Supreme Court No. 98765-3, No. 98773-4 and No. 98774-2

IN THE SUPREME COURT
STATE OF WASHINGTON

Court of Appeals No. 77830-7-1
(consolidated with No. 77401-8-1 and No. 78430-7-1)

BELLEVUE FARM OWNERS ASSOCIATION ET AL.,

Respondents,

v.

CHAD STEVENS,

Petitioner.

HOOPOE LLC'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Eight years ago, a group of San Juan County property owners asked the local superior court to confirm the validity of certain homeowners' covenants that restricted homeowner Chad Stevens' ("Stevens") efforts to host commercial weddings and start a winery. Hoopoe LLC ("Hoopoe"), which owns two undeveloped lots apart from a larger group of residential lots in Bellevue Farm, was a nominal party. When the case escalated to include myriad unrelated tort claims, Hoopoe obtained separate counsel and implored Stevens not to retaliate against Hoopoe individually.

Despite Hoopoe's warning, Stevens nevertheless filed meritless counterclaims against Hoopoe, a member of Bellevue Farms Owners Association ("BFOA"). Because the actions complained of related solely to Hoopoe's conduct as a voting member of a non-profit corporation, Hoopoe could have no personal liability irrespective of the court's ultimate decisions about the covenants.

Stevens was undaunted and unrelenting during the ensuing several years as the trial court confirmed the majority of the covenants at issue in favor of BFOA. The trial court also dismissed all claims against Hoopoe and awarded it attorneys' fees and costs. The appellate court affirmed the ruling in favor of Hoopoe on all issues.

Mr. Stevens now asks this Court to review the straightforward decisions of the lower courts on well-settled areas of contract and corporate law. Stevens fails to allege any new basis on which to grant his petition for review. The Court of Appeals correctly concluded Hoopoe was the substantially prevailing party and therefore entitled to attorneys' fees and costs under the fee-shifting provision of the Bellevue Farms' 1997 Covenants, Conditions and Restrictions ("CCRs"). Stevens attempts to re-characterize the trial court's orders granting summary judgment and dismissing his counterclaims against Hoopoe with prejudice as a "voluntary dismissal" of claims—which cannot factually stand. As it is "***undisputed that the court dismissed all of Steven's counterclaims against Hoopoe on summary judgment***," Stevens fails to present any legal basis to review the Court of Appeals decision that Hoopoe is entitled to attorneys' fees and costs.[1]

Stevens requests that this Court review two additional issues. Both are equally meritless. He attempts to manufacture a decisional dispute by arguing that (1) *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229, 215 P.3d 990 (2009) contradicts the Court of Appeals' decision

[1] *Bellevue Farms v. Stevens*, No. 77830-7-I, slip op. at 32 (Wash. Ct. App. Div. 1 May 11, 2020) ("Slip. Op." or "Opinion"). Stevens does not raise any error or request for review relating to the Court of Appeals' conclusion that Stevens' claims against Hoopoe fell within the scope of Article 9 of the CCRs.

that the former BFOA President's actions could not be attributed to the individual homeowners in this situation; and (2) *Wilkinson v. Chiwawa Cmtys. Ass'n*, 180 Wn.2d 241, 327 P.3d 614 (2014) contradicts the Court of Appeals' decision that homeowner's associations in Washington can change restrictive covenants relating to pre-existing covenants and are consistent with the general development plan of the community. Neither decision conflicts with this Court's precedent or a published Court of Appeals' decision. Furthermore, neither issue presents any questions of substantial public interest as would warrant review by this Court. The Petitioner fails to satisfy any prong of RAP 13.4(b), and this Court should decline the invitation to accept review.

Hoopoe respectfully requests this Court deny Stevens' petition for review and award attorneys' fees to Hoopoe.

II. COUNTERSTATEMENT OF ISSUES

1. Whether the Court of Appeals correctly determined Hoopoe substantially prevailed against Stevens when it successfully defended and dismissed with prejudice the counterclaims Stevens asserted against it, thereby entitling Hoopoe to its attorneys' fees and costs under Article 9 of the CCRs?

2. Whether the Court of Appeals correctly determined statements by BFOA's former President cannot demonstrate the

community's unequivocal, decisive abandonment of a restrictive covenant?

3. Whether the Court of Appeals correctly determined that BFOA's clarification of the language in the restrictive covenants did not add any new or additional restrictions, so a unanimous vote of BFOA members was not legally required?

4. Whether Hoopoe is entitled to attorneys' fees on this Petition for Review?

III. COUNTERSTATEMENT OF THE CASE

Hoopoe is a Washington limited liability company formed by Ms. Pamela Gross and Dr. Charles Anderson. In 2009, Hoopoe acquired two undeveloped parcels of San Juan County real estate in a short plat known as Bellevue Farm. CP 2802-03. By virtue of its lot ownership in Bellevue Farm, Hoopoe automatically became a member of BFOA homeowners' association. CP 2802. BFOA is nonprofit corporation.

In 2011-12, certain property use issues arose in Bellevue Farm. One issue was whether property could be used for certain commercial uses. Another issue related to the use of a common waterfront area along the shore of Westcott Bay, which use was restricted to actual house guests. CP 35. A third key issue related to the construction of a fence between the common waterfront and Stevens' house.

BFOA proposed and passed a clarification to Article 4(a)'s "actual house guests" definition, and it also proposed and passed an amendment to Article 5 establishing that commercial alcohol processing and sales do not qualify as "agricultural purpose." BFOA then asked the San Juan County superior court to confirm its action. CP 1-27.

Stevens retaliated with a barrage of counterclaims. CP 1583-1608. Litigation escalated and rhetoric sharpened; additional tort claims and counterclaims were filed. When BFOA lost its lawyers temporarily, Hoopoe sought its own separate, independent counsel. Stevens filed claims alleging that Hoopoe had committed a multitude of "violations" of the CCRs. *Id.*; *see also* CP 2804-05.

Hoopoe's counsel wrote to Stevens' then-counsel on June 20, 2013, pleading with Stevens not to assert counterclaims because there was no basis for holding Hoopoe individually liable on any theory:

> Not only are the BFOA and my client distinct legal entities, Hoopoe was not even present at the last Board meeting and did not cast a vote. Did you investigate who attended that meeting? I cannot see any basis whatsoever to make those claims against Hoopoe.

CP 2771. Stevens was undeterred and filed counterclaims notwithstanding. CP 2806-07.

On March 26, 2016, all of Stevens' claims against Hoopoe were dismissed on summary judgment. The Court also awarded Hoopoe attorneys' fees against Stevens. Stevens appealed.

The appellate court affirmed the trial court's ruling in favor of Hoopoe and against Stevens on all counts. Slip. Op. at 67-73.

The court of appeals specifically affirmed the attorney fees awarded to Hoopoe. Stevens argues Hoopoe was not entitled to an award of attorney fees because the trial court did not find Hoopoe to be the substantially prevailing party and because article 9 of the 1997 CC&Rs did not apply to the claims he asserted against Hoopoe. Slip. Op. at 68-70.

The appellate court specifically rejected both arguments, finding that Hoopoe took no individual action to revise any of the CCRs (nor could it), and its only interest as a plaintiff in the CCR Claims was as a member of BFOA. It noted that the trial court made the requisite prevailing party finding, and it laid out its reasoning as to why it had reached this conclusion. Slip. Op. at 68-70.

Second, the court of appeals found that the trial court did not err in concluding that Stevens's claims against Hoopoe fell within the scope of article 9's fee-shifting provisions. The language of certain of Stevens's counterclaims unambiguously alleged violations of the 1997

CC&Rs. Stevens' himself sought fees, and "by alleging that Hoopoe violated the CC&Rs, [Stevens] created a risk that Hoopoe could be ordered to pay [his] attorney's fees and costs under Article 9 of the CC&Rs. Having created that risk, [Stevens] cannot now seek to avoid an award to Hoopoe under Article 9 of the CC&Rs." Slip. Op. at 68-70. The appellate court also concluded that the trial court did not abuse its discretion in certifying Hoopoe's judgment as final under CR 54(b).

Finally, the appellate court awarded Hoopoe its attorneys' fees.

IV. REASONS WHY THE COURT SHOULD DENY REVIEW

A. Petitioner Fails to Satisfy RAP 13.4(b).

Under RAP 13.4(b), a petition for review will be granted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

No conflicting appellate court or supreme court decisions were cited or identified. The case below is a straightforward governed by established principles of state law. Mr. Stevens' disputes are private; there is no issue of public import or gravity at stake. Since its inception this case has been an unfortunate example of the cost of neighborhood dispute.

B. The Court of Appeals Correctly Determined Hoopoe Was the Prevailing Party Entitled to Attorneys' Fees and Costs.

The Court of Appeals followed this Court's precedent and aligned with other Courts of Appeal when it affirmed the trial court's ruling that Hoopoe was the prevailing party on summary judgment and as such, entitled to the attorneys' fees and costs authorized by statute, RCW 4.84.330 and contract, the CCRs. None of the case law Stevens references undermines the Appellate Court's holding as required for review under 13.4(b)(1) or 13.4(b)(2). Stevens' petition is predicated on a selective reading of the Opinion of the Appellate Court—unfortunately for him, he cannot justify review by ignoring the parts of the opinion he wishes were untrue.

"In general, a prevailing party is ***one who receives an affirmative judgment in his or her favor.*** If neither wholly prevails, then the determination of who is a prevailing party depends upon who is the substantially prevailing party, and this question depends upon the extent of

the relief afforded the parties." *Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669 (1997) *cf. Transpac Development, Inc. v. Oh*, 132 Wn. App. 212, 217, 130 P.3d 892 (2006) ("If both parties prevail on major issues, it is appropriate to let each bear their own costs and fees.").

Hoopoe is undoubtedly the prevailing party here. The Court of Appeals affirmed all of the trial court's rulings with respect to Hoopoe. Slip. Op., at 67-73, 96. First, the Appellate Court upheld the trial court's summary judgment in favor of Hoopoe on Stevens's counterclaims. *Id*. at 68. The Court also agreed with the trial court that "***Hoopoe is the prevailing party on its Motion for Summary Judgment of Dismissal.***" *Id*. (emphasis added). The Appellate Court affirmed the trial court's dismissal of each and every one of Stevens's counterclaims against Hoopoe. *Id.* The trial court laid out its reasons for reaching the ruling on the fee-shifting issues, and the Court of Appeals agreed with the trial court's reasoning. *Id*.

The trial court granted Hoopoe's Motion for Summary Judgment on Stevens's counterclaims against it on March 29, 2016 and incorporated the Order in the Hoopoe Judgment on August 11, 2016. Stevens did not "voluntarily dismiss" those specific claims,[2] but even if he had, Hoopoe is

[2] Counterclaims 1, 2, 3, 7, and 10. *See* specifically, the Order on Motion for Summary Judgment filed March 13, 2013; the Amended Order on Motions for Summary Judgment filed May 6, 2013, the Order Granting BFOA's Motion for Summary Judgment on

still entitled to its fees and costs at the prevailing party. *See Elliot Bay Adjustment Co., Inc. v. Dacumos*, 200 Wn. App. 208, 214, 401 P.3d 473 (2017) (citing *AllianceOne Receivables Mgmt, Inc. v. Lewis*, 180 Wn.2d 389, 398-99, 325 P.3d 304 (2014)) (holding that after a "voluntary dismissal with prejudice," the prevailing party is entitled to its attorneys' fees and costs under RCW 4.83 *et seq.*, if the statute otherwise authorizes the fees and costs).

The Court of Appeals decision does not conflict with Washington law—Stevens questions the trial court's conclusion that Hoopoe is the prevailing party, but fails to identify any fault in the trial court or Court of Appeal's analysis as to why Hoopoe did not prevail. Hoopoe urges the Court to deny Stevens's petition for review.

C. The Court of Appeals Correctly Determined Statements by BFOA's Former President Cannot Demonstrate the Community's Unequivocal, Decisive Abandonment of a Restrictive Covenant.

The Court of Appeal's decision reflects Washington law. Its affirmance of the trial court correctly held BFOA and each individual owner in the community needed to take "an unequivocal and decisive act inconsistent with the existence of a restriction" to abandon it. *Id.* at 47.

Stevens' Claim for Partition of the Commonly Owned Bellevue Farm Waterfront filed October 4, 2013, and the Order on Motions for Summary judgment heard September 9, 2015 and filed November 20, 2015.

BFOA's former President's statements, mostly made before some of the owner plaintiffs even bought their properties, could not show that the entire community as a whole or all individual owners abandoned the restrictive covenants. Without something more showing that the individual owners were aware of the statements and took some action to indicate their subjective intent to embrace the President's actions, the President's actions cannot prove that the community abandoned the restrictive covenant. *Id.*at 45. The Appellate Court's decision aligns with the decisions of this Court and other Courts of Appeal; it is not a departure from Washington agency law that substantially impacts the public interest.

Stevens only raises the issue of whether the former BFOA President's statements by themselves establish that BFOA and its members abandoned the restrictive covenant. His argument that a President of a homeowners' association will always bind the individual homeowners under agency law directly conflicts with this Court's opinions. *See Riss v. Angel*, 131 Wn.2d 612, 635-36, 934 P.2d 669 (1997) The Court in *Riss* stated

> [T]he strict application of respondeat superior to find member liability comes from the rules of law developed in the field of business relationships. When such law is transferred to other forms of ***voluntary associations, where individual members may have little or no authority in the day-to-day operations of the association***, reality is apt to be sacrificed to theoretical formalism. Courts, therefore, have

> in some cases recognized ***that individual members of some associations may not be in any true sense principals*** of the individuals through the association acts. These courts have held ***that individual members are not liable unless they authorize or ratify the acts of the association's agents***."

Id. at 635 (internal citations omitted) (emphasis added).

The Court in *Riss* held that the homeowner's association had "business-like" features but primarily operated to review and enforce restrictive covenants. "The association is nonprofit and unincorporated." The actions by select members could not bind the members who did not violate the covenants. *Id.*

The Court of Appeals never stated or implied that agency law did not apply to a homeowners' association. None of the cases cited by Stevens even address agency law in the context of a homeowners association, and thus are irrelevant and unpersuasive. *See Smith v. Hansen, Hansen & Johnson, Inc.*, 63 Wn. App. 355, 818 P.2d 1127 (1991) (concerning a suit by a builder against a supply company); *State ex rel. Hayes Oyster Co. v. Keypoint Oyster Co.*, 64 Wn.2d 375, 391 P.2d 979 (1964) (concerning a suit between a selling and buying corporation); *Sons of Norway v. Boomer*, 10 Wn. App. 618, 519 P.2d 28 (1974) (concerning a dispute between lessee and lessor over pornographic viewing magazines); *King v. Riveland*, 125 Wn.2d 500, 886 P.2d 160 (1994) (concerning a dispute by inmates and the Department of Corrections state officials).

The Appellate Court's decision applied agency law to the homeowners association to determine whether the President's statements could establish that the homeowner Plaintiffs abandoned the restrictive covenant or should be equitably estopped from arguing they did not. The Appellate Court concluded that the President's statements could not be attributed to the community *as a whole* or demonstrate the community *as a whole abandoned the restrictive covenant*. *Id.*

The Appellate Court also addressed why Stevens's reliance on *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229, 268-70, 215 P.3d 990 (2009 is unavailing. *Deep Water* does not attribute liability to the homeowners because of statements by the President of the homeowners's association. The homeowners in *Deep Water* were liable because they failed in their duty to evaluate the building plans. *Slip. Op. at 45.* The situation is *Deep Water* has no bearing on this situation. The individual homeowners did not fail their duty or fail to enforce the restrictive covenant. In fact, "Stevens conceded [] that Hoopoe did not abandon its rights to enforce article 4(a)." *Id.*

The Court of Appeal's decision aligns with precedent by applying agency law principles to BFOA's President. The application of agency law demonstrates that his statements alone, contradicted by the actions of other

homeowners, cannot demonstrate that BFOA or Owner Plaintiffs abandoned their significant property rights in the restrictive covenant.

D. The Court of Appeals Correctly Determined BFOA's Clarification of the Language in the Restrictive Covenants Did Not Add Any New or Additional Restrictions.

The Court of Appeals interpreted the restrictive covenants at issue in this case using the principles of contract interpretation described in *Wilkinson v. Chiwawa Cmtys. Ass'n,* 180 Wn.2d 241, 249, 327 P.3d 614 (2014). *Slip Op.* at 36. Contrary to Stevens' assertions, the Appellate Court recognized *Wilkinson*'s limitation on adding or changing restrictions without a unanimous vote. Stevens ascribes error to the Appellate Court's opinion rather than recognizing that contract interpretation principles, as iterated under *Wilkinson,* demonstrate that "BFOA did not impose new restrictions." *Id.* at 37.

The Court of Appeals thoroughly examined *Wilkinson* and determined that the clarifying definition of "permissible and impermissible agricultural activities" related "to pre-existing covenants and [was] consistent with the general development plan for Bellevue Farm." Therefore, only a majority vote was required under *Wilkinson*. 180 Wn.2d at 256 ("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***"). The language defining permissible and impermissible agricultural uses conforms with the requirements in *Wilkinson* and appellate decisions. *See also Meresse v. Stelma*, 100 Wn. App. 857, 864-65, 999 P.2d 1267 (2000).

Stevens' contention that the Court of Appeals' decision contradicted *Wilkinson* is meritless. The decision complies with *Wilkinson*, and does not deprive anyone of any property rights as to justify review by this Court.

E. Hoopoe is Entitled to its Attorneys' Fees.

Hoopoe is entitled to recover its appellate fees and costs pursuant to CCR Article 9 and settled Washington law providing that when a contract or agreement provides for payment of attorneys' fees, the prevailing party is entitled to reasonable fees and costs incurred at both trial and appeal. *Atlas Supply, Inc. v. Realm, Inc*., 170 Wn. App. 234, 287 P.3d 606 (Div. 1 2012) (trial court properly awarded fees to defend compulsory counterclaim); *see also First Citizens Bank & Trust Co. v. Harrison*, 181 Wn. App. 595, 606-07, 326 P.3d 808 (2014), *review denied*, 181 Wn.2d 1015, 337 P.3d 326 (2014) (allowing lender to recover attorney fees and costs incurred in responding to borrowers' appeal pursuant to contractual fee provision); *Geonerco, Inc. v. Grand Ridge*

Props. IV LLC, 146 Wn. App. 459, 470, 191 P.3d 76 (2008) (builder, as prevailing party in contractual specific performance action, was entitled to attorneys' fees incurred before the trial court and also on appeal). Thus, if Hoopoe prevails on this Petition, it is entitled to its fees.

V. CONCLUSION

For the foregoing reasons, Hoopoe respectfully requests the Court deny Stevens' petition for review and asks that the Court award fees.

RESPECTFULLY SUBMITTED this 14th day of August, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2020, I electronically filed the foregoing Motion with the Clerk of the Court using the Washington State Court of Appeals Electronic Filing System, which will send notification of such filing to those attorneys of record registered on the Electronic Filing System as follows:

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Executed this 14 August 2020, at Bellevue, Washington.

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