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,

Defendants,

APPEAL FROM THE SUPERIOR COURT

HONORABLE JOHN NICHOLS

REPLY BRIEF

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INTRODUCTION

In *Wilkinson v. Chiwawa Communities Association,* 180 Wn.2d 241, 327 P.3d 614 (2014), the Supreme Court held that covenants cannot be amended to impose a new restriction unless the covenants explicitly allow this to occur or unless all owners consent. The Declaration of Covenants and Restrictions for Rivershore (CCRs) allow only for modification of existing restrictions, not imposition of new ones. The First Amendment to Declaration of Covenants and Restrictions for Rivershore (the 2008 Amendment) imposes a new restriction—a restriction on further subdivision of lots. It not approved by all owners. It is therefore not valid under the holding of *Wilkinson v. Chiwawa Communities Association, supra.*

The trial court came to this conclusion. (CP 17) The Defendants do not even attempt a refutation. They rely solely on the "Law of the Case" doctrine to preclude any consideration of this issue. But the "Law of the Case" doctrine does not apply when the precise question was not reached in the prior appellate decision or when the result of the prior decision was clearly erroneous. The Court of Appeals did not pass on this question in the prior appeal. If it did, as Defendants contend, its decision was incorrect. Therefore, the trial court's decision must be reversed, and the 2008 Amendment must be invalidated.

The remainder of this brief will discuss the other arguments advanced by the Defendants. While it may refer to certain arguments made in the Brief of Appellants, it will attempt not to repeat them.

ARGUMENT

I. The Owners of Lots 1, 8, and 9 Did Not Approve the 2008 Amendment.

The CCRs require that eighty percent (80%) of all owners approve any "modification" of the CCRs. (Exhibit 1, Tab 1) In 2008, Lot 1 was owned by Kae Howard as Trustee of the Kae Howard Trust dated November 8, 2002. (CP 26, FF 16) Lot 8 was owned by Tod McClaskey, Jr. and Veronica McClaskey, as Trustees of the McClaskey Family Trust—Fund A, dated December 1, 2006. (CP 27, FF 6) The McClaskeys and Ms. Howard signed the 2008 Amendment as individuals and not in their capacities of their respective trusts. (CP 27, FF 18)

Gerald Davis died in 2001. Prior to that time, he owned Lot 9 along with his wife, Roberta Davis. The interest of Mr. Davis' Estate in Lot 9 has never been deeded to anyone. Under the terms of his will, the property was to go to the trust he created, not Roberta Davis personally. The Trustees have not deeded his interest in Lot 9 to anyone else, and did not sign the 2008 Amendment. (CP 27 FF 19-21)

Based on these facts, it cannot be said that the owners of Lots 1, 8, and 9 agreed to the 2008 Amendment. (CP 27, FF 19-20; See Brief of Appellants, pps. 16-20)

The Defendants first respond that the McClaskeys and Ms. Howard did not have to sign in their correct capacities, and that Ms. Davis' signature alone is sufficient. That argument is at odds with the clear language of the CCRs concerning modification. As is stated:

> . . .it appears to be 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. . .

(Emphasis added.) The owners themselves must assent. Ms. Howard and the McClaskeys individually were not owners of their respective lots in 2008. Ms. Davis had only an undivided one-half interest in Lot 9. The other undivided one-half interest was held by Trustees of Mr. Davis' trust. Therefore, there was not assent of the owners of these lots. (Brief of Appellants, pps. 16-20)

The Defendants suggest that Ms. Davis, Ms. Howard and the McClaskeys should be considered agents of the true owners. (Brief of Defendants', pps. 15, fn. 8, 9) But the trial court did not find that any of them were acting as agents. In fact, it found that the McClaskeys and Ms.

Howard 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 27, FF 18) Defendants have not cross-appealed or taken issue with these findings. They are therefore verities on appeal. *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162 (2010); *Francis v. Department of Corrections*, 178 Wn.App. 42, 52, 313 P.3d 457 (2013). Furthermore, these findings demonstrate that no agency existed. A principal must manifest willingness that an agent act on his behalf and the agent must manifest that willingness to act. *Holst v. Fireside Realty, Inc.*, 89 Wn.App. 245, 255, 948 P.2d 858 (1997). The findings show the absence of any such manifestation. Finally, the Defendants bear the burden of showing the agency relationship. *Holst v. Fireside Realty, Inc., supra*. The trial court did not find that Ms. Davis, Ms. Howard, or the McClaskeys were acting as agents. The absence of a finding is interpreted as a finding against the Defendants on this question. *Ellerman v. Centerpoint Prepass, Inc.*, 143 Wn.2d 514, 524, 22 P.3d 795 (2001); *Penberthy Electromelt International, Inc. v. U.S. Gypsom Co.*, 38 Wn.App. 514, 519, 686 P.2d 1138 (1984); *Estate of Bussler*, 160 Wn.App. 449, 465, 247 P.3d 821 (2011). Defendants' agency argument fails for all these reasons.

The Defendants point the Court to RCW 11.98.110(2) to suggest that the failure of the McClaskeys and Ms. Howard to sign the 2008 Amendment in their respective capacities as Trustees has no bearing. That statute states in pertinent part:

> Actions on contracts which have been transferred to a trust and on contracts made by a trustee. . . may be maintained by the party in whose favor the cause of action has accrued as follows:
>
> . . .
>
> (2) If the action is on a contract made by the trustee, the trustee may be held personally liable on the contract, if personal liability is not excluded. Either the addition by the trustee of the words "trustee" or "as trustee" after the signature of a trustee to a contract or the transaction of business as trustee under an assumed name in compliance with chapter 19.80 RCW excludes the trustee from personal liability. . . .

This statute relates to and concerns the liability of a Trustee on a contract. It does not detract from the rule that an individual who has conveyed property to himself or herself as trustee no longer owns the property in his or her individual capacity. (Brief of Appellants, pps. 17-18)

In conclusion, the Defendants have not refuted the Andersons' assertion that the owners of Lots 1, 8, and 9 did not agree to the 2008 Amendment.

II. The "Law of the Case" Doctrine Does Not Preclude Consideration of These Issues.

By their silence on the issue, the Defendants have conceded—at least implicitly—that the 2008 Amendment required agreement of all owners within the subdivision. They argue only that the Court should not address this issue based on the "Law of the Case" doctrine. Under such circumstances, the "Law of the Case" doctrine is not applicable.

The Rules of Appellate Procedure are to be "liberally interpreted to promote justice and facilitate decision of cases on the merits." RAP 1.2(a); *State v. Olson*, 126 Wn.2d 315, 893 P.2d 629 (2000). Rules governing the "Law of the Case" doctrine have been incorporated into the Rules of Appellate Procedure in RAP 2.5(c). Therefore, the "Law of the Case Doctrine" and RAP 2.5(c) should not be used to thwart a decision on the merits and in the Andersons' favor.

The Defendants have made a number of other arguments to support their contentions. None of them have any merit. They will be addressed sequentially.

First of all, the Defendants claim that the arguments the Andersons are making now were precluded by their failure to note these in a response to affirmative defenses. (Brief of Defendants, p. 10) Such a response

would be gratuitous because a response to affirmative defenses is not a pleading that is allowed. As CR 7(a) states:

> There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third party complaint, if a person who is not an original party is summoned under the provisions of Rule 14; and a third party answer, if a third party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third party answer.

(Emphasis added.) In any event, the Andersons' complaint alleges that "(T)he (2008) Amendment is ineffective to preclude short-platting of a lot within Rivershore." (CP 3) This would encompass all objections, including those concerning the assent of the requisite number of owners. Finally, the question was clearly tried because the trial court made findings of fact on these issues. (CP 26-27; FF 16-21) If we assume that the Anderson's complaint did not raise this issue—which it did—the pleadings will be deemed amended to include all issues that are tried by express or implied consent of the parties. CR 15(b) The Defendants' argument on this ground has no merit for all these reasons.

The Defendants go on to argue that the Andersons' lost this argument by failing to raise it in the prior appeal. The "Law of the Case" doctrine precludes reconsideration of rules of law previously announced.

Lutheran Daycare v. Snohomish County, 119 Wn.2d 91, 113, 829 P.2d 746 (1992). It is also designed to preclude "agitation of settled issues." *State v. Harrison*, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003). In its prior decision, the Court of Appeals did not address — much less resolve — whether unanimous consent to the 2008 Amendment was required or whether the owners of Lots 1, 8, and 9 gave their assent. The trial court did not reach them either.[1] Furthermore, "Law of the Case" doctrine precludes only to re-litigation of identical legal issues. *Folsom v. County of Spokane,* 111 Wn.2d 256, 264, 759 P.2d 1196 (1988); *State v. Clark*, 143 Wn.2d 731, 745, 24 P.3d 1006 (2001). The legal issues presented here simply were not decided in the prior appeal.

Defendants also claim that the "Law of the Case" doctrine precludes consideration of matters that could have been considered in the prior appeal, citing *Sambasivan v. Kadlec Medical Center*, 184 Wn.App. 567, 338 P.3d 860 (2014); Brief of Respondents, p. 11. But as the Court in that case said, this notion has only been applied to situations where the issue was either squarely presented or was not raised in a prior trial. (Brief of Appellants, pps. 23-24) That is not the case here. Neither the

[1] Plaintiff's motion for summary judgment was styled "Plaintiffs Motion for Summary Judgment (Limited Issues). (CP 44-45)

trial court in its summary judgment ruling or the Court of Appeals in its prior decision addressed the issues presented in this case. Furthermore, and in that case, the Court allowed consideration of an issue that could have been raised in the prior appeal of a summary judgment ruling but was not. (Brief of Appellants, pps. 23-24)

By contending that the Andersons' arguments cannot be raised here, Defendants are confusing the "Law of the Case Doctrine" with preclusion by *res judicata.* The Court cautioned against doing this in *Roberson v. Perez,* 156 Wn.2d 33, 41, 123 P.3d 844 (2005). *Res judicata* precludes re-litigation of the same claim where there is identity of subject matter, cause of action, person and parties, and quality of person for and against whom a claim is made. It prohibits consideration of questions that were raised or could have been raised in the prior litigation. *Estate of Black,* 153 Wn.2d 152, 170, 102 P.3d 796 (2004). For *res judicata* to apply, however, there must be a final judgment on the merits. *Schoeman v. New York Life Insurance Company,* 106 Wn.2d 855, 860, 726 P.2d 1 (1986) The prior decision of the Court of Appeals was not a final decision on the merits as more was left to be done in the trial court. Therefore, *res judicata* does not apply.

The "Law of the Case" doctrine is discretionary as RAP 2.5(c)(2) makes clear. Other issues may be considered when the first appellate

decision was clearly erroneous or when there has been an intervening change in the law. *Roberson v. Perez*, *supra*, 156 Wn.2d at 42-43. The parties disagree whether *Wilkinson v. Chiwawa Communities Association, supra*, announced a new rule of law. (Brief of Appellants, pps. 26-30; Brief of Respondents, pps. 12-14) The Andersons will not repeat their arguments previously made.

But the Andersons have also argued that the first decision of the Court of Appeals was clearly erroneous because the 2008 Amendment required agreement by all owners before it could be valid and all owners did not assent. (Brief of Appellants, p. 26) Just as Defendants do not even attempt to refute the conclusion that unanimity among homeowners was required to pass the 2008 Amendment, they do not argue that prior decision of the Court of Appeals was not clearly erroneous in light of the rule expressed in *Wilkinson v. Chiwawa Communities Association, supra*, as well as other cases from the Court of Appeals.[2] By their silence, Defendants are tacitly conceding that the prior ruling of the Court of Appeals was clearly erroneous and, therefore, that the "Law of the Case" doctrine should not preclude consideration of this issue.

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[2] *Shafer v. Board of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 76 Wn.App. 267, 883 P.2d 1387 (1994); *Meresse v. Stelma*, 100 Wn.App. 857, 999 P.2d 1267 (2000).

III. Defendants Were Estopped to Amend the CCRs.

The trial court found that the other owners were not estopped to go forward with the 2008 Amendment. The Defendants' arguments in support of the trial court's decision lack merit.

Estoppel requires an admission, statement, or act inconsistent with the claim afterward asserted; action by a party in reliance upon that act, statement, or admission; and injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission. (Brief of Appellants, p. 31; Brief of Respondents, p. 18)

The Defendants claim that the first element is not satisfied because none of the Defendants made any statement. However, an estoppel can be made out by silence. (Brief of Appellants, pps. 31-32)

Defendants then state that the Andersons had no right to rely on the inaction of the other owners because Mr. Anderson had consulted with counsel when Mr. Brown first divided Lot 13. They base this on Mr. Anderson's knowledge of all facts. This begs the question of what the facts were prior to the Andersons buying Lot 2 in the Subdivision. First of all, they had received an opinion from Zachary Stoumbos, the attorney that had been consulted, that the CCRs likely did not preclude division of lots. (Exhibit 1, Tabs 36, 37) They also knew that there had been no action to amend the CCRs and that none of the owners had discussed taking such

action. (CP 25, FF 8) They had every right to take advantage of the situation as it presented itself at that time by purchasing Lot 2.

Although they did not raise this defense in their answers, the Defendants claim that the Andersons should not be allowed to rely on estoppel because they are guilty of unclean hands. (Brief of Respondents, p. 17; CP 4-5, 12-14) This affirmative defense was waived by the failure to allege it. *Harting v. Barton*, 101 Wn.App. 956, 6 P.3d 91 (2000).

That affirmative defense does not apply here in any event. The affirmative defense of unclean hands is defined in the following way:

> Equity will not interfere on behalf of a party whose conduct in connection with the subject-matter or transaction and litigation has been unconscientious, unjust, or marked by the want of good faith, and will not afford any remedy.

Portion Pack, Inc. v. Bond, 44 Wn.2d 161, 170, 265 P.2d 1045, 1051 (1954); *Port of Walla Walla v. Sun-Glo Producers, Inc.*, 8 Wn.App. 51, 56, 504 P.2d 324 (1972). The Andersons did nothing that would fall under the definition of unclean hands. They consulted with counsel on the issue whether Mr. Brown could subdivided Lot 13 and attempted to persuade the City of Vancouver not to allow the division. They then decided to avail themselves of their rights under the CCRs just as Mr. Brown had done. There is nothing unjust or unconscientious about their conduct.

Finally, the Defendants point to *Department of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 19-20, 42 P.3d 4 (2002), for the proposition that the failure to appeal cannot make out an estoppel. That case is readily distinguishable from ours. The party sought to be estopped in that case was the Department of Ecology. As the Court noted, equitable estoppel against the government is not favored. In order to be asserted, it must be necessary to prevent a manifest injustice, and applying estoppel must not impair the exercise of government functions. 146 Wn.2d at 20. The issue here is not some sort of failure to appeal or failure to litigate by the Defendants. The estoppel is made out by their taking no action to amend the CCRs to preclude any further division — just as the 2008 Amendment states — directly after Mr. Brown divided Lot 13.

In short, the trial court erred by ruling that the Defendants were not estopped to amend the CCRs.

ATTORNEY'S FEES

Defendants unsuccessfully sought an award of attorney's fees before the trial court. (CP 30; CP 117-20) They did not cross appeal from this determination. Nonetheless, they are seeking an award of attorney's fees on appeal. They are not entitled to this relief.

Defendants base their claim on the following language in the CCRs:

> Should any suit or action be instituted by any of said parties to enforce any of said reservations, conditions, agreements, covenants and restrictions, or to restrain the violation of any thereof, after demand for compliance therewith or for cessation of such violation, events, and whether such suit or action be entitled to recover from the defendants therein such sum as the court may adjudge reasonable attorney fees in such suit or action, in addition to statutory costs and disbursements.

(Exhibit 1, Tab 1, pg. 5) This language is not a model of clarity. It could be read to allow attorney's fees to be awarded in actions to enforce the CCRs. Defendants are not entitled to an award of attorney's fees, however, because this was not such an action.

A party is not entitled to an award of attorneys' fees in litigation unless a statute, contractual provision, or rule of equity allows such an award. See, e.g., *Gander v. Yeager*, 167 Wn.App. 638, 645, 274 P.3d 293 (2012). If a party relies upon a contractual provision, as Defendants do here, that party can only obtain an award of attorneys' fees if the contractual provision at issue allows for such an award for the litigation in question. Based upon that rule, the Court denied attorneys' fees to a landlord who prevailed in a suit for declaratory relief commenced by the tenant to establish a right to exercise an option when the attorney's fees clause allowed fees only in any action to deal with tenant defaults.

Hindquarter Corp. v. Property Development Corp., 95 Wn.2d 809, 815, 631 P.3d 923 (1981). And in a one page *per curiam* opinion in *Belfour USA Group, Inc. v. Thiel,* 160 Wn.2d 669, 160 P.3d 39 (2007), the Court held that a party was not entitled to attorneys' fees for compelling arbitration when the contract provided for attorneys' fees for collecting under the contract as opposed to enforcing a contractual term.

In Paragraph 19, the CCRs appear to allow attorneys' fees in actions to enforce any provision of the CCRs or to restrain any violation. That is not our suit. The Andersons commenced this action for declaratory relief to determine the validity of the 2008 Amendment. (CP 1-3) All the Defendants except Mr. Brown denied the allegations in the complaint and stated, as an affirmative defense, that the 2008 Amendment is valid. (CP 4-6) In his answers, Mr. Brown also denied allegations but did not set up the same affirmative defense. (CP 8-14) Critically, no defendant made a counterclaim seeking to enforce the 2008 Amendment. The matter was pleaded and tried as an action for declaratory relief only. Therefore, Paragraph 19 does not apply to our situation as the trial court ruled.

In order for the Defendants' claim to carry the day, language must either be added to or subtracted from Paragraph 19. The reference to enforcement would have to be removed and language to the effect that attorneys' fees would be awardable in action "arising out of or related to"

the CCRs. But no words can be added to a covenant under the guise of interpreting it. *Hollis v. Garwall, Inc.,* 137 Wn.2d 683, 974 P.2d 836 (1999).

The language of Paragraph 19 is also inapplicable because it does not pertain to any amendment to the CCRs. By its terms it governs actions to enforce "said reservations, conditions, agreements, and covenants and restrictions, or to restrain the violation thereof." (Emphasis added) Terms in covenants are to be interpreted in accordance with their ordinary meaning. *Wilkinson v. Chimawa Communities Association, supra*, 180 Wn.2d at 251. The use of the word "said" in this context refers to previously recited elements. Black's Law Dictionary (9th Ed. 2009). The word "said" therefore refers to what is stated in the original CCRs only. Paragraph 19 could have referred to anything contained in the CCRs "or any amendment thereof." That language is simply not there. The absence of certain language from a covenant is evidence that the drafters rejected the omitted term. *Wilkinson v. Chimawa Communities Association, supra,* 180 Wn.2d at 251. The omission of language indicating that Paragraph 19 would apply to amendments means that it cannot apply to amendments.

A similar issue was raised in *Meresse v. Stelma, supra,* 100 Wn.App. at 868. The plaintiff in that case prevailed on a claim that an

amendment was invalid because unanimous owner consent was lacking. The covenants in that case included the following provision:

> If the parties hereto or any future owners of the above described property or their assigns shall violate or attempt to violate any of the covenants, restriction, reservations or agreements herein from the date of purchase, it will be lawful for any other person or persons owning real estate situated in (the Subdivision) . . . to prosecute any proceedings at law or equity against the persons violating or attempting to violate any restrictions, reservations, covenants, or agreement, and either to prevent him or them from doing so or to recover damages of other dues (sic) from such violation including attorneys' fees and court costs.

100 Wn.App. at 868 The Court of Appeals denied the plaintiff attorneys' fees because the action was not one to enforce any covenant.

In short, Defendants are not entitled to an award of attorneys' fees because Paragraph 19 does not provide for them in this case. Notably, the Andersons have not requested attorney's fees on appeal even though they should prevail.

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CONCLUSION

The trial court erred by upholding the validity of the 2008 Amendment. The trial court's decision should be reversed, and the Court should invalidate the 2008 Amendment. In any case, neither party should be entitled to an award of attorney's fees on appeal.

RESPECTFULLY SUBMITTED this 15 day of June, 2015.

BEN SHAFTON, WSB #6280
Of Attorneys for the Andersons

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Respondents,

APPEAL FROM THE SUPERIOR COURT

HONORABLE JOHN NICHOLS

DECLARATON OF MAILING

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(360) 699-3001

COMES NOW AMY ARNOLD and declares as follows:

1. My name is AMY ARNOLD. 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 June 15, 2015, I deposited in the mails of the United States of America, first class mail with postage prepaid, a copy of the REPLY BRIEF 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 15 day of June, 2015.

AMY ARNOLD