, they work to phase out STVRs in the long run, creating an annual registration process

whereby Association lot owners register their intent to use their property(ies) for STVRs. The registration is 'use-it-or-lose-it' in nature; failure to register annually forever bars a property owner from using a lot for STVRs. Transferring ownership of a lot also acts to bar subsequent owners from STVR lot usage. Consistent with RCW 64.37.050, STVR lot owners must also purchase liability insurance, naming the Association and neighboring lot owners as additional insureds. CP 36–38.

Respondents in this action, the Murphys, purchased their lot in 2006 and have used it as an STVR near-exclusively since 2009. CP 52. The Murphys objected to the STVR Amendments and indicated their refusal to comply with those amendments. *See* CP 53–55.

The Association and the Murphys sued one another and filed cross-motions for summary judgment, seeking a determination as to the validity and enforceability of the STVR amendments. The superior court, applying the *Wilkinson* Court's "new" versus "modified" CCR analysis, determined

that the STVR amendments were invalid and unenforceable because they were new restrictions on residential Lot use and therefore required approval of 100% of the Association's ownership to be valid. CP 122–27, RP 31. Division III ultimately affirmed. Appx. 1–10. This timely Petition followed.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should accept review under RAP 13.4(b)(4) because this matter involves two issues of substantial public interest that should be determined by this Court: (1) the (in)applicability of *Wilkinson* in light of post-*Wilkinson* legislation and the rapid expansion of the STVR industry, and (2) the (in)ability of owner associations like the Association to regulate STVRs as commercial business uses.

The Court should also accept review under RAP 13.4(b)(3) because this matter involves a significant question of law under the Constitution of the State of Washington: the (in)validity of local government ordinances that define,

regulate, and prohibit STVRs as "commercial" use of residential property, given *Wilkinson*'s holding that STVRs cannot, under any circumstances, be considered commercial in nature.

1. **This Court decided *Wilkinson* when the modern STVR industry was in its infancy. Subsequent expansion of the industry as commercial businesses and concomitant local, state, and national regulation require *Wilkinson*'s revisitation and overturning.**

In 2014, the *Wilkinson* Court held that STVRs could not, under any circumstances, be considered as commercial business use of residential property:

> If a vacation renter uses a home "for the purposes of eating, sleeping, and other residential purposes," this use is residential, not commercial, no matter how short the rental duration. The owner's receipt of rental income either from short-or long-term rentals in no way detracts or changes the residential characteristics of the use by the tenant. Nor does the payment of business and occupation taxes or lodging taxes detract from the residential character of such use to make the use commercial in character.

Wilkinson, 180 Wn.2d at 252–53 (internal quotation omitted).

This portion of *Wilkinson* should be overruled as incorrect and harmful. *State v. W.R., Jr.*, 181 Wn.2d 757, 768, 336 P.3d 1134 (2014) (this Court will "overrule a prior decision only upon a clear showing that the rule it announced is incorrect and harmful"). A rule can become incorrect when subsequent law-making bodies clarify that the Court's "prior understanding was erroneous." *Id.*; s*ee, e.g., State v. Abdulle,* 174 Wn.2d 411, 420, 275 P.3d 1113 (2012) (overruling precedent after clarification from U.S. Supreme Court). Here, subsequent legislation at the local, state, and national level corrects the Court's 2014 erroneous prior understanding of the commercial business nature of STVRs.

a. The STVR Industry expanded rapidly after 2014.

For many years, STVRs have been a popular lodging choice for a minority of travelers in high volume tourist destinations in the United States. With the advent of technology-based online platforms that facilitate the marketing

and booking of STVRs, this market has expanded rapidly across the nation, including Washington state.

The incredible growth of two companies, Airbnb and HomeAway, evidence the STVR industry's rapid expansion. Airbnb was founded in 2009 "when two hosts welcomed three guests to their San Francisco home." The company now has 4 million hosts "in almost every country across the globe." https://news.airbnb.com/about-us/ (last visited June 2, 2023).[2]

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[2] This Petition for Review contains multiple website citations, directing the Court to "legislative facts," which are appropriate for this Court to consider when "asked to decide on policy grounds whether to continue or eliminate a common law rule." *Wyman v. Wallace*, 94 Wn.2d 99, 102–03, 615 P.2d 452 (1980). Legislative facts are "background information a court may take into account when determining the constitutionality or proper interpretation of a statute, or when extending or restricting common law rule." *Cameron v. Murray*, 151 Wn. App. 646, 658–59, 214 P.3d 150 (2009), *review denied*, 168 Wn.2d 1018 (2010) (citing *Wyman*). Moreover, it is appropriate for this Court to consider evidence outside the record "for the limited purpose of helping this court decide whether to accept direct review." *Dioxin/Organochlorine Center v. Department of Ecology*, 119 Wn.2d 761, 769–70, 837 P.2d 1007 (1992). The Association respectfully requests that the Court take judicial notice of the legislative facts found on the cited web pages for the limited purpose of deciding whether to accept direct review.

HomeAway, another STVR company that includes the website VRBO.com, launched in 2006, grew rapidly, and was acquired by Expedia in 2015 for $3.9 billion, a price nearly 20% higher than its market value at that point.[3] It currently offers more than "2 million bookable vacation rentals." https://www.vrbo.com/ (last visited June 2, 2023).

b. STVR expansion created the need for regulation.

This explosion of the STVR industry since 2014 has not been problem-free. A recent Policy Brief from former Seattle City Councilmember, Tim Burgess, notes that in addition to the pressure "**commercial use** of" STVRs places on limited housing resources, "many neighbors of units that have been converted to [STVRs] raise legitimate questions about neighborhood livability":

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[3]https://www.nytimes.com/2015/11/05/business/dealbook/expedia-to-acquire-homeaway-for-3-9-billion.html?_r=0 (last visited June 2, 2023).

> [T]he **more commercial use** of short term rental platforms has taken entire houses, condos and apartments off of the long term housing market…. **Commercial enterprises** utilizing online rental platforms to market **multiple units** in **multiple locations** further exacerbate the housing crisis facing Seattle.[4]

Reacting to complaints from neighbors of properties being utilized as STVRs, local governments, including Chelan County and the cities of Seattle and Spokane, have enacted laws to regulate, restrict, and in some cases, outright ban, STVRs. For example, Chelan County recently passed code revisions to regulate STVRs, including a requirement that all STVR properties obtain UBI numbers. CCC 11.88.290 (*effective* 9/27/2021).[5] Spokane likewise considers STVRs to be commercial businesses. *See* SMC 17C.316.040(C) (requiring

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[4]https://www.seattle.gov/Documents/Departments/Council/Issues/RegulatingShortTermRentals/Regulating-Short-Term-Rentals---Policy-Brief.pdf, at pp. 3, 5 (last visited June 2, 2023) (emphasis added).

[5]https://www.co.chelan.wa.us/files/community-development/Draft%20Code_2020_0709_PC%20Rec_sub715.pdf (adopted 7/27/2021) (last visited June 2, 2023).

permit and City business license). Seattle regulates STVRs to "protect the livability of residential neighborhoods." SMC 6.600.010.

Other local governments in Washington have followed suit, adopting regulations concerning "traffic mitigation, parking, noise, other impacts, and consumer safety." SHB 1798 Senate Bill Report, March 26, 2019, at 2. Even Washington's Department of Revenue, as of October of 2015, has an agreement with Airbnb to collect retail and hotel/motel taxes to remit directly to DOR.[6] Indeed, cities across the country have passed similar laws in response to the rapidly-growing STVR industry – laws that treat STVRs as commercial business and

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[6]https://dor.wa.gov/get-form-or-publication/publications-subject/tax-topics/airbnb-collect-and-send-taxes-behalf-hosts (last visited June 2, 2023).

seek to regulate revenue and mitigate parking, traffic, noise, and other 'neighborhood livability' impacts.[7]

c. Washington enacts the Short-Term Rental Act.

In 2019, Washington state joined this chorus of national legislation, enacting SHB 1798, codified as the Short-Term Rental Act (RCW 64.37.010–050). CP 259–61. The act establishes once and for all the commercial business character of STVRs in Washington state. Under the act, STVRs statewide must now pay applicable business taxes, provide safety disclosures and post escape routes, advertise on platforms that meet state disclosure requirements, and obtain $1M in general liability insurance specifically to cover STVR use – all actions required of any other commercial lodging businesses. *Id.* The Bill's sponsor, Representative Cindy Ryu, stated the commercial business intent in her introducing the

[7]https://www.alltherooms.com/resources/articles/airbnb-regulations/ (last visited June 2, 2023).

Bill: "I introduced this bill to **even the playing field for our local hotels**." [8]

The laws identified above, including Washington's Short-Term Rental Act, permit regulation of STVRs as "commercial" uses. But *Wilkinson* creates a carve-out, prohibiting owner associations to from regulating STVRs as commercial use of residential property. In other words, current Washington law effectively holds that STVRs are commercial business uses for all purposes ***other than regulation by owner associations like the Association***. *Wilkinson* is therefore 'clearly harmful' to owner associations, like the Association, desiring to regulate STVR businesses to mitigate parking, noise, and other 'neighborhood livability impacts' that STVR commercial businesses can and do create.

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[8]https://lodgingmagazine.com/washington-state-passes-short-term-rental-legislation/ (last visited June 2, 2023) (emphasis added).

Moreover, the carve-out renders the commercial intent of the Short-Term Rental Act "superfluous and meaningless" when applied to STVR business conducted on properties governed by owner associations. "A statute must not be judicially construed in a manner that renders any part of the statute meaningless or superfluous." *Plein v. Lackey*, 149 Wn.2d 214, 227, 67 P.3d 1061 (2003).

In light of the rapid development of the STVR industry and the evolution of laws regulating STVRs since 2014—particularly the 2019 Short Term Vacation Rental Act—*Wilkinson* is ripe for revisitation. The Court should accept review to reverse its carve-out holding in *Wilkinson* as incorrect and harmful. *W.R., Jr.*, 181 Wn 2d at 768.

2. *Wilkinson*'s carve-out incorrectly and harmfully singles out owner associations like the Association, prohibiting them from regulating STVRs as commercial businesses.

As discussed supra, the Association sought to regulate STVR use by amending its residential use restrictions, instead

of its business use restrictions, expressly because of *Wilkinson*. CP 36, 76, 79.

Had the Association, the superior court, and Division III, not been bound by *Wilkinson*'s carve-out holding that STVRs cannot be considered commercial business uses, the Association could have drafted—and the courts could have considered—the 2020 Amendments as amendments to the CCR's business restrictions, which expressly prohibit "nuisance" businesses. CP 18. Given that the Association drafted its 2020 Amendments in direct response to STVR nuisance complaints from Association owner/members (CP. 10–11), amendments to the Association's CCRs that merely refine what constitutes a "nuisance" business cannot be considered 'new' restrictions requiring 100% approval of the Association's ownership to be valid; only a 60% vote would be sufficient. *Wilkinson*, 180 Wn.2d at 255–56. *Wilkinson*'s carve-out directly harmed the Association and will continue to harm it and other owner associations if not overturned.

3. *Wilkinson*'s "new" versus "modified" CCR analysis should be rejected.

Wilkinson's requirement that superior courts distinguish between the nebulous, subjective terms of 'new restrictions' or 'modifications of existing restrictions' is ripe for error, such as the superior court's error here. Other jurisdictions reject this distinction. *E.g.*, *Adams v. Kimberley One Townhouse Owner's Ass'n, Inc.*, 352 P.3d 492, 497 (Idaho 2015) (declining to adopt a distinction between the addition of new restrictions and the modifications of existing restrictions, instead adopting an "unconscionable harm" standard); *McElveen-Hunter v. Fountain Manor Ass'n, Inc.*, 386 S.E.2d 435, 435-36 (N.C. Ct. App. 1989), *aff'd*, 399 S.E.2d 112 (N.C. 1991) (upholding an amendment that added a new restriction against rentals of less than one year, reasoning that the plaintiff purchased the units subject to the rights of other owners to restrict their occupancy broadly and with notice before buying the units that the declaration was subject to change).

Here, Division III correctly noted that *Wilkinson* "impliedly rejected" the long-held rule in Washington that CCRs are valid so long as they coincide with the "general plan of development," instead adopting a "new" versus "modified" analysis for CCRs:

> Under the [*Wilkinson*] majority's holding, the majority of [Chiwawa] homeowners could not approve an amended covenant that … did not modify or relate to a [preexisting] covenant. In so holding, the court impliedly rejected the former principle that sanctioned the adoption of additional covenants by majority vote, regardless of whether the covenant was "new" or a "modification" as long as the covenant coincided with the original plan of development.

Appx. at A-6 (¶ 26).

Citing with approval Chief Justice Madsen's dissent in *Wilkinson* (the "dissent wisely wondered"), Division III questioned the efficacy of *Wilkinson*'s new rule, positing where "modified" ended and "new" began. *Id.* (¶ 29). But Division III declined to adopt Idaho's "unconscionable harm" standard to

CCR analysis in Washington, holding that only this Court could effect such a change in Washington law. *Id.*

Application of Idaho's "unconscionable harm' standard to the Association's CCR amendments here could have prevented the superior court's error. Under the "unconscionable harm" standard, the Association's amended CCRs are valid. Nothing in the Association's STVR amendments could remotely be considered "unconscionable," which is usually described as "shocking the conscience," "monstrously harsh," or "exceedingly calloused." *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 303, 103 P.3d 753 (2004) (further defining "unconscionable harm").

Instead, with only *Wilkinson's* 'new' versus 'modified' directive to guide it, the superior court, predictably, misapplied *Wilkinson*, drawing far too fine a distinction between 'new' and 'modified' restrictions. The Court should revisit its guidance in *Wilkinson*, reject it, and adopt Idaho's "unconscionable harm"

standard to prevent more errors like the errors currently under review.

4. *Wilkinson* also calls into question the validity of city and county ordinances that define, regulate, and prohibit STVRs based on their "commercial" nature.

As further evidence of *Wilkinson*'s incorrect and harmful nature, *Wilkinson*'s STVR carve-out likely renders constitutionally void local codes and ordinances that seek to regulate STVRs as commercial uses of residential property.

County and city zoning laws are 'police powers' subject to constitutional limitations. *Rhod-A-Zalea & 35th, Inc. v. Snohomish Cnty.*, 136 Wn.2d 1, 6, 959 P.2d 1024, 1027 (1998) (powers are limited by "applicable enabling acts **and the constitution**") (emphasis added). As discussed *supra*, cities and counties across Washington state have enacted STVR zoning ordinances in order to regulate, and in some cases, prohibit STVR as commercial uses of residential property. However, *Wilkinson*'s holding that STVRs can never, under any

circumstances, be considered commercial uses of residential property, renders void and unenforceable any local county or city zoning ordinances defining STVR use as "commercial."

Chelan County's STVR Ordinance, CCC 11.88.290, serves as one example from many. The STVR Ordinance, effective in 2021, defines STVR use expressly and unambiguously as a "commercial use." CCC 11.88.290(1)(A). The County's Code defines "commercial use" broadly as "**any** activity involving the sale of goods or services carried out for profit." CCC 14.98.420 (emphasis added). "Washington Courts have repeatedly construed the work 'any' to mean 'every' and 'all'." *NOVA Contracting, Inc. v. City of Olympia*, 191 Wn.2d 854, 866, 426 P.3d 685 (2018).

But seven years earlier, the *Wilkinson* Court held that short-term rental uses, like those the County's STVR Ordinance seeks to regulate and prohibit as "commercial" in nature, can never, under any circumstances whatsoever, be considered "commercial use." And under *Wilkinson*, the non-commercial,

residential nature of STVR use exists regardless of whether the property owner engages in traditionally 'commercial' activities, such as receiving rental income or paying business or occupation taxes on the use. *Wilkinson*, 180 Wn.2d at 252–53.

Thus the County's STVR Ordinance – along with any other county or city ordinance that defines STVRs as "commercial" use – is void and unenforceable because it violates the constitutional doctrines of separation of powers and of preemption. *See Hale v. Wellpinit School Dist. No. 49*, 165 Wn.2d 494, 503–07, 198 P.3d 1021 (2009) (discussing at length the history and purpose of the separation of powers doctrine); *Cannabis Action Coalition v. City of Kent*, 183 Wn.2d 219, 226, 351 P.3d 151 (2015) (local ordinance invalid if "the Ordinance conflicts with some general law"). A general state law "preempts" a local ordinance when "an ordinance permits what state law forbids or forbids what state law permits." *Id.* at 227.

In short, with regard to the commercial or residential character of STVR uses in Washington state, the *Wilkinson*

Court has spoken: such uses are expressly and unequivocally "residential," and can never become "commercial." Concerning conclusions of state law [the Washington State Supreme Court] is the final arbiter." *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998) (quoting *Leschi Improvement Council v. Washington State Highway Comm'n,* 84 Wn.2d 271, 286, 525 P.2d 774 (1974). Therefore, a county ordinance, like Chelan County's STVR Ordinance, cannot ignore, overrule, or abrogate binding, preemptive Washington Supreme Court precedent.

The County's STVR Ordinance attempts to do precisely that by defining STVR use as "commercial" and regulating it as such, directly contrary to the definition provided by controlling Supreme Court precedent in *Wilkinson*. This attempt fails as a matter of Washington law and Chelan's STVR Ordinance, along with many other local ordinances, are likely void and

unenforceable so long as *Wilkinson* remains valid Washington law.

At best, ordinances like Chelan's STVR Ordinance are void as vague. Washington's "void for vagueness" doctrine applies to laws that forbid the doing of an act in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. *A.W.R. Const., Inc., Wash. State Dept. of Labor & Indus.*, 152 Wn. App. 479, 489, 217 P.3d 349 (2009), *review denied*, 168 Wn.2d 1016 (2010). Chelan's STVR Ordinance seeks to regulate a type of "commercial use" that it labels "short-term rental use." But because renting "a home for the purposes of eating, sleeping, and other residential purposes" cannot be considered a "commercial use" (*Wilkinson*, 180 Wn.2d at 252), whatever commercial use the County's STVR Ordinance seeks to regulate and prohibit is anyone's guess. But whatever that use is, under *Wilkinson*, the controlling "general law" of

Washington (*Cannabis Action Coalition*, 183 Wn.2d at 226), it cannot include use of residential property for STVRs.

At bottom, *Wilkinson* creates enforcement issues not only for associations like the Association here, but also for local municipalities that seeks to regulate STVRs on the same level as other commercial lodgings. The Court should accept review to overrule *Wilkinson* as incorrect and harmful.

5. This Court is ideally positioned to overturn *Wilkinson*. The facts before this Court provide the best opportunity to do so.

"[O]nce this court has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by this court." *State v. Gore*, 101 Wn.2d 481, 487, 687 P.2d 227 (1984), *superseded on other grounds by* RCW 9.41.010(3). Division III acknowledged this fact, expressing frustration that *Wilkinson* tied its hands and prevented it from addressing Twin W's concerns:

> We share Twin W's concern that the 2004 covenants never contemplated the use of land within the association for [STVRs]…. The concerns were highlighted in Justice Madsen's astute dissent in [*Wilkinson*]. We share Twin W's concern about the traffic and noise attended to vacation rentals. We remain bound, however, by the Supreme Court's *Wilkinson* ruling.

Appx. at A-8 (¶ 41).

Therefore, this Court is the only rule-making body positioned to provide the relief the Association requests.

The relative recency in which *Wilkinson* was decided is immaterial. In *State v. Berlin*, 133 Wn.2d 541, 548–49, 947 P.2d 700 (1997), this Court overruled *State v. Lucky*, 128 Wn.2d 727, 912 P.2d 483 (1996), decided only 19 months earlier. Also immaterial is any inference of legislative acquiescence that may be drawn from the lack of specific mention of *Wilkinson* in the legislative history of the Short Term Rental Act (SHB 1798):

> We are neither bound by legislative silence nor beholden to the legislature's inaction in response to our incorrect and harmful decisions. The scant support legislative silence or inaction may lend a

> prior interpretation cannot overcome the need to correct a long-standing injustice of our own making.

State v. Blake, 197 Wn.2d 170, 210, 481 P.3d 521 (2021) (Stephens, J. concurring in part, dissenting in part).

Indeed, as Division III noted, *Wilkinson* was a 5-4 decision with two dissenting opinions. Appx. at A-6 (¶ 25). Now, only three of the five Justices signing onto the majority opinion serve on the Court. This Court is ideally positioned to revisit *Wilkinson*.

Moreover, the underlying facts of this matter and the procedural posture with which it comes to this Court are ideal to address the incorrect and harmful nature of *Wilkinson*. Factually, the Court is presented with a homeowners association that sought to regulate STVRs in a post-*Wilkinson* world. Because *Wilkinson* precluded regulation of STVRs via modification of the nuisance business prohibitions contained in its CCRs, the Association here attempted to regulate STVRs by modifying its residential use restrictions, intentionally taking

into account the restrictions that failed in *Wilkinson*. These modifications failed when the superior court, applying *Wilkinson*'s "new" versus "modified" analysis, concluded that the Association's STVR modifications were unenforceable "new" restrictions that required 100%-member approval, leaving the Association with no viable recourse to regulate STVR uses, despite its best effort to work carefully within *Wilkinson*'s limitations. The facts before this Court provide a real-life example of the harm *Wilkinson* causes.

Procedurally, Division III did everything but outright ask this Court to accept review of this matter and address the problems with *Wilkinson*. Division III issued a published opinion in this matter, without hearing oral argument. In that Opinion, Division III cited with approval, on multiple occasions, the logic and concerns raised in the *Wilkinson* dissents, calling the dissents "wise" and "astute." Appx. at A-6. A-8 (¶¶ 29, 41). And the court, instead of summarily rejecting the Association's arguments, took the time to thoroughly

address why each and every argument the Association presented failed under *Wilkinson*, all the while "shar[ing]" the Association's concerns. Appx. at A-8 (¶ 41). The court even authored a concurrence proposing a possible workaround so long as *Wilkinson* remains valid law. Appx. at A-10 (¶¶ 60–61). But ultimately, Division III was left with no option but to deny the Association's appeal, recognizing that it is "bound … by the Supreme Court's *Wilkinson* ruling." Appx. at A-8 (¶ 41).

F. CONCLUSION

The STVR industry was in its infancy when this Court decided *Wilkinson*. Since then, the industry has exploded, and state and local governing bodies, both locally and nationally, have enacted laws to regulate STVRs, treating them as commercial businesses enterprises on par with bed-and-breakfasts, hotels, and the lodging industry as a whole. Washington state's legislature is no exception, enacting the Short-Term Rental Act in 2019.

Wilkinson carves out an exception to the commercial business treatment of STVRs, preventing condominium, homeowners, and other owner associations like the Association, as well a local municipalities, from regulating STVRs as commercial businesses. *Wilkinson* also creates an error-prone analysis for lower courts to apply, forcing a determination of whether a proposed CCR change constitutes merely a modification to an existing covenant, or an entirely new covenant.

The Court should accept direct review of Division III's Opinion and (a) overturn retroactively that portion of *Wilkinson* that prohibits consideration of STVRs as commercial business uses of residential property, (b) adopt Idaho's "unconscionable harm" standard for CCR review, (c) conclude that the Association is authorized to amend its covenants by simple majority vote when the change is consistent with the general plan of development and does not cause an unconscionable harm, and (d) reverse and remand this action to the superior

court—including all attorney fee awards—for further proceedings consistent with this Court's Opinion.

This document contains 4,954 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED, this 2nd day of June, 2023.

H. LEE LEWIS LAW, PLLC

By: _____

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TABLE OF APPENDICES

2023 WL 3471537
Only the Westlaw citation is currently available.
Court of Appeals of Washington, Division 3.

TWIN W OWNERS' ASSOCIATION, a Washington non-profit corporation, Appellant,
v.
Andrew MURPHY and Jennifer Murphy, a married couple, Respondents.

No. 39299-6-III
|
Filed May 16, 2023

Synopsis

Background: Homeowner association brought action against property owners for declaratory judgment that restrictive covenants restricting and regulating short-term rentals were enforceable and for injunctive relief against property owners' noncompliance with covenants. Property owners asserted counterclaims. Association moved and property owners cross-moved for summary judgment. The Superior Court, Douglas County, Brian C. Huber, J., granted partial summary judgment in favor of property owners and declared covenants void. Association petitioned Supreme Court to accept direct interlocutory review, and Supreme Court commissioner denied petition. Property owners moved to modify commissioner's ruling and sought attorney fees incurred in opposing petition, pursuant to association's established covenants. The Supreme Court denied motion. Subsequently, the Superior Court granted property owners' motion to dismiss remaining claims and awarded them attorney fees incurred in opposing petition, but not those incurred on their motion to modify commissioner's ruling. Association filed second petition for direct review, and the Supreme Court denied petition and transferred appeal.

Holdings: The Court of Appeals, Fearing, C.J., held that:

covenants restricting and regulating short-term rentals were new covenants that provision governing amendments did not authorize;

covenant provision governing vote when owner approval was required did not authorize new covenants; and

Supreme Court's denial of interlocutory petition without ruling on fee request did not preclude trial court from awarding fees owners incurred in opposing petition.

Affirmed.

Lawrence-Berrey, J., filed concurring opinion.

Procedural Posture(s): On Appeal; Motion for Summary Judgment; Motion for Attorney's Fees.

Appeal from Douglas Superior Court, Docket No: 21-2-00050-2, Honorable Brian C. Huber, Judge.

Attorneys and Law Firms

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PUBLISHED OPINION

Fearing, C.J.

***1** Vacation rentals have catapulted in popularity over the past decade. While they were already favored by many savvy families looking for more space and more savings, vacation homes blossomed even more when millennial travelers took notice. These adventure-seekers started choosing one-of-a-kind stays over been-there-done-that hotel rooms. Now, even more people are desiring short-term rentals for another reason—as alternative accommodations to social distance and stay away from others. *What are the pros and cons of owning a vacation rental property?* VACASA, , https://www.vacasa.com/homeowner-guides/pros-cons-of-

owning-vacation-rental-property (last visited May 5, 2023).

¶1 We swim across the Columbia River from Chelan County, the situs of the land in *Wilkinson v. Chiwawa Communities Association*, 180 Wash.2d 241, 327 P.3d 614 (2014), to Douglas County, the location of the property in this appeal. We address the same question resolved by the Washington Supreme Court in *Wilkinson*: whether a homeowner association may amend its restrictive covenants to ban or highly regulate the use of a residence as a vacation rental. Since we are an intermediate appellate court, we decline to usurp our limited authority and to overrule Supreme Court precedent. We deem the precedent controlling in this appeal brought by Twin W Owners' Association. We affirm the superior court's summary judgment ruling, favoring homeowners Andrew and Jennifer Murphy, that declared amended restrictive covenants void. We also affirm a ruling by the superior court that awarded reasonable attorney fees and costs to the Murphys for work incurred before the state Supreme Court.

FACTS

¶2 Twin W Owners' Association (Twin W or homeowner association) is a Washington nonprofit corporation that governs ninety-four properties in rustic Douglas County. The properties oversee the prodigious Columbia River. In 2004, the homeowner association adopted and recorded a set of covenants, conditions, and restrictions encumbering all lots.

¶3 We quote some of the Twin W, then known as Twin WW Ranch, protective covenants relevant to this appeal. The 2004 covenants introduce, in an initial section labeled "preamble," a theme of maintaining a rural character and protecting property values:

> 1.1 Sometimes there is a fine line drawn between protecting property owners and inhibiting their life style. To fully understand the following protective covenants, it is necessary to examine the underlying theme or intent of Twin WW Ranch as a collection of properties: rural living with insured [sic] quality and protected life style in the midst of productive fruit orchards.
>
> 1.2 Twin WW Ranch lies in a rural setting offering small acreages with a tremendous view of the Columbia River. The parcels were designed so the purchaser could feel comfortable in building a quality home and estate without fear of devaluation due to his neighbor's action. In most cases, homes lack protection and are subject to devaluation. However, Twin WW Ranch has the ability to protect itself from devaluation and insure increasing value for its homeowners. More importantly, these covenants are designed to create and maintain a protected rural life style.

***2** Clerk's Papers (CP) at 15.

¶4 The Twin W covenants constrain, in vague terms, some uses of a lot.

> 2.1 Reasonable Use. No lot shall ever be used in a fashion which unreasonably interferes with the other lot owners' use and enjoyment of their respective properties.
>
> ....
>
> 2.4 Offensive Activities. No noxious or offensive activity shall be carried on upon any lot, nor shall anything be done or maintained thereon which may be, or become, an annoyance or nuisance, or adversely effect the use, value, occupation and enjoyment of any adjoining property in the development.
>
> ....
>
> 2.12 Businesses. No store or business shall be carried on upon said premises or permitted thereon which involves on-premises sales, or which constitutes a nuisance.

CP at 15-18.

¶5 The 2004 restrictive covenants address administration of the homeowner association:

> 3.1 Approval. When these covenants require owner approval such approval shall be by sixty percent (60%) vote, with one vote per lot (a "Lot").
>
> 3.2 Amendment. Amendment of these covenants shall be by sixty percent (60%) vote, with one vote per Lot. Amendments shall be in writing and recorded in the same manner as these covenants.

CP at 18. No provision expressly reserves to the homeowner association the power to add new covenants. Finally, the 2004 covenants provide for an award of attorney fees to a substantially prevailing party in litigation:

> 3.4 Enforcement. Enforcement shall be by proceedings at law or in equity against any person or persons violating or attempting to violate any covenant either to restrain violation or to recover damages. The substantially prevailing party in any dispute of the enforcement of these covenants shall be entitled to recover reasonable attorney's fees.

CP at 19.

¶6 Enter Andrew and Jennifer Murphy. In 2007, the Murphys purchased a lot within Twin W. In 2009, the Murphys built a $1.2 million home on the lot for the purpose of generating income as short-term rental property.

¶7 Other Twin W homeowners complain about the rental nature of Andrew and Jennifer Murphy's residence. A neighbor declared that, at times, as many as twenty people and a dozen cars have occupied the Murphys' rental property. The large groups have partied late and emitted loud noise into the early hours of the morning. On one New Year's weekend, renters exploded mortar fireworks between 1:00 a.m. and 1:20 a.m. A call to the Murphys after the fireworks went unanswered.

¶8 Renters of Andrew and Jennifer Murphy's vacation rental have deposited, in the road, garbage in excess of the residence's garbage can's capacity. The wind has blown the garbage into neighbors' lots. Murphy renters have also abandoned, on a boat dock, full gas cans at risk of being blown into the Columbia River.

¶9 In 2020, Twin W passed, by supermajority vote, new protracted covenants restricting and regulating short-term rentals. We quote most of the new covenants in order to illustrate their stretched and painstaking nature:

> 2.21 Short-Term Rental Properties. Pursuant to Section 1.1 (Preamble), Section 1.2 (Preamble), Section 2.1 (Reasonable Use), and Section 2.4 (Offensive Activity), the rental of Lots for periods of less than thirty days at a time to any person ("Short-Term Rental"), other than the rental of an accessory dwelling unit, shall be subject to the following regulations intended to protect the other Lot owners from unreasonable interference with their use and enjoyment of their Lots:
>
> ***3** In order to be eligible to engage in Short Term Rental activity, a Lot must have a completed residence constructed; no Lot without a completed residence shall engage in Short Term Rental activity (i.e.—no renting vacant lots, motorhomes, trailers, etc.). Commencing in 2021, prior to renting their properties, all Lot owners desiring to use their Lot for a Short-Term Rental shall apply to the Twin W board on or before October 15 of the year prior to renting for permission to engage in Short-Term Rentals for the upcoming calendar year, using an application to be provided by the Twin W board and paying the associated processing fee.
>
> For 2021, each applicant desiring to engage in Short-Term Rentals shall be granted permission by the Twin W board to do so. A Lot owner must continuously apply for a Short-Term Rental in each year, starting in 2021, or that Lot will forever lose its eligibility to be used as a Short-Term Rental. All Lots shall forever lose their eligibility to apply to engage in Short-Term Rentals upon a change of ownership (including a change in the ownership of shares or units in an entity that owns the Lot) that occurs after October 15, 2020. A Lot may also lose its eligibility to apply to engage in Short-Term Rentals upon violation of and pursuant to the Short-Term Rental Rules and Regulations attached as Exhibit A.
>
> Each Lot authorized to engage in Short-Term Rentals shall maintain a policy of general liability insurance applicable to its Short-Term Rental with limits of $1,000,000 per occurrence, and which names Twin W, Twin W's association administrator at that time, and all Lot owners that immediately surround the applicant's Lot as well as all Lot owners who share joint use of a dock, as additional insureds. Each Lot authorized to engage in Short-Term Rentals shall pay an administration fee to Twin W to cover the additional expenses associated with oversight of the Short-Term Rentals such that no general association dues paid by all Lot owners will be used for administering Short-Term Rentals. No Lot owner shall rent any portion of its Lot as a Short-Term Rental at the same time as it is rented as an ADU [accessory dwelling unit] Rental.
>
> Twin W adopts the Short-Term Rental Rules and Regulations attached as Exhibit A and incorporated herein to govern Short-Term Rentals, which may be amended by Twin W's board from time to time upon written notice

to Lot owners, but without a vote of the Lot owners, to aid in the efficient administration of Short-Term Rentals, however, no amendment of the Short-Term Rental Rules and Regulations shall change the number of annual Short-Term Rentals without a vote of the Lot owners.

... 2.22 Accessory Dwelling Unit Rental Properties. Pursuant to Section 1.1 (Preamble), Section 1.2 (Preamble), Section 2.1 (Reasonable Use), and Section 2.4 (Offensive Activity), the rental of accessory dwelling units on any Lot to any person ("ADU Rental") shall be subject to the following regulations intended to protect the other Lot owners from unreasonable interference with their use and enjoyment of their Lots:

Prior to renting their property, all Lot owners desiring to use their Lot for an ADU Rental shall apply annually on or before October 1 to the Twin W board for permission of an ADU Rental for the following calendar year, using an application to be provided by the Twin W board. Up to five Lots may be used as an ADU Rental in a given year. If Twin W receives more than five timely ADU Rental applications, all applicants shall be placed into a lottery and five Lots shall be chosen for approval for the upcoming calendar year. Each ADU Rental applicant shall maintain a policy of general liability insurance applicable to its ADU Rental with limits of $1,000,000 per occurrence, and which names Twin W, Twin W's association administrator at that time, and all Lot owners that immediately surround the applicant's Lot as well as all Lot owners who share joint use of a dock, as additional insureds. Each ADU Rental applicant shall pay an administration fee to Twin W to cover the additional expenses associated with oversight of the ADU Rentals such that no general association dues paid by all Lot owners will be used for administering ADU Rentals. No Lot owner shall rent any portion of its Lot as a short term rental at the same time as it is rented as an ADU Rental. Lot owners are advised to refer to Douglas County Code 18.16.170, which provides, "The property owner (which shall include title holders and contract purchasers) shall occupy either the primary unit or the accessory unit as their permanent residence." Twin W adopts the ADU Rental Rules and Regulations attached as Exhibit A and incorporated herein to govern ADU Rentals, which may be amended by Twin W's board from time to time upon written notice to Lot owners, but without a vote of the Lot owners, to aid in the efficient administration of ADU Rentals, however, no amendment of the ADU Rental Rules and Regulations shall change the number of annual ADU Rentals without a vote of the Lot owners.

***4** ....

2.23 Prohibition of Leasing Residences to Multiple Tenants and Subleasing Residences. No residence shall be leased to more than one tenant at any time. No residence shall be subleased.

CP at 36-38.

¶10 Lot owners in Twin W voted separately on each of the paragraphs of the new covenants rather than in the aggregate. Covenant 2.21 received sixty-two yes votes and twenty-three no votes. Covenant 2.22 received fifty-nine yes votes and twenty-seven no votes. Covenant 2.23 received seventy yes votes and fifteen no votes.

¶11 Other property owners in the homeowner association, besides Andrew and Jennifer Murphy, rent their property on short terms. In 2020, the Murphys' residence generated income of $103,171.

PROCEDURE

¶12 Following approval of the 2020 covenants, Twin W sought a declaratory judgment to declare the covenants enforceable. The homeowner association further sought injunctive relief against Andrew and Jennifer Murphy for noncompliance with the newly adopted covenants. In its complaint, Twin W referenced the 2004 covenants that prohibit nuisances and offensive activities. The complaint alleged that use of property for short-term vacation rentals had led to nuisances. Nevertheless, the complaint did not seek a declaration that the Murphys engaged in a nuisance.

¶13 Twin W, on the one hand, and Andrew and Jennifer Murphy, on the other hand, filed cross motions for summary judgment. Twin W's motion sought a declaration validating the 2020 restrictive covenants. The motion did not claim that the Murphys had violated provisions of the 2004 covenants.

¶14 The superior court granted partial summary judgment to Andrew and Jennifer Murphy and declared covenants 2.21, 2.22, and 2.23 void. The partial summary judgment order left outstanding some counterclaims advanced by the Murphys.

¶15 Twin W petitioned the Washington Supreme Court to accept direct review of the order granting Andrew and Jennifer Murphy partial summary judgment. The petition

sought interlocutory review since counterclaims remained pending before the superior court. The Supreme Court commissioner denied the homeowner association's petition in a ruling that omitted any mention of an attorney fee award.

¶16 Andrew and Jennifer Murphy filed a motion to modify the Supreme Court commissioner's ruling. The motion sought an award of attorney fees incurred when answering Twin W's petition for discretionary review. In response to the motion to modify, the Supreme Court ruled "[t]hat the Appellant's motion to modify the Commissioner's ruling is denied." Br. of Appellant, App'x at 8.

¶17 The superior court subsequently granted Andrew and Jennifer Murphy's motion to dismiss their remaining claims. The court also entered an award of attorney fees for the Murphys. Over the objection of Twin W, the court's fee award included fees incurred by the Murphys in defending against the homeowner association's interlocutory petition to the Supreme Court but excluded fees incurred by the Murphys' motion to modify the commissioner's ruling.

¶18 In a second petition to the Supreme Court, Twin W Owners' Association requested direct review of the superior court's final judgment. The Supreme Court again denied the homeowners association's petition and transferred the appeal to this court.

LAW AND ANALYSIS

***5** ¶19 On appeal, Twin W seeks the overturning of *Wilkinson v. Chiwawa Communities Association*. In the alternative, the homeowner association asks us to distinguish the Washington Supreme Court precedent from the circumstances on appeal. We decline both requests. Finally, Twin W assigns error to the superior court's award of reasonable attorney fees and costs incurred for work performed in opposing direct and interlocutory review by the Supreme Court. We affirm the attorney fees ruling.

Real Property Restrictive Covenants

¶20 *Issue 1: Should this court overrule the Washington Supreme Court's decision in* Wilkinson v. Chiwawa Communities Association*?*

¶21 *Answer 1: No.*

¶22 Twin W Owners' Association wrote its appeal brief with the dream of the Washington Supreme Court accepting direct review. The brief requests overruling of *Wilkinson v. Chiwawa Communities Association*, 180 Wash.2d 241, 327 P.3d 614 (2014). In support of overturning the precedent, Twin W emphasizes the explosion, since the issuance of the *Wilkinson* decision in 2014, in short-term vacation rental properties. This eruption in a new business model has prompted government entities to adopt laws and regulations treating vacation rentals as bed and breakfasts, motels, and hotels. Twin W murmurs that *Wilkinson* prevents it from reasonably regulating the business use of its properties in the same manner as other local, state, and national regulatory bodies and to prevent an ongoing nuisance.

¶23 Washington limits the authority of a simple majority of homeowners to adopt new covenants or amend existing ones in order to place new restrictions on the use of private property. *Wilkinson v. Chiwawa Communities Association*, 180 Wash.2d 241, 255-56, 327 P.3d 614 (2014). The law refuses to subject a minority of landowners to unlimited and unexpected restrictions on the use of their land merely because the covenant agreement permitted a majority to make changes to existing covenants. *Meresse v. Stelma*, 100 Wash. App. 857, 866, 999 P.2d 1267 (2000). The rule protects the reasonable expectations of landowners to resist new deprivations to property rights. *Wilkinson v. Chiwawa Communities Association*, 180 Wash.2d 241, 256, 327 P.3d 614 (2014). This court examines whether existing covenants provide an "express reservation of power authorizing less than 100 percent of property owners within a subdivision to adopt new restrictions respecting the use of privately-owned property." *Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 76 Wash. App. 267, 273, 883 P.2d 1387 (1994).

¶24 In *Wilkinson v. Chiwawa Communities Association*, 180 Wash.2d 241, 327 P.3d 614 (2014), the homeowner association covenants restricted lots to single family residences, banned the use of any lot for commercial activity, and limited residents to a single six-foot yard sign when advertising property sales or rentals. The covenants permitted the homeowner association to change the protective restrictions and covenants in whole or in part by majority

vote. In 2008 and again in 2011, a majority of the homeowner association members voted to prohibit short-term rentals.

¶25 In a 5 to 4 decision, the Supreme Court, in *Wilkinson v. Chiwawa Communities Association*, announced two distinct holdings. The court first held that restrictive covenants that bar commercial use of residences and restrict lots to single-family residences do not prohibit short-term rentals particularly when the covenants limit the size of rental signs. In so ruling, the Supreme Court sought to divine the 1988 covenant drafter's intent as to the allowance of short-term vacation rentals. The dissent rightly criticized this ruling. A court might have an easier task in attempting to discover whether the drafters of the Bill of Rights intended for wiretaps to qualify as searches and seizures under the Fourth Amendment to the United States Constitution or in endeavoring to discern whether the framers of the Bill of Rights would classify a hydrogen bomb as an "arm" for purposes of the Second Amendment. No one in 1988 expected family residences to become hotels.

***6** ¶26 The Supreme Court, in *Wilkinson v. Chiwawa Communities Association*, also ruled that language in covenants allowing a majority of homeowners to "change" or "amend" the protective covenants did not permit the majority to "create" or record "new" covenants. Under the majority's holding, the majority of Chiwawa Communities homeowners could not approve an amended covenant that precluded rentals for terms less than thirty days because the covenant did not modify or relate to a 1988 covenant. In so holding, the court impliedly rejected the former principle that sanctioned the adoption of additional covenants by majority vote, regardless of whether the covenant was "new" or a "modification" as long as the covenant coincided with the original general plan of development. *Meresse v. Stelma*, 100 Wash. App. 857, 865-66, 999 P.2d 1267 (2000). This former rule assumed that the initial covenants allowed changes by majority vote.

¶27 In this appeal, Twin W does not challenge the first holding of the Supreme Court in *Wilkinson v. Chiwawa Communities Association*. Indeed, the universal rule is that use of property for short-term vacation rentals does not transform a home from residential use to commercial use for purposes of covenants restricting commercial use. *Wilson v. Maynard*, 2021 S.D. 37, 961 N.W.2d 596 (2021); *Kinzel v. Ebner*, 2020-Ohio-4165, 157 N.E.3d 898 (Ct. App.); *Forshee v. Neuschwander*, 2018 WI 62, 381 Wis. 2d 757, 914 N.W.2d 643; *Tarr v. Timberwood Park Owners Association*, 556 S.W.3d 274 (Tex. 2018); *Houston v. Wilson Mesa Ranch Homeowners Association, Inc.*, 2015 COA 113, 360 P.3d 255; *Russell v. Donaldson*, 222 N.C. App. 702, 731 S.E.2d 535 (2012). This court had previously ruled that covenants restricting property to single family residences did not preclude the use of the property for vacation rentals. *Ross v. Bennett*, 148 Wash. App. 40, 203 P.3d 383 (2008).

¶28 Twin W asks this court to overrule the second holding in *Wilkinson v. Chiwawa Communities Association*. Nevertheless, once the state Supreme Court has decided an issue of state law, we are bound by that interpretation until it is overruled by the Supreme Court. *State v. Gore*, 101 Wash.2d 481, 487, 681 P.2d 227 (1984).

¶29 Twin W further argues that the *Wilkinson* Court's "new" versus "modified" covenant restriction analysis creates erroneous results and should be rejected. The dissent in *Wilkinson* expressed the same thought. The dissent wisely wondered about the location of the line between where a "creation" ends and a "change" begins. God crafted changes when he or she created the heavens and the earth and all that in them is. Twin W asks us to adopt Idaho's "unconscionable harm" standard when determining the validity of changes to homeowner association restrictive covenants. Idaho draws no definitive distinction between an association's adoption of a new restriction and the modification of existing restrictions. *Adams v. Kimberley One Townhouse Owner's Association*, 158 Idaho 770, 775, 352 P.3d 492 (2015). We deem this second request a restatement of the homeowner association's entreaty to overrule the entire *Wilkinson* decision and thus also reject this additional request.

¶30 *Issue 2: Are Twin W's amended restrictive covenants void? Stated differently, did the superior court correctly grant Andrew and Jennifer Murphy summary judgment?*

¶31 *Answer 2: Yes.*

¶32 In an attempt to validate its 2020 covenants, Twin W seeks to distinguish its covenants from the covenants addressed in *Wilkinson v. Chiwawa Communities Association* or to assert arguments never posited by the Chiwawa Communities Association. We assemble Twin W's arguments into five contentions.

¶33 First, Twin W emphasizes that no language in the 2004 covenants relates to rental activity by lot owners. Twin W distinguishes *Wilkinson v. Chiwawa Communities Association*, because the Supreme Court, in *Wilkinson*, reasoned that the homeowner association covenants demonstrated that the original drafters anticipated and permitted rentals when they restricted the size of rental signs residents could hang. Based on this reading, the high court concluded that Chiwawa covenants permitted rentals without any durational limitation. According to Twin W, since its 2004 covenants did not expressly mention rentals, the covenants impliedly precluded rentals. At least, according to Twin W, no one should complain if later covenants restrict rentals.

***7** ¶34 We deem Twin W's first argument to harm, rather than benefit the homeowner association. Assuming the 2004 covenants failed to mention any rental of property, the 2020 covenants, seeking to restrict short-term rental activity, move further in the continuum toward new covenants, not amendments to any existing covenants. The Supreme Court, in *Wilkinson v. Chiwawa Communities Association*, ruled that, when a later covenant lacks a relationship to the initial covenants, the later covenant creates a new covenant, not an amendment to the covenants.

¶35 Second, Twin W contends that the 2004 covenants' broad provisions requiring reasonable lot use and prohibiting nuisances give lot owners reasonable notice that the homeowner association could subject short-term vacation rentals to further regulation. To the contrary, in *Wilkinson*, the Supreme Court held that covenants prohibiting a nuisance would not have placed homeowners on notice that short-term rentals might later be prohibited. Twin W's 2004 covenants similarly lack a nexus to the subject of short-term rentals to qualify the 2020 covenants as amendments.

¶36 Third, Twin W contrasts its 2020 covenants' requirements phasing out short-term vacation rentals with Chiwawa Association's covenant that would have banned short-term vacation rentals altogether and immediately. Nevertheless, under *Wilkinson*'s rule, a mere majority of voters cannot pass any new restriction on rental activity. Twin W cannot avoid this rule merely because the 2020 covenants do not impose an immediate and total ban on rentals.

¶37 Fourth, Twin W argues the 2020 covenants fulfill the community's general plan of development promulgated in the 2004 covenants' preamble. While *Wilkinson* frequently referenced the "general plan" of the Chiwawa Community Association development, we consider the meaning of the phrase murky. We do not read Twin W's 2004 covenants' ethereal references to rural living as imposing restrictions on lot owners' ability to lease their property. We note that the homeowner association did not offer any evidence that the Murphys' short-term rentals devalued neighboring properties.

¶38 Fifth, Twin W maintains that a covenant provision, separated from section 3.2 addressing amendments, granted authority to implement a new restrictive covenant with approval of sixty percent of the owners. Covenant 3.1 provides:

> Approval. When these covenants require owner approval such approval shall be by sixty percent (60%) vote, with one vote per lot (a "Lot").

CP at 18. According to Twin W, if paragraph 3.2 did not grant authority to adopt a new covenant with a sixty percent vote, paragraph 3.1's language, addressing owner approval in general, did. We disagree.

¶39 This court applies rules of contract interpretation to restrictive covenants with the goal to ascertain and give effect to the purposes intended by the covenants. *Wilkinson v. Chiwawa Communities Association*, 180 Wash.2d 241, 249-50, 327 P.3d 614 (2014). When determining intent, we give covenant language its ordinary and common meaning. *Riss v. Angel*, 131 Wash.2d 612, 621, 934 P.2d 669 (1997). To interpret this individual provision, this court must consider the document in its entirety. *Mountain Park Homeowners Association v. Tydings*, 125 Wash.2d 337, 344, 883 P.2d 1383 (1994). This court owes no deference to a homeowner association's interpretation of its governing documents. *Bangerter v. Hat Island Community Association*, 199 Wash.2d 183, 188, 504 P.3d 813 (2022).

¶40 Twin W covenant 3.1 outlines a process in the event "these covenants require owner approval." CP at 18. A scan of other covenants reveals that owner approval is sometimes required for Twin W action. For example, an owner may

only store large construction equipment on a lot for one year unless the homeowner association approves a longer period. Twin W may seek injunctive relief against a lot owner for failure to pay costs of repair, replacement, and maintenance of common amenities only if such legal action is approved by the homeowner association members. When we read the 2004 restrictive covenants in their entirety, we conclude the drafters intended covenant 3.1 to address these discrete circumstances, not the adoption of new covenants.

***8** ¶41 We share Twin W's concern that the 2004 covenants never contemplated the use of land within the association for short-term vacation rentals. No one expected a burgeoning short-term vacation rental industry. We recognize that long-term tenants more likely live in harmony with neighbors and treat the property better than vacation renters. These concerns were highlighted in Justice Madsen's astute dissent in *Wilkinson v. Chiwawa Communities Association*. We share Twin W's concern about the traffic and noise attended to vacation rentals. We remain bound, however, by the Supreme Court's *Wilkinson* ruling.

¶42 Twin W did not contend, in its complaint, that Andrew and Jennifer Murphy violated 2004 covenants that prohibit nuisances or that restrict property uses that devalue neighboring residences. We render no decision as to the applicability of the nuisance prohibition in the 2004 restrictive covenants to the Murphys' use of their residence. We also note the possibility that Twin W could amend the 2004 nuisance covenants by a sixty percent vote under paragraph 3.2 of the covenants in order to address problems inherent in short-term rentals. We issue no opinion as to whether such amendments would be deemed modifications to the covenants rather than new covenants.

Attorney Fees

¶43 *Issue 3: When the Supreme Court denies direct review without deciding whether to award the opposing party reasonable attorney fees and costs, may the superior court award the opposing party reasonable attorney fees and costs incurred in defending against direct review when a contract provision allows the prevailing party an award and the opposing party prevails before the superior court?*

¶44 *Answer 3: Yes.*

¶45 Twin W seeks reversal of the superior court's attorney fee award relating to the costs the Murphys incurred when responding to the homeowner association's petition for direct, discretionary, and interlocutory review by the Supreme Court. Twin W believes the trial court lacked authority to award fees incurred during an appeal to the Supreme Court. Twin W highlights that the Supreme Court declined to award attorney fees in both the court commissioner's initial ruling denying review and the subsequent denial of the Murphys' motion to modify, which latter motion explicitly advanced an attorney fee argument. Twin W characterizes the superior court's ruling granting fees as a violation of the Supreme Court's mandate.

¶46 When Twin W petitioned for direct review from the trial court's interlocutory order, the Supreme Court considered the question of whether to accept discretionary review under RAP 2.3. The Supreme Court did not expressly consider whether to grant Andrew and Jennifer Murphy fees incurred in objecting to review.

¶47 This attorney fees dispute poses an esoteric question that requires a convoluted review of appellate rules. Thankfully, other case law precedes us. Twin W Owners advances *Thompson v. Lennox*, 151 Wash. App. 479, 212 P.3d 597 (2009), in support of its argument that the superior court lacked authority to grant attorney fees for work performed in the Supreme Court. In response, Andrew and Jennifer Murphy forward *Emerick v. CSC*, 189 Wash. App. 711, 357 P.3d 696 (2015). We deem *Emerick v. CSC* more on point.

¶48 In *Thompson v. Lennox*, 151 Wash. App. 479, 212 P.3d 597 (2009), Don Thompson and Sheri Nimmo appealed the superior court's decision in favor of Mary Lennox. Thompson and Nimmo claimed their neighbor Lennox violated an open-air easement. The superior court, pursuant to a contract provision, granted Lennox reasonable attorney fees and costs incurred. Thompson and Nimmo appealed the judgment in favor of Lennox. The Court of Appeals dismissed the appeal when Thompson and Nimmo failed to timely file an opening brief.

***9** ¶49 Two months after dismissal of the appeal, Mary Lennox brought a motion in the superior court for an award of attorney fees incurred during the pendency of the appeal. Lennox relied again on the contract provision for an award of fees to the prevailing party. Don Thompson and Sheri Nimmo objected to an award and argued that the superior court lacked authority to grant an award. The superior court

awarded Lennox the additional fees. Thompson and Nimmo appealed once again. This court agreed that the superior court lacked authority to award Lennox the fees.

¶50 When reversing the award of reasonable attorney fees and costs incurred by Mary Lennox during the earlier abandoned appeal, the court, in *Thompson v. Lennox*, framed the issue as whether the superior court, as opposed to the Court of Appeals, held authority to award fees incurred during the first appeal. Lennox argued that the Rules of Appellate Procedure never contemplated which court should address a request for fees under the circumstance when the appellant forsakes the appeal. This court reviewed subsections of RAP 18.1. RAP 18.1(a) provides that, if applicable law grants a party the right to recover reasonable attorney fees or expenses on review, the party "must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court." The party seeking appellate fees "must" devote a section of its opening brief to the request for the fees or expenses. RAP 18.1(b). If the party has yet to file a brief, the request "must" be included in a motion. RAP 18.1(b). Within ten days after the filing of a decision awarding a party the right to reasonable attorney fees and expenses on appeal, the party being awarded fees "must" serve and file in the appellate court an affidavit detailing the expenses incurred and the services performed by counsel. RAP 18.1(d). The clerk "will include the award" of attorney fees and expenses in the mandate, the certificate of finality, or in a supplemental judgment. RAP 18.1(h).

¶51 The Court of Appeals rejected Mary Lennox's argument that she lacked an opportunity to request fees in the Court of Appeals because of the abandonment of the appeal before she could file her brief. The court answered that RAP 18.1 demands that a party seeking fees on appeal do so before the appellate court. Although Lennox had yet to file a brief at the time of the appeal dismissal, she could have filed a motion within ten days. Despite the court issuing a mandate after the abandonment, the Court of Appeals retained jurisdiction to address requests for fees. RAP 12.7(a).

¶52 Twin W's circumstances differ from the facts presented in *Thompson v. Lennox*. Andrew and Jennifer Murphy asked for an award of reasonable attorney fees and costs before the Supreme Court. The Supreme Court did not address the request because it never accepted review. An award by the high court would have been premature because claims remained pending before the superior court. No court could identify the prevailing party until the completion of the entire suit.

¶53 In *Emerick v. Cardiac Study Center, Inc.*, 189 Wash. App. 711, 357 P.3d 696 (2015), a cardiologist sued his former practice to invalidate a noncompete clause. The superior court first voided the clause in its entirety. On appeal, this court reversed and remanded to the superior court to narrow the clause to a limited geographic territory and limited time period. The cardiology practice did not then ask the Court of Appeals for an award of fees because it did not consider itself to be the prevailing party since the court ordered further proceedings before the superior court.

***10** ¶54 The superior court on remand granted, pursuant to a contract provision, the Cardiac Study Center reasonable attorney fees incurred in the superior court, but not fees incurred before the Court of Appeals in obtaining the reversal in the first appeal. The superior court reasoned that it lacked jurisdiction to award fees on appeal. The superior court also reasoned that the Court of Appeals had denied an award during the first appeal. Cardiac Study Center appealed the denial of its attorney fees incurred during the first appeal. This court reversed and granted the cardiology practice its request. This court reasoned that, after the reversal in the first appeal, no one yet knew the prevailing party in the underlying action. This court remanded to the superior court to determine a reasonable sum for fees incurred during both the first and the second appeal.

¶55 Twin W covenants provide for an award of attorney fees to the substantially prevailing party. When the Supreme Court reviewed the interlocutory filings, the court did not know which party would ultimately prevail on remand. The Supreme Court never issued a ruling denying attorney fees. Unlike in *Thompson*, the initial appeal to the Supreme Court did not terminate the case, and no untimeliness infected the Murphys' fee request.

¶56 *Issue 4: Whether this court should award a party reasonable attorney fees and costs incurred on appeal?*

¶57 *Answer 4: Yes. This court should award Andrew and Jennifer Murphy reasonable attorney fees and costs.*

¶58 Both parties request attorney fees incurred before this court under RAP 18.1 and section 3.4 of the 2004 covenants entitling a substantially prevailing party to attorney fees.

Because Andrew and Jennifer Murphy prevail on all issues in this appeal, we award them appellate attorney fees.

CONCLUSION

¶59 We affirm the summary judgment order that declares the 2020 restrictive covenants void. We affirm the superior court's previous award of reasonable attorney fees and costs to the Murphys and grant the Murphys reasonable attorney fees and costs on appeal.

I CONCUR:

Siddoway, J.

Lawrence-Berrey, J. (concurring)

¶60 I write separately to allay a valid concern of homeowners' associations faced with individual owners using their properties for short-term rentals. Protective covenants routinely prohibit owners from using their property in a manner that constitutes a nuisance to other owners. The solution is to amend the nuisance covenant so that short-term rentals do not become a nuisance.

¶61 For example, the covenant may be amended to require owners using their property as short-term rentals to have an on-site representative to timely address nuisance complaints and that a failure to properly address a nuisance complaint as determined in the sole discretion of a designated committee subjects the owner to a fine that may be recorded as a lien against the property if not paid within a certain period of time. The amended covenant can specify restrictions of who can serve as the on-site representative, how the committee is comprised, how notice and hearings of the committee are held, the range of fines and whether and how they may increase upon successive violations, and the manner in which liens may be foreclosed. As a caution to homeowners' associations, a court's willingness to enforce the covenant will largely depend on its overall fairness, including how it is administered in individual situations.

All Citations

--- P.3d ----, 2023 WL 3471537

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CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2023, I electronically filed the foregoing with the Clerk of the Court using the Washington State Appellate Court's Portal electronic filing System. Notice of this filing will be sent to the parties listed below by operation of the Court's e-filing system. Parties may access this filing through the Court's system.

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

SIGNED and DATED at Wenatchee, Chelan County, Washington, this 2nd day of June, 2023.

H. LEE LEWIS

H. LEE LEWIS LAW, PLLC

June 02, 2023 - 8:55 AM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	39299-6
Appellate Court Case Title:	Twin W Owners' Association v. Andrew Murphy et al.
Superior Court Case Number:	21-2-00050-2

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