NO. 47126-4-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

DALE E. and LETA L. ANDERSON; DALE E. ANDERSON and LETA L. ANDERSON, TRUSTEES OF THE DALE E. ANDERSON AND LETA L. ANDERSON FAMILY TRUST; and RIVER PROPERTY, LLC,

Appellants,

v.

JAMES W. BROWN; ROBERT D. DAVIS; KAE HOWARD, TRUSTEE OF THE KAE HOWARD TRUST; MICHAEL J. and CRISTI D. DEFREES, husband and wife; TUAN TRAN and KATHY HOANG, husband and wife; VINCENT and SHELLY HUFFSTUTTER, husband and wife; THOMAS J. and GLORIA S. KINGZETT, husband and wife; LARRY R. and SUSAN I. MACKIN, husband and wife; TOD E. McCLASKEY, JR. and VERONICA A. McCLASKEY, TRUSTEES OF THE McCLASKEY FAMILY TRUST—FUND A; CRAIG STEIN; and RICHARD and CAROL TERRELL, husband and wife,

Respondents,

APPEAL FROM THE SUPERIOR COURT

HONORABLE JOHN NICHOLS

BRIEF OF APPELLANTS

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Assignment of Error No. 3: The Court erred in entering the Judgment.

ISSUES PRESENTED

1. Did the First Amendment to Declaration of Covenants and Restrictions for Rivershore (the 2008 Amendment) require the approval of all homeowners within the subdivision?

2. Did the owners of Lot 8 in Rivershore validly assent to the 2008 Amendment?

3. Did the owners of Lot 9 in Rivershore validly assent to the 2008 Amendment?

4. Does the "Law of the Case" doctrine preclude consideration of the preceding three issues?

5. Are the defendants estopped from assenting to the 2008 Amendment?

STATEMENT OF THE CASE[1] [2]

I. Operative Facts.

Rivershore Estates Phase I (the Subdivision) is located between Evergreen Highway and the Columbia River in Vancouver. When first platted in 1989, it contained thirteen (13) lots varying in size from .66 acres to 1.34 acres. (CP 23, FF1 and FF3; Ex. 1, Tabs 3-6) The Subdivision's developers recorded the Declaration of Covenants and Restrictions for Rivershore (CCRs) in 1989. The CCRs did not directly prohibit division of lots within Rivershore. (CP 23, FF1; Ex. 1, Tab 1) The Subdivision also included tidelands abutting the Columbia River. These are owned in common among the owners of lots within the Subdivision. (Ex. 1, Tab 1, Paragraphs 15-16, and Tab 2) Finally, the CCRs allow for "modification" of "restrictions" contained in the CCRs with the "affirmative vote of 80% of the then owners of lots within this subdivision." (Ex. 1, Tab 1, Introductory Paragraph)

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[1] This case was tried to the court. There is no serious dispute concerning the factual findings that the court made. Therefore, factual citations will be to the Findings of Fact and Conclusions of Law. The reference will be to a page within the Clerk's Papers together with the legend "FF" to refer to the specific finding.

[2] The parties submitted agreed exhibits to the Court in a three-ring binder containing numbered tabs. The trial clerk marked this three-ring binder as one exhibit. Counsel understands that the entire three-ring binder is being transmitted to the Court of Appeals. Exhibits as part of the Clerk's Papers. References to documents will be to "Ex. 1" followed by the appropriate numbered tab.

In 2002, James Brown decided to subdivide Lot 13 into two parcels. Dale Anderson learned of this and contacted Zachary Stoumbos, a Vancouver attorney, to attempt to stop the process. Other homeowners ultimately joined him. These were Kae Howard, the owner of Lot 1 in her capacity as Trustee of her trust; Brenda Andrist, then the owner of Lot 2; Roberta Davis, then one of the owners of Lot 9; Craig Stein, then the owner of Lot 5; and Vince Huffstutter, then one of the owners of Lot 11. They unsuccessfully attempted to convince the City of Vancouver not to approve Mr. Brown's subdivision. (CP 24-25, FF5-6)

Mr. Stoumbos wrote to Mr. Anderson on April 8, 2003, and forwarded the letter to Ms. Howard, Ms. Andrist, Ms. Davis, Mr. Stein, and Mr. Huffstutter on April 23, 2003. The letter pointed out that there was nothing in the CCRs precluding division of any lot. It also indicated that the CCRs could be amended to preclude any further division. (CP 25, FF8; Ex. 1, Tabs 36-37) After receipt of Mr. Stoumbos' letter, the group chose not to pursue litigation to stop the division of Lot 13. Thereafter, and prior to April of 2008, there was no discussion among the owners of lots in Rivershore, including the Andersons, about amending the CCRs to preclude further division. (CP 25, FF6, 8)

The subdivision of Lot 13 created two parcels. Mr. Brown's existing residence was on one. The other lot had no structures on it at the

time of division. River Property, LLC purchased the lot without any structures in 2005. Dale Anderson and Leta Anderson are the members of that entity. (CP 24, FF5)

Ms. Andrist lost Lot 2 through a nonjudicial foreclosure of a deed of trust. The Andersons learned of its availability through a realtor. They were interested in purchasing the lot provided it could be divided. Mr. Anderson obtained information from a development consultant to determine the feasibility of division under the ordinances of the City of Vancouver and concluded that the property could be divided. The Andersons then purchased Lot 2 for $1.762 million. The deed to them was filed with the Clark County Auditor on April 30, 2008. (CP 25, FF7)

The Andersons would not have purchased Lot 2 had there been any prohibition against subdivision in place at the time they bought it. (CP 26, FF11) The Andersons did not, however, advise other owners in Rivershore of their intention to divide Lot 2 before they purchased it. (CP 25, FF7; Ex. 1, Tab 10; CP 26, FF15)

The Andersons then applied to the City of Vancouver in 2008 to divide the property. The other owners in the Subdivision learned of the application through customary city postings on the property. (CP 25, FF9)

On October 15, 2008, the First Amendment to Declaration of Covenants and Restrictions for Rivershore (the 2008 Amendment) was recorded with the Auditor. As is pertinent, it states:

> Lots 1 through 13, consisting of the original 13 lots contained in Rivershore, shall not be further subdivided or short platted.

It made this restriction "effective immediately." (CP 25-26, FF10-11; Ex. 1, Tab 4) The document was signed and assented to by the owners of Lots 3, 5, 6, 7, 10, 11, and 12. Mr. Brown also signed the document. The Andersons, then owners of Lots 2 and 4, did not agree to the amendment. Neither did River Property, LLC. (Ex 1, Tab 4)

In 2008, Ms. Howard as the Trustee of her Trust was the owner of Lot 1. Also in 2008, Tod McClaskey and Veronica McClaskey as Trustees of the McClaskey Trust-Fund A, dated December 1, 2006, were the owners of Lot 8. Ms. Howard and the McClaskeys signed the 2008 amendment as individuals and not in their capacities as trustees of their respective trusts. Prior to doing so, they had not delegated their duties as trustees to themselves as individuals and had not as trustees executed powers of attorney to themselves to take action for themselves as trustees. (CP 23, FF3; CP 26-27, FF16-18)

Gerald Davis and Roberta Davis, husband and wife, purchased Lot 9 of Rivershore in 1990. (CP 27, FF19) Mr. Davis died in 2001. His will

created a "credit shelter" trust and a "QTIP" trust. All of his assets were left to those trusts. Ms. Davis was the beneficiary of those trusts for her life with the remainder going to her children on her passing. David Jahn, Morris Bush, and Michael Yount were designated co-executors of the will and co-trustees of the trust. (CP 23, FF2; Ex. 1, Tab 41) Mr. Davis' will was admitted to probate on November 12, 2003. (Ex. 1, Tab 42) The three personal representatives executed and filed a Declaration of Completion of Probate on November 12, 2003. (Ex. 1, Tab 43) No deed has ever been executed or delivered conveying Mr. Davis' interest in Lot 9 of Rivershore to any person or entity. (CP 27, FF21)

The Andersons applied with the City of Vancouver to divide Lot 2 into two parcels. One will be on the north side of the lot and will be bare land. Its area will be slightly less than one-quarter acre. It will have no interest in the tidelands in which all other owners of Rivershore have an interest. The newly created parcel will share access with the rest of Lot 2. The remainder of Lot 2 will have an area of approximately three-quarters of an acre. The Andersons' proposal was approved by the City of Vancouver in 2011. (CP 26, FF12-13) If the Andersons cannot divide Lot 2, they will lose expenses incurred to divide the parcel and will also lose value added to the whole of Lot 2 in the amount of $750,000.00. (CP 26, FF14)

II. Procedural Facts.

The Andersons filed a complaint for declaratory relief on April 13, 2009. They sought a declaration that the CCRs and the 2008 Amendment did not preclude them from dividing Lot 2. (CP 1-3) The defendants answered. (CP 4-15)

On the Andersons motion for summary judgment, the trial court decided that the 2008 Amendment was not effective because 80% of the owners of lots in Rivershore had not agreed to it. It ruled in essence that there were fourteen lots — twelve together with the two created by the division of Lot 13 — and that the affirmative votes of twelve owners were required to approve any amendment. (Ex.1, Tab 46)

The defendants then appealed. The Court issued an unpublished decision on December 10, 2013. It first affirmed the trial court by ruling that the original CCRs do not prohibit the division of lots. But it reversed the trial court's ultimate decision. It ruled that the owners of the two lots that were formerly Lot 13 would only be entitled to one-half of a vote each. Therefore, the 2008 Amendment had sufficient votes — 10.5 of 13 or 80.7%. (Ex. 1, Tab 47)

On remand, the matter was tried to the court. The trial court issued it Memorandum of Opinion on December 22, 2014. (CP 16-21) It ruled that the other owners of lots in Rivershore were not estopped from

amending CCRs to preclude the Andersons from dividing Lot 2. (CP 20) It further concluded that the 2008 Amendment required the approval of all owners within Rivershore based on the opinion of the Supreme Court in *Wilkinson v. Chiwawa Communities Association,* 180 Wn.2d 241, 327 P.3d 614 (2014). (CP 17, 20) But it ruled that invalidating the 2008 Amendment because of a lack of unanimity was precluded by the decision of the Court of Appeals and the "Law of the Case" doctrine. (CP 17-19) The Andersons argued that the 2008 Amendment did not have a sufficient number of votes because Ms. Howard and the McClaskeys did not sign the 2008 Amendment as Trustees of their trusts and also because no successor of Gerald Davis signed the document. The trial court ruled that these arguments were also precluded by the "Law of the Case" doctrine and the previous decision of the Court of Appeals. (CP 20)

On January 7, 2015, the trial court entered Findings of Fact and Conclusions of Law. (CP 22-28) It specifically found that prohibition on further division contained in the 2008 Amendment "represented a new restriction on the use of lots within Rivershore at that time." (CP 26, FF4) Its legal conclusions essentially incorporated its Memorandum of Opinion. (CP 27) Finally, it entered judgment declaring that the 2008 Amendment was valid and operated to preclude the Andersons from subdividing Lot 2. (CP 29-31)

This appeal followed.

ARGUMENT

Assignment of Error No. 1: The trial court erred in its Memorandum of Opinion.

Assignment of Error No. 2: The trial court erred in its Conclusions of Law in the Findings of Fact and Conclusions of Law.

Assignment of Error No. 3: The Court erred in entering the Judgment.

I. Standard of Review.

This matter was tried to the court. On review, the appellate court determines whether the trial court's findings of fact are supported by substantial evidence and whether the findings of fact support the conclusions of law and the evidence. *City of Tacoma v. State*, 117 Wn.2d 348, 361, 861 P.2d 7 (1991); *Jensen v. Lake Jane Estates*, 165 Wn.App. 100, 104, 267 P.3d 435 (2011). There is no particular dispute about the trial court's finding of fact in this case. However, they do not support the conclusions of law that the trial court made. Therefore, its judgment should be reversed, and the 2008 Amendment should be invalidated.

II. The 2008 Amendment Is Not Valid Because It Adopts a New Covenant or Restriction and Was Not Unanimously Approved.

When initial covenants do not explicitly provide for the creation of new restrictions and when an amendment to those covenants establishes a new restriction, that amendment is not valid unless it is approved by all affected owners. The CCRs in this case do not allow for imposition of new restrictions. The 2008 Amendment bans further division of lots and thereby imposes a new restriction. Since the 2008 Amendment was not approved by all owners, it is not valid. This conclusion follows unmistakably from the Supreme Court's decision in *Wilkinson v. Chiwawa Communities Association, supra.*

In *Wilkinson v. Chiwawa Communities Association, supra*, the Supreme Court invalidated an amendment to the restrictive covenants that prohibited vacation rentals of less than six months. The amendment had been passed only by a majority of the owners. The Court announced a new rule for the determination of whether all homeowners must agree to covenant amendments. It stated that an amendment to restrictive covenants that imposes new restrictions is not valid where (1) the existing covenants allow only for their modification as opposed to permitting the enactment of new restrictions; and (2) where all affected owners do not consent. The Court said:

> In Washington, 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 is limited. When the governing covenants authorize a majority of homeowners to *create* new restrictions unrelated to existing ones, majority rule prevails "provided that such power is exercised in a reasonable manner consistent with the general plan of the development. . ." However, when the general plan of development permits a majority to *change* the covenants but not create new ones, a simple majority cannot add new restrictive covenants that are inconsistent with the general plan of development or have no relation to existing covenants. . .

180 Wn.2d at 255, 256. It went on to note that the "general plan of development" — with which any amendment must be consistent, as it stated — includes that portion of the covenants dealing with amendment. The opinion said:

> While we recognize, . . . that no Washington case has described the precise contours of when an amendment would be "consistent with the general plan of development," we need not provide that guidance here because the Chiwawa general plan did not authorize a majority of owners to adopt new covenants. The Chiwawa general plan of development merely authorized a majority of owners "to change these protective restrictions and covenants in whole or in part."

180 Wn.2d at 257. Finally, the Court emphasized that the test for validity of any amendment would depend on the expectation of an owner when he or she took title to the property in the following words:

> . . . (t)he Chiwawa general plan of development allows homeowners to rent their homes without any durational

> limitation. Homeowners who took title under these covenants were not on notice that short-term rentals might be prohibited without their consent. The Association defends its actions as consistent with the general plan because it did not ban *all* rentals, just *some* rentals. . . . The Association, however, misses the distinction between contracts that permit *changes* to existing covenants by majority vote and those that allow the *creation* of new covenants by majority vote. In distinguishing between these types of contracts, we respect the expectation of the parties and the contract they entered. . .

180 Wn.2d at 257.

The CCRs in our case allow for modification of existing covenants. They do not allow a majority to create new restrictions. The CCRs read as follows on that subject:

> . . . (I)f. . . it appears to the advantage of this platted subdivision that these restrictions should be modified then, and in that event, any modification desired may be made by affirmative vote of 80% of the then owners of lots within this subdivision and evidenced by a suitable instrument filed for public record. . .

(Ex. 1, Tab 1, Introductory Paragraph) This language allows for "modification" of "these restrictions." The latter phrase, "these restrictions," can refer only to restrictions contained in the CCRs because of the use of the word "these." The terms "modify," or "modification" must be given their common or ordinary meaning. *Wilkinson v. Chiwawa Communities Association, supra,* 180 Wn.2d at 250. That common and ordinary use can be found in a dictionary definition. *Krein v. Smith*, 60

Wn.App. 809, 811-812, 807 P.2d 906 (1991). The term "modify" is equivalent to the term "change." (Merriam Webster Online Dictionary) Therefore, the CCRs allow changes to existing restrictions only. That means, as the Court stated in *Wilkinson v. Chiwawa Communities Associations, supra,* no new restriction may be imposed by a less than unanimous vote.

As the trial court found, the 2008 Amendment imposes a new restriction. There is nothing in the original CCRs that addresses division of lots one way or another. The trial court found that the original CCRs did not directly prohibit division of lots within the Subdivision. (CP 23, FF1) In its previous decision, the Court of Appeals came to the same conclusion:

> By their own terms, the original Covenants do not directly address the future division of lots within Rivershore. And because we will not imply a restriction in the Covenants against lawful subdivision of one's own land where the Covenants do not expressly prohibit such an activity, the original Covenants do not prevent the Andersons — or any of the other Neighbors — from subdividing their lots. . .

(Ex. 1, Tab 47 p. 6-7 of 9) The language of the 2008 Amendment makes it clear that it imposes a new restriction. Once again, its operative language is:

> Lots 1-13, consisting of the original 13 lots contained in Rivershore, shall not be further subdivided or short platted.

By use of the word "further," the 2008 Amendment recognizes that the CCRs did not prohibit Mr. Brown's division of Lot 13. Since anyone could divide his or her lot under the original CCRs, the 2008 Amendment amounts to a new restriction. Since the CCRs do not allow for the creation of new restrictions but only for modification of existing ones, the 2008 Amendment required the consent of all owners of lots within the Subdivision. Since the Andersons and River Property, LLC did not approve, the 2008 Amendment is not valid.

The defendants may argue that the 2008 Amendment does express a plan for development that precludes division based on the following language in Paragraph 1:

> No lot shall be used except for residential purposes. No building shall be erected, altered, placed, or permitted to remain on any lot other than one detached single family dwelling not to exceed two stories, plus basement, in height and private garage for not less than two cars. . .

(Ex. 1, Tab 1, paragraph 1) This provision does not address the issue of lot division because the term "lot" is not defined in the CCRs, as the Court of Appeals noted at Page 6 of its prior opinion. (Ex. 1, Tab 47 p. 6) The original CCRs also do not contain any language limiting the term "lot" to the first 13 that were platted. The language upon which the defendants rely means that only one single family home can be constructed on any lot — whether that lot was one of the first 13 or a lot that is created by a division.

For example, the lot owned by River Property, LLC is subject to all of the various building and aesthetic restrictions in the original CCRs.

If the amendment in *Wilkinson v. Chiwawa Communities Association, supra,* amounted to a new restriction, then the 2008 Amendment certainly does. The covenants in that case recognized that property could be rented—the amendment prohibited only rentals of less than six months. The defenders of the amendment argued that it simply changed the nature of allowed rentals. By contrast, the CCRs don't even mention division of lots. Any amendment that purports to deal with lot division must clearly be a new restriction.

Parenthetically, it should be noted that some portions of the CCRs can be amended with the approval of 80% of the owners. For example, 80% of the owners could change the requirement that a two story residence have a minimum area of 3,000 square feet as set out in Paragraph 2 of the CCRs. Paragraph 11 could also be amended to allow materials used for siding other than brick, brick veneer, cedar siding, or stone masonry.

In our case, the CCRs allow for modification of existing restrictions but not for the creation of new restrictions. When the Andersons acquired Lot 2, therefore, they were not on notice that the CCRs could be changed to add new restrictions without consent of all

owners. Their expectations must be honored. Since the original CCRs did not prohibit lot division, all owners were required to join in the 2008 Amendment. The Andersons owned Lots 2 and 4 at that time. River Property, LLC owned one of the lots in the former Lot 13. Those parties did not agree to the 2008 Amendment. Therefore, it is not valid. The trial court's judgment to the contrary was therefore error.

III. The 2008 Amendment Did Not Have the Assent of 80% of the Owners.

a. Introduction.

If it is assumed that 80% of the owners of lots in Rivershore could impose a prohibition on division of lots, the proponents of the 2008 Amendment simply did not attain the agreement of 80% of the owners as the CCRs require. For that reason also, the 2008 Amendment is not valid.

b. The Owners of Lot 1 and Lot 8 Did Not Approve the 2008 Amendment.

When the 2008 Amendment was signed and filed, Lot 1 was owned by Kae Howard as Trustee of the Kae Howard Trust dated November 8, 2002. (Ex. 1, Tab 8) Also at that time, Lot 9 was owned by Tod McClaskey, Jr. and Veronica McClaskey, as Trustees of the

McClaskey Trust Fund A, dated December 1, 2006. (Ex. 1, Tab 20) The typed portion of the 2008 Amendment, apparently prepared by counsel, and the signatures given by the McClaskeys and Ms. Howard, do not indicate that they are signing in their capacities as Trustees but rather as individuals. Their respective trust agreements allow the trustees to execute powers of attorney to others to perform the duties of the trustee and otherwise to delegate their duties. None of them either signed powers of attorney or delegated their trustee duties. (CP 27; FF 18) Since Ms. Howard individually and the McClaskeys individually were not owners of Lots 1 and 8 respectively in 2008, the 2008 Amendment does not have the concurrence of 80% of the owners and is therefore not effective.

A trustee is the owner of trust property to the exclusion of the trustor. 76 Am.Jur.2d *Trusts* §§251, 255. The trustee takes the grantor's full title to property conveyed to him or her as trustee. Restatement (Third) *Trusts* §42, *Comment b*; *Merz v. Mahner*, 57 Wash. 324, 326-327, 106 P. 1118 (1910). Based on this principle, a deed conveying property was held ineffective because the grantor had previously deeded the property to herself as trustee and did not execute the deed in her capacity as trustee. *Bongaards v. Millen*, 55 Mass.App.Ct. 51, 768 N.E.2d 1107, 1110-1111 (2002). Similarly, a grant of property to a trust was ineffective when the trustor had conveyed the property to himself as trustee of another trust and

had not deeded the property from the first trust back to himself before delivering the deed in question. *Austin v. City of Alexandria*, 265 Va. 89, 95-96, 574 S.E.2d 289 (2003).

Since the McClaskeys and Ms. Howard as individuals were not the owners of Lots 1 and 8, respectively, none of them could give the valid or required assent to the 2008 Amendment. Therefore, that document had the agreement of the owners of Lots 3, 5, 6, 10, 11, 12, and one-half of Lot 13. Even if the 2008 Amendment had the assent of Lot 9—which it didn't as will be discussed below, it received an affirmative vote of less than 80% of the owners of lots within the Subdivision. The 2008 Amendment is therefore invalid because it did not secure enough votes.

c. The Owners of Lot 9 Did Not Approve the 2008 Amendment.

The 2008 Amendment was signed by Roberta Davis, one of the owners of Lot 9. That lot had other owners at the time. The signature by one of them was not effective to give approval for that lot.

Gerald Davis and Roberta Davis, as husband and wife, purchased Lot 9 in 1990. (Ex.1, Tab 21) Mr. Davis died in 2001. The Davises' respective interests in Lot 9 were community property before Mr. Davis died. After his death, the interest that each had in Lot 9 became the separate property of each. *Crawford v. Morris*, 92 Wash. 288, 158 P. 957

(1916); Weber *Family and Community Property Law*, 19 Wash.Prac. §13.1. Mr. Davis' estate and Ms. Davis were then tenants in common just as if they had dissolved their marriage without dealing with the property in the dissolution decree. *Fritch v. Fritch*, 53 Wn.2d 496, 334 P.2d 43 (1959). Mr. Davis left a will that was admitted to probate. The personal representatives closed the probate in 2003 without deeding Mr. Davis' one-half interest in the property to anyone.

Mr. Davis' death had the effect of vesting the title of his undivided one-half interest in Lot 9 to the devisees under his will. RCW 11.04.250. In this case, those were the trustees of the trust that he created in his will — Mr. Jahn, Mr. Bush, and Mr. Yount. They were still had title to Mr. Davis' undivided one-half interest in 2008 because that one-half interest had never been deeded to anyone else, and the estate had been closed in 2003. None of them signed the 2008 Amendment.[3] That document contains only the signature of Ms. Davis, and her signature represents only her undivided one-half interest. There is nothing from the owners of the other undivided one-half interest. Therefore, it cannot be said that there was assent to the 2008 Amendment from the owners of Lot 9.

[3] When a trust provides for three or more trustees, any action can be taken by a majority of them. RCW 11.98.016(1).

Without agreement from the owners of Lot 9, the 2008 Amendment did not have the support of 80% of the owners. That means that the amendment failed.

d. Conclusion.

The CCRs require assent of 80% of the owners of lots within the subdivision for any modification. The 2008 Amendment did not receive the agreement from the owners of Lots 1, 8, and 9. Therefore, it cannot operate to preclude the Andersons from dividing Lot 2.

IV. The "Law of the Case" Doctrine Does Not Prohibit Consideration of the Preceding Issues.

a. Introduction.

As discussed above, the 2008 Amendment was invalid because it represented a new restriction and did not have the approval of all owners of lots. It was also invalid because it did not receive the affirmative vote of the owners of Lots 1, 8, and 9, and therefore did not receive the assent of 80% of the owners as required by the CCRs. The trial court believed that consideration of those issues was precluded by the "Law of the Case" doctrine and the first decision of the Court of Appeals. That decision was incorrect.

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b. The Issues Presented in This Appeal Were Not Decided in the Previous Appeal.

The "Law of the Case" doctrine precludes reconsideration of decisions made by the appellate court in a prior appeal of the same case. *Bunn v. Bates*, 36 Wn.2d 100, 216 P.2d 741 (1950); *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). The doctrine applies only to "questions as have been presented and decided on the former appeal and those necessarily involved with such a decision." *Junkin v. Anderson,* 21 Wn.2d 256, 150 P.2d 678 (1944); *Columbia Steel Co. v. State*, 34 Wn.2d 700, 706, 209 P.2d 482 (1949). Conversely, when an issue is not decided in the first appeal, the "Law of the Case" doctrine does not prevent its being decided in the second appeal. *Riley v. Sturdivant,* 12 Wn.App. 808, 532 P.2d 640 (1975); *Holst v. Fireside Realty, Inc.,* 89 Wn.App. 245, 948 P.2d 858 (1997)

In the first appeal, the Court of Appeals stated that the 2008 Amendment was valid. The lynchpin of the decision was the Court's ruling that the owners of the lots created through the division of Lot 13 were each entitled to only one-half of a vote. The basis for the decision is made clear by its statement after it agreed with the trial court that the CCRs did not prohibit division of lots that "affirming the trial court on this point does not determine the voting rights of any newly created lot." (Ex.

1, Tab 47, p. 7) The Court of Appeals did not deal with the questions presented in this appeal — whether all owners had to agree and whether there was assent from the owners of Lots 1, 8, and 9. That factor, by itself, means that the "Law of the Case" doctrine does not apply to preclude consideration of issues presented in this appeal.

c. The "Law of the Case" Doctrine Does Not Prohibit Consideration of Issues Not Raised When the First Appellate Decision Is a Reversal of a Grant of a Summary Judgment Motion.

The Court of Appeals first reviewed the trial court's grant of a motion for summary judgment. In this procedural context, the "Law of the Case" doctrine does not preclude consideration of the issues the trial court did not address in its grant of summary judgment, as the Court recently held in *Sambasivan v. Kadlec Medical Center*, _____ Wn.App. _____, 338 P.3d 860 (November 18, 2014).

The plaintiff in that case was an interventional cardiologist. He sued for national origin discrimination in connection with renewal of hospital privileges. These were subsequently reinstated. However, the hospital adopted new standards that led to his loss of privileges. He then amended his complaint to drop his discrimination claim and to add federal and state claims of retaliation. The trial court dismissed these claims on summary judgment. The Court of Appeals reversed.

On remand, the hospital again moved for summary judgment on the retaliation claim but on different grounds. Dr. Sambasivan again appealed. He first argued that the "Law of the Case" doctrine precluded the hospital raising these new grounds because they could have been brought to the Court's attention in the prior appeal. The Court rejected this argument. It stated:

> We may also refuse under the ("Law of the Case") doctrine to address issues that could have been raised in a prior appeal. . . Kadlec could have asked us to affirm partial summary judgment on the issue of whether medical staff bylaws create a contractual relationship between the hospital and members of staff, but did not. *See LaMon v. Butler,* 112 Wash.2d 193, 200–01, 770 P.2d 1027 (1989)(an appellate court may sustain a trial court's summary judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider it). Dr. Sambasivan asks us to follow cases that have applied the law of the case doctrine to refuse to consider questions that "might have been determined." . . .
>
> Most of the decisions relied upon by Dr. Sambasivan are distinguishable as involving an appellate court's refusal in a second appeal to revisit an issue that was squarely presented and decided in the first. . .Other second appeals that he cites followed a first appeal from the result of a trial, making it reasonable to say, as to issues that could have been raised following the first trial but were not, that "[t]he law of the case, as applied to the same facts, shown by the same evidence, was thus settled for all time." . . . But here, the first appeal was from a summary judgment motion that was addressed to limited issues. The trial court resolved the motion on even more narrow

> grounds. We note that unlike CR 12(g), which requires the consolidation of certain motions to dismiss, CR 56 does not require a party to consolidate its grounds for summary judgment in a single motion.

(Emphasis added) 338 P.3d at 865-866. In other words, the "Law of the Case" doctrine does not prohibit raising new issues subsequently or on remand if the first appeal was from the grant of a motion for summary judgment because a party is not required to present all issues in a summary judgment motion.

Our case has the same procedural context. While the trial court may have granted summary judgment in favor of the Andersons on several different grounds, it chose to rule on only one — that 80% of the owners of the lots in Rivershore had not consented to the 2008 Amendment because the owners of the lots within former Lot 13 were each entitled to a full vote. The Court of Appeals reversed, holding that those owners were only to one-half a vote each. Neither the trial court nor the Court of Appeals determined whether there was assent from the owners of Lots 1, 8, and 9, or whether all owners were required to agree for the 2008 Amendment to be effective. The point is that a party is not required to raise all issues on summary judgment. That means that the Andersons and River Property, LLC, were free to raise them at trial and

may also raise them now. They are not precluded from doing so by the "Law of the Case" doctrine.

d. Under the Circumstances of This Case, All Issues Should Be Considered.

An appellate court is not bound by the "Law of the Case" doctrine. It may exercise its discretion to determine all issues that are presented. As RAP 2.5(c)(2) provides:

> The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

This rule codifies two exceptions to the "Law of the Case" doctrine. First, the doctrine may be avoided when the prior decision is clearly erroneous and the erroneous decision would work a manifest injustice to one party. Secondly, the doctrine may be avoided where there has been an intervening change in controlling precedent between trial and appeal. *Roberson v. Perez*, *supra*, 156 Wn.2d at 33, 42-43. The second exception is critical. As the Court stated:

> An appellate court's discretion to disregard the law of the case doctrine is at its apex when there has been a subsequent change in controlling precedent on appeal.

Roberson v. Perez, *supra*, 156 Wn.2d at 43.

The prior decision of the Court of Appeals can be viewed in two ways. First, it can be seen as a decision reversing the very limited issue on which the trial court based its first decision—that both of the lots within the subdivided Lot 13 were entitled to one vote. The defendants were able to persuade the trial court to read the decision more broadly — as deciding all issues related to the validity of the 2008 Amendment. If the decision is viewed as defendants would have it, it is clearly erroneous for the reasons stated above, and especially—as noted by the trial court—as required by the Court's decision in *Wilkinson v. Chiwawa Communities Association, supra.*

More importantly, there has been an intervening decision by the Supreme Court on this issue, *Wilkinson v. Chiwawa Communities Association, supra.* And it is clear that an intervening Supreme Court decision must be followed regardless of the "Law of the Case" doctrine. 1B James William Moore, *Moore's Federal Practice* ¶0.404(1) at II-6-II-7 (2d Ed. 1996), cited with favor in *Roberson v. Perez, supra,* 156 Wn.2d at 42. That means that the rule set down in *Wilkinson v. Chiwawa Communities Association, supra,* at least, must be followed to invalidate the 2008 Amendment.

The defendants cannot argue that *Wilkinson v. Chiwawa Communities Association, supra,* does not present any new issue of law.

The Court of Appeals had previously considered the issue in two cases, *Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn.App. 267, 883 P.2d 1387 (1994), and *Meresse v. Stelma*, 100 Wn.App. 857, 999 P.2d 1267 (2000). Both opinions analyzed the question presented differently from rule announced by the Court in *Wilkinson v. Chiwawa Communities Association, supra.* In *Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc., supra,* the plat referred to bylaws of the homeowners' association which in turn, as the Court concluded, allowed the corporation to promulgate new restrictions as long as those were done reasonably and in conformity with the general plan of development. It upheld the amendment to the covenants prohibiting outdoor storage of motor vehicles and commercial fishing, finding that all requirements had been met. In *Meresse v. Stelma, supra,* the Court invalidated a covenant relocating a common roadway. The covenants in that case allowed a majority of the owners to "change or alter" the covenants. The Court appeared to assume that this language would allow any amendment that was consistent with the general plan of development. It did not uphold the amendment in question because it determined that it was not consistent with the area's general plan of development. It could have used the same analysis that the Supreme Court enunciated in *Wilkinson v. Chiwawa Communities Association, supra,* and overturned the amendment on the

basis that the relocation of the roadway was a new restriction and not a mere "change." But it did not. Furthermore, and critically, it distinguished *Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc., supra,* on the basis that the amendment in that case did not produce a covenant that "differed in nature from those already in existence" and therefore in keeping with the general plan of development. 100 Wn.App. at 866.

While the opinions in both cases stated that any amendment must be consistent with the general plan of development stated in the covenants, neither indicated that the general plan of development includes the provisions in the covenants regarding their amendment or change. (See, p. 11 above) The opinion broke new ground by directing consideration of amendment provisions as part of the general plan of development.

More importantly, *Wilkinson v. Chiwawa Communities Association, supra,* enunciated clear rules to determine whether or not an amendment to covenants not agreed to by all owners would be valid and based its decision on the whether language within the covenants allow for the creation of new restrictions or merely changes to existing restrictions. Neither *Meresse v. Stelma, supra,* or *Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc., supra,* did so in precisely the same way.

Therefore, *Wilkinson v. Chiwawa Communities Association, supra,* announced a new principle of law.

If the decision in *Wilkinson v. Chiwawa Communities Association, supra,* did not announce a new principle of law, it certainly clarified existing law by setting out a clear analytical framework. Such a clarification by the Supreme Court also amounts to an intervening decision which must be followed. That is precisely what the Court decided in *Roberson v. Perez, supra.* In that case, a number of persons, including Mr. and Ms. Sims, were accused of abusing children. When the allegations surfaced, they sent their child to stay with relatives in Kansas so that he wouldn't be the subject of dependency proceedings. After their acquittal on criminal charges, they sued local law enforcement alleging negligent investigation. The trial court dismissed these claims, but the Court of Appeals reversed recognizing the tort of negligent investigation of child abuse claims by law enforcement. On remand, the jury awarded the Simses a total of $3 million in damages against Douglas County. The County appealed. Meanwhile, the Supreme Court decided *M.W. v Department of Social and Health Services,* 149 Wn.2d 589, 70 P.3d 954 (2003), a decision that "clarified the potential scope of claims under RCW 26.44" and held that such claims could only be brought when the negligent investigation led to a harmful placement decision. 149 Wn.2d at 38 The

Court of Appeals applied the reasoning from *M.W. v. Department of Social and Health Services, supra,* to rule that the Simses had no claim because there had been no harmful placement decision that came from the bad investigation. The Simses argued to the Supreme Court that the first Court of Appeals decision, the ruling that they did have a claim, could not be disturbed under the "Law of the Case" doctrine. The Court did not agree, holding that the clarification the Court gave in *M.W. v. Department of Social and Health Services, supra,* had to be considered and followed as "intervening, controlling precedent" from the Supreme Court. 149 Wn.2d at 44. It also noted that the law of the case doctrine should not be applied to allow someone to recover on a claim that the law does not recognize. 149 Wn.2d at 47.

Our case is conceptually no different from *Roberson v. Perez, supra.* The decision in *Wilkinson v. Chiwawa Communities Association, supra,* either announced a new rule of law or clarified how similar cases should be analyzed. Therefore, its consideration is not barred by the "Law of the Case" doctrine. Furthermore, the 2008 Amendment is invalid under the rules set out in that case as the trial court concluded. As the Court noted in *Roberson v. Perez, supra,* the "Law of the Case" doctrine cannot be applied to allow a different result than would follow from intervening precedent.

e. Conclusion.

For all these reasons, the "Law of the Case Doctrine" either does not apply or should not be applied to preclude consideration of the preceding issues.

V. The Other Owners Were Estopped to Amend the CCRs.

The other owners of lots in the Subdivision took no action to amend the CCRs to preclude further division after Mr. Brown divided Lot 13 and before the Andersons purchased Lot 2. This failure estops them from amending the CCRs to prohibit further division.

A party relying on equitable estoppel must demonstrate (1) an admission, statement, or act inconsistent with the claim afterward asserted; (2) action by that party in reliance upon that act, statement, or admission; and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement, or admission. *Shafer v. State*, 83 Wn.2d 618, 623, 521 P.2d 736 (1974). The first element can be made out by silence. As has been stated:

> Where a person with actual or constructive knowledge of facts induces another, by his words or conduct, to believe that he acquiesces in or ratifies a transaction, or that he will offer no opposition thereto, and that other, in reliance on such belief, alters his position, such person is estopped from repudiating the transaction to the others' prejudice.
>
> Such an estoppel may arise under certain circumstances from silence or inaction as well as from words or action.

Huff v. Northern Pacific Railway, 38 Wn.2d 103, 114-115, 228 P.2d 121 (1951); *Board of Regents v. City of Seattle,* 108 Wn.2d 545, 553-554, 741 P.2d 11 (1987).

The facts present a clear case for estoppel. When Mr. Brown sought to divide Lot 13, the owners of Lot 12 — Mr. and Mrs. Kingsett — chose not to oppose it. (Ex. 1, Tab 52, p. 19) Others did not join the opposition and consult Mr. Stoumbos. Those who did — including Ms. Howard, Ms. Davis, Mr. Huffstutter, and Mr. Stein — were told in 2003 that an amendment to the CCRs would be necessary to preclude any further division of lots within the Subdivision. Nonetheless, they took no action to change the CCRs. By their silence or failure to act prior to the Andersons purchasing Lot 2 — especially in the face of Mr. Stoumbos' recommendation to amend the CCRs — the owners indicated that they would not oppose the division of any lots within the Subdivision. This satisfies the first element.

The Andersons relied on this lack of action to purchase Lot 2 with the idea that they would divide. They would not have purchased the lot at a cost of $1.762 million if they believed that they would not be allowed to divide it. They will be damaged if the 2008 Amendment is valid because they will lose the value engendered by the division of the lot and what

they have already paid in division costs. Therefore, the second and third elements are also satisfied.

The trial court rejected the Andersons' claim of estoppel concluding that the owners' inaction did not amount to a waiver of any opportunity to amend the CCRs. (CP 20) This was based on language in Paragraph 19 of the CCRs stating that the failure of a person to enforce restrictions under the CCRs amount to a waiver of any existing violation. (Ex. 1, Tab 1) This conclusion is incorrect. First of all, the language of Paragraph 19 applies to waiver of violations of the restrictions contained in the CCRs. It does not by its terms have anything to do with rights to amend. More importantly, considerations of waiver do not affect applicability of the doctrine of estoppel. Waiver and estoppel are different doctrines with different elements. *Farm Crop Energy, Inc. v. Old National Bank of Washington*, 38 Wn.App. 50, 54, 685 P.2d 1097 (1984), reversed on other grounds, 109 Wn.2d 923, 750 P.2d 231 (1988). Waiver is an intentional relinquishment of a known right. *Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954); *Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, 106, 297 P.3d 677 (2013). The elements of estoppels are stated above.

For these reasons, the facts that the trial court found require that the other owners be estopped from promulgating the 2008 Amendment in

such a way as to affect the Andersons desire to divide Lot 2. Its decision that estoppel had not been made out was error.

CONCLUSION

The 2008 Amendment is not valid because it was not agreed to by all owners within the Subdivision. Since it was not approved by the owners of Lots 1, 8, and 9, it did receive the necessary votes of 80% of the owners required for any change to existing restrictions. It is not valid for that reason as well. Finally, the other owners of lots within the Subdivision were estopped from passing the 2008 Amendment. Therefore, the 2008 Amendment cannot be upheld. The trial court erred by ruling to the contrary.

For these reasons, the Court of Appeals should reverse the trial court's decision and declare that the 2008 Amendment is not valid.

RESPECTFULLY SUBMITTED this 6 day of March, 2015

BEN SHAFTON, WSB #6280
Of Attorneys for Appellants

NO. 47126-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

DALE E. and LETA L. ANDERSON; DALE E. ANDERSON and LETA L. ANDERSON, TRUSTEES OF THE DALE E. ANDERSON AND LETA L. ANDERSON FAMILY TRUST; and RIVER PROPERTY, LLC,

Appellants,

v.

JAMES W. BROWN; ROBERT D. DAVIS; KAE HOWARD, TRUSTEE OF THE KAE HOWARD TRUST; MICHAEL J. and CRISTI D. DEFREES, husband and wife; TUAN TRAN and KATHY HOANG, husband and wife; VINCENT and SHELLY HUFFSTUTTER, husband and wife; THOMAS J. and GLORIA S. KINGZETT, husband and wife; LARRY R. and SUSAN I. MACKIN, husband and wife; TOD E. McCLASKEY, JR. and VERONICA A. McCLASKEY, TRUSTEES OF THE McCLASKEY FAMILY TRUST—FUND A; CRAIG STEIN; and RICHARD and CAROL TERRELL, husband and wife,

Respondents,

APPEAL FROM THE SUPERIOR COURT

HONORABLE JOHN NICHOLS

DECLARATON OF MAILING

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COMES NOW Lorrie Vaughn and declares as follows:

1. My name is LORRIE VAUGHN. I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Washington, and am not a party to this action.

2. On March 6, 2015, I deposited in the mails of the United States of America, first class mail with postage prepaid, a copy of the BRIEF OF APPELLANTS to the following person(s):

Mr. Stephen Leatham
Heurlin Potter Jahn Leatham
& Holtmann
PO Box 611
Vancouver, WA 98666-0611

I DECLARE UNDER PENALTY OF PERJURY AND THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE, INFORMATION, AND BELIEF.

DATED at Vancouver, Washington, this 6th day of March, 2015.

Lorrie Vaughn
LORRIE VAUGHN