

U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE

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No. 41062-1-II

STATE OF WASHINGTON
BY: 

COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

NORM and JANET BRUNS, husband and wife,
Appellants/Cross Respondents,

vs.

THE WILLIAM M. AND WILHELMA COFER LIVING TRUST,
Respondent/Cross Appellant

Appeal from the Kitsap County Superior Court
State of Washington

RESPONDENT/CROSS APPELLANT'S REPLY BRIEF

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I. ARGUMENT

A. An ADU is part of, not separate from, a single family dwelling

1. The terms family and dwelling are not defined in the Covenants

Covenant number 1 contains a use restriction of “residential purposes” and the building restriction of “one detached single family dwelling”. CP 202-3 (App C); EX 2 (App B). None of these words are defined in the Covenants; the Covenants do not contain a definition section. Covenant language is construed similar to contract construction. See *Hollis v. Garwall Inc.*, 137 Wn.2d 683, 974 P.2d 836 (1999). Undefined terms in a contract must be given their “plain, ordinary, and popular” meaning. *Farmers Ins. Co. v. Miller*, 87 Wn.2d 70, 73, 549 P.2d 9 (1976); *Prudential Property & Cas. Ins. Co. v. Lawrence*, 45 Wn.App. 111, 724 P.2d 418 (1986). To determine the ordinary meaning of an undefined term, our courts look to standard English language dictionaries. See, e.g., *Safeco Ins. Co. of Am. v. Davis*, 44 Wn.App. 161, 165, 721 P.2d 550 (1986).

Merriam Webster’s Ninth New Collegiate Dictionary (1985) defines “residential” as “used as a residence or by residents”. “Residence” definitions include: “the act or fact of dwelling in a place for some time”

and “the place where one actually lives as distinguished from his domicile...”.

Merriam Webster’s defines “family” in a number of ways including: “a group of individuals living under one roof and usu. under one head” and “a group of people united by certain convictions or a common affiliation” and “the basic unit in society having as its nucleus two or more adults living together and cooperating in the care and rearing of their own or adopted children”.

Merriam Webster’s defines a “dwelling” as “A shelter (as a house or building) in which people live”. The American Heritage Dictionary (1985) defines dwelling as “A place to live in; abode”.

Thus the Cofers, and any other lay persons, reading the Covenant would understand that use of the house with ADU for living purposes would be “residential”. At trial the Bruns did not establish that the house and ADU at the Cofer property were used for anything other than residential purposes (as opposed to business purposes). CP 702 (Bruns Trial Brief stating issues for trial); RP 279-287 (3-16-10); *Ross v. Bennett*, 148 Wn.App. 40, 203 P.3d 383, rev. denied, 166 Wn.2d 1012, 210 P.3d 1018 (2009).

The Cofers and other lay persons would also understand that there are a wide range of designs for a house to meet these definitions of

dwelling. There is certainly no prohibition stated in these definitions against the ADU that was incorporated into the Cofers' home. And, the City of Bainbridge Island zoning definitions include an ADU in the definition of dwelling. EX 53.

2. No Prohibition of ADU's in Covenants

The fatal flaw in Bruns' case is that the plain language of the Covenants does not prevent the construction and use of the ADU as a rental unit. The Brunses cannot analogize this case to *Riss v. Angel*, 131 Wn.2d 612, 934 P.2d 669 (1997), to get around this undisputed fact. The *Riss* court said that covenants are to be construed to affect their purpose. The only statement of purpose in the Covenants is that shown in Covenant No. 1, requiring "residential purposes". The Covenants do not, for example, declare that their purpose is to "protect the desirability and value of the real property", or "ensure the continuity of character of the neighborhood". Stopping at this point, the burden on the Brunses was to show that the Cofer home violated the purpose. They did not do so; instead it is established law that the uses of the home/ADU was for residential purposes. See *Ross v. Bennett*, supra.

The *Riss* court further held that if covenants require interpretation (i.e. the purpose is unclear from the plain language), then the Court should

consider the home owners' collective interests and surrounding circumstances. This interpretation of what may or may not be in the home owners' collective interest is a fact finding inquiry wherein the court would need to hear testimony from neighbors, the Brunses, the Cofers, and perhaps other community representatives to determine what is in the collective best interest of the neighborhood. This is in large part because there is no stated purpose in the Covenants. The Court, and the homeowners, would be forced to interpret the purpose of the Covenants through the testimony of witnesses and presentation of physical evidence.

At trial the Brunses vehemently objected to any such investigation by the Court and through pre-trial motion practice tried to prohibit neighbors and other third party witnesses from testifying about the collective best interest of the neighborhood. CP 574-577. As the party with the burden of proving the purpose of the Covenants, the Brunses refused to put on any evidence.

3. ADU is not a separate unit

The Brunses misstate the issues raised by the Cofers on appeal, claiming that the Cofers contend that an ADU is not a dwelling under the Covenants. What the Cofers accurately claim is that the ADU is not a stand-alone dwelling at the property.

4. Covenant No. 7 prohibits living in a garage, not on the floor above the garage

Covenant No. 7 prohibits use of a garage (and other locations) as a residence, either temporarily or permanently. Ex. 2 (App B). The Cofers' ADU was not located in the garage at the home. It was located on the floor above the garage, in a living space that had been built to accommodate human habitation according to zoning requirements. RP 354 (3-16-10); RP 459 (3-17-10); Exs. 15 & 16. This design is similar to the Brunses own home, where they have a second story above their garage, and neighboring homes where there is a second story above the garage, all used as part of the residence. Ex. 57.

The insistence of the Brunses that Covenant No. 7 is violated by this design makes no sense. That covenant also prohibits using a basement as a residence. Logically their argument would prevent anyone from living on the first floor of a home when it is above a basement.

The Brun's arguments about Covenant No. 7 are also moot. The trial court received evidence of the construction plans of the Cofers to join the detached garage to the main house. Exs. 49, 50. Those plans have been carried out as described during the trial. The Brun's made no

objections at trial to the plans to join the structures, nor did they ask the Court to enjoin the construction plans.

5. Zoning Code relied upon

The Covenants were only created because the developers (The Tawreseys) believed Covenants were required by the City of Bainbridge Island building/zoning laws. RP 433 (3-17-10). The Tawreseys drafted the Covenants to incorporate the definitions contained in the Bainbridge Island zoning requirements, and specifically to replicate the single family dwelling/residence provisions. RP 434, 470 (3-17-10). This is significant because, as described above, there are no definitions provided in the Covenants themselves. The Bruns argue on appeal that the Covenants must be frozen in time in 1979, such that if zoning codes were to be relied upon, it was only the 1979 code. The Tawreseys did not testify that such a limitation existed, nor did they testify that they intended to lock the 1979 code in place.

The Brunes argue that the Covenants would be a “moving target” if the definitions of terms were allowed to grow and change as the community and zoning code changed. They fear this would amount to a wholesale delegation of the Covenants to the City. In fact, the very terms

of the Covenants do permit changes as the zoning changes over time. See for example Covenant No. 4:

No building shall be located on any lot nearer to the front lot line, backline or sideline than the minimum building setback lines shown on the recorded plat, or nearer than minimum building setback distances **of the most recent City of Winslow zoning ordinance...**

(Emphasis added) (Ex. 2) (App B).

See also Covenant No. 12:

No individual water supply system shall be permitted on any lot unless such system is located, constructed and equipped in accordance with **the requirements, standards and recommendations of applicable state or local public health authority. Approval of such system as installed shall be obtained from such authority.**

(Emphasis added) (Ex. 2) (App B).

See also Covenant No. 13:

No individual sewage disposal system shall be permitted on any lot unless such system is designed, located and

constructed in accordance with the requirements, standards and recommendations of the Kitsap County Health Department. **Approval of such system as installed shall be obtained from such authority.**

(Emphasis added) (Ex. 2) (App B).

See also Covenant No. 20:

No lot or portion of a lot in this plat shall be divided and sold or resold or ownership changed or transferred whereby the ownership of any portion of this plat shall be **less than the area required for the use district in which located.**

(Emphasis added) (Ex. 2) (App B).

As described throughout the Covenants, the drafters created situations where the design and construction of the homes in the neighborhood would be governed by codes and City/County government authorities, using standards that are in effect at the time of construction. Thus a sewage system built in a home in 2002 would have to comply with the Kitsap County Health Department standards for 2002, not the standards in effect in 1979 when the Covenants were created. Building setbacks have to take into account the “most recent zoning ordinance”, not the ordinance that was in effect in 1979. The building design restriction in Covenant

No. 1 does not mention or limit the code applicable to what is or isn't a single family dwelling. But as testified to by the drafters at trial, the goal was to incorporate the zoning code, and the zoning code is a living breathing document that changes over time.

This is significant because the Cofers testified that in the absence of design definitions concerning an ADU in the Covenants themselves, they turned to the City zoning code for definitions before constructing their home. So contrary to the Brunses arguments, the Covenants do not envision the home owners being locked into a frozen status using 1979 standards.

6. Using Zoning code definitions does not abrogate the Covenants

The Brunses cite to the **Bainbridge Municipal Code § 18.03.020** for the proposition that the Code cannot abrogate the Covenants. A word/covenant is abrogated if it is abolished or treated as non-existent. The City Codes do not abolish the terms single family dwelling or ADU; the Code defines those terms when they were undefined in the Covenants.

B. The Brunses Are Not Entitled to Equitable Relief

1. The plain fact is that there is no level playing field

It is not equitable to enforce the Covenants under the circumstances of this case. Covenants serve their purpose when enforced consistently, and a standard will not be enforced where it has been applied inconsistently. See, e.g., *Riss v. Angel*, 131 Wn. 2d 612, 625, 934 P.2d 669, 677 (1997), citing to *Town & Country Estates, Ass'n v. Slater*, 227 Mont. 489, 740 P.2d 668, 669 (1987) (harmony of external design too vague to be enforceable where development was a cacophony of styles). It is black letter law that if covenants have been habitually and substantially violated so as to create an impression that they have been abandoned, equity will not enforce the covenants. *White v. Wilhelm*, 34 Wn. App. 763, 769, 665 P.2d 407, 411 (1983); *Sandy Point Improvement Co. v. Huber*, 26 Wn.App. 317, 319, 613 P.2d 160 (1980). Further, “one who has violated a building restriction cannot enforce a building restriction against others.” *Reading v. Keller*, 67 Wn.2d 86, 89, 406 P.2d 634 (1965). “[W]here a restriction has been violated by a substantial number of property owners other than the defendant, and especially where the plaintiff himself is one of the violators, a mandatory injunction requiring removal of the offending structure will not be granted.” (Footnotes omitted.) 20 Am.Jur.2d, supra at § 331.

In this case the facts adduced at trial demonstrated:

- The Architectural Control Committee no longer lived in the neighborhood, and had not lived there for years. RP 463 (3-17-10)
- The fact that the Architectural Control Committee was not living in the neighborhood made neighbor Barbo question the Covenants' enforceability and usefulness. RP 349 (3-16-10)
- The Bruns installed a green metal roof, not in harmony with other roofs in the neighborhood. RP 173 (3-15-10)
- The Bruns built an outbuilding, spa and sauna not in compliance with the Covenants. RP 104, 137 (3-15-10)
- A house has been painted pink, not in harmony with other homes. RP 350 (3-16-10)
- Roofs, decks and sheds were built without ACC approval. RP 349-350 (3-16-10)
- A neighbor kept a horse trailer at his property. RP 320 (3-16-10)
- Neighbors raised chickens on their lot. RP 324 (3-16-10)
- During the lawsuit, Mr. Bruns went to neighbor Barbo to ask whether he thought the Covenants were still enforced. RP 344 (3-16-10)

There are twenty covenants for this neighborhood of which 15 concern use of lots. App B. Of those, Covenants numbers 1, 2, 3, 6, 7, 10, and 16 were violated, some on numerous occasions.

The Bruns' response to these violations has been to establish their own weighing process to determine which violations matter, and which do not. They argue that neighbor Bob Barbo does not object to the pink house, and that Mr. Bruns actually likes it. Bruns Reply Brief p. 20. They assert that no one has yet complained about the horse trailer stored at another lot. Bruns Reply p. 24. The claim that if Mr. Cofer had a concern about the chicken coop, that should have been resolved by simply speaking to the neighbor. Bruns Reply p. 23.

The trial court erred because it found that these violations were minor and do not destroy the overall scheme of the covenants. App C p. 6. Each one of the described actions is a direct violation of a covenant term. Covenant No. 10 says "No ...poultry...shall be raised, bred or kept on any lot..." App B p. 2. Neighbors ignored this covenant entirely. It should not matter, with respect to equitable affirmative defenses, whether any one particular violation was upsetting to a neighbor or the Court. While individual neighbors or the Court may feel on a case by case basis that the violations are no big deal, such a standard prohibits consistent and fair enforcement.

2. Inconsistent enforcement is highlighted by concessions granted to neighbor Bob Barbo

It is evident from the testimony of Mr. Barbo that he, like the other non-party neighbors, was not comfortable being asked to testify in the lawsuit filed by the Bruns against the Cofers. He even went so far as to question Mr. Bruns as to whether the Bruns had made efforts to settle their concerns in a neighborly fashion with the Cofers before suing them. RP 346 (3-16-10). This is understandable because long after the court battle is over the neighbors will have to co-exist and hopefully get along. Yet despite his discomfort, the clear statements of Mr. Barbo when he began his testimony were:

“I expressed my concern about the disagreement with the Cofers, and that I would like some day to have an ADU possibly in our yard or build a room over our garage for my parents to stay for some length of time, or my in-laws, that sort of thing. And that's when Norm explained that he didn't see that that would ever be a problem, that that was different than the disagreement he had with the Cofers. And that, you know, building an ADU specifically wasn't an issue.” RP 345 (3-16-10)

The Bruns now try to qualify this language by later statements in testimony, but the point made by Mr. Barbo rings loud and true. Mr. Bruns was concerned about what occurred on the Cofer lot next door, not

on other lots around the neighborhood. On appeal, the Brunses argue this testimony does not constitute substantial evidence, citing that on cross exam Mr. Bruns categorically denied making this admission to Mr. Barbo. RP 162-163 (3-15-10). But the Bruns give no reason why Mr. Barbo, disinterested in this lawsuit, would lie to the Court. Unlike Mr. Bruns, he has no bias. Mr. Barbo's statements are certainly more substantial and believable evidence than the denials of Mr. Bruns. The trial court erred in weighing this testimony.

C. **The Cofers should be awarded fees and costs**

CR 11 requires attorneys to “stop, think and investigate more carefully before serving and filing papers.” *Bryant v. Joseph Tree, Inc.*, 119 Wn. 2d 210, 219, 829 P.2d 1099, 1104 (1992). “[R]ule 11 has raised the consciousness of lawyers to the need for a careful pre-filing investigation of the facts and inquiry into the law.” *Id.*; Commentary, Rule 11 Revisited, 101 Harv.L.Rev. 1013, 1014 (1988). The reasonableness of an attorney's inquiry is evaluated by an objective standard. *Miller v. Badgley*, 51 Wn.App. 285, 299, 753 P.2d 530, review denied, 111 Wn.2d 1007 (1988). “[T]he appropriate level of pre-filing investigation is ... tested by ‘inquiring what was reasonable to believe at the time the pleading, motion or legal memorandum was submitted.’ ” *MacDonald v.*

Korum Ford, 80 Wn. App. 877, 890, 912 P.2d 1052, 1060 (1996), (quoting *Bryant*, 119 Wn.2d at 220, 829 P.2d 1099) “An attorney’s ‘blind reliance’ on a client ... will seldom constitute a reasonable inquiry.” *Miller v. Badgley*, 51 Wn.App. 285, 302, 753 P.2d 530, review denied, 111 Wn.2d 1007 (1988) (quoting *Southern Leasing Partners, Ltd. v. McMullan*, 801 F.2d 783, 788 (5th Cir.1986)).

There is no evidence that the attorney for the Bruns made any investigation or inquiry into this issue before amending their complaint to allege that the Cofers violated Covenant No. 2 by failing to get ACC approval of roofing and paint colors at their home. CP 9-10. In this case the Bruns’ own factual inquiry involved a total of three phone calls, with little evidence of any wrong doing when it came to roofing and paint colors at the Cofer house:

- July 5 – Mrs. Bruns calls Mrs. Tawresey to inquire as to whether the Cofers had made submittals to the ACC. Mrs. Tawresey said she did not know, but would check. RP 261 (3-16-10)
- July 6 – Mrs. Bruns calls Mrs. Tawresey again. Mrs. Tawresey is still not sure, and will check again and speak to her husband John. RP 264 (3-16-10)
- July 7 – Mrs. Bruns speaks to Mrs. Tawresey, and the below transpires:

“And then either that Friday afternoon or the next day, Saturday afternoon, she did call back and tell me that she had found a letter on her computer that stated that they had accepted the Cofer house plans, but the Cofers needed to get back to them regarding the roofing material and the exterior paint. And I asked her if she could send me a copy of that letter. And she agreed to do that. And I received it early the following week.”

RP 264-265 (3-16-10) EX 4.

This was the sum total of the investigation that the Bruns made regarding the roof and paint color submittals at the Cofer house prior to amending their lawsuit to allege: “

Paragraph 2 of the Covenants provides that “[n]o building shall be erected, placed or altered on any lot until the construction plans and specifications and a plan showing the location of the structure have been approved by the Architectural Control Committee.” The representatives of the Architectural Control Committee specifically conditioned any approval on Defendant’s submitting its choice of roofing material (including color and type) and

the exterior paint color. Defendant failed to fulfill this condition...

CP 9-10 (Emphasis added).

Before filing this baseless claim in their pleading, the Bruns did absolutely no further investigation with the Tawreseys or other witnesses to find out if in fact the Cofers had submitted paint and roof color choices to the ACC.

For nearly a year, this claim was pursued in litigation and the Cofers were required to file a summary judgment motion to get the claim dismissed. CP 303. In that summary judgment effort, the Cofers provided declarations from the Tawreseys confirming that there were no ongoing concerns or issues about whether the Cofers had obtained approvals. CP 351. The Bruns never investigated by simply asking the Cofers directly whether they had obtained the consents, and instead waited until after the Cofers had to file sworn declarations on summary judgment verifying their actions. RP 153-154 (3-15-10).

The trial court abused its discretion in failing to sanction the Bruns for this lack of reasonable inquiry.

II. CONCLUSION

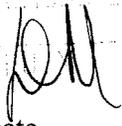
The issues raised by the Cofer's in their cross appeal should be reviewed and the decisions of the trial court reversed as summarized in the conclusion of the Cofer's opening brief.

DATED this 20th day of May, 2011.

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STATE OF WASHINGTON
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COUNTY OF KING
BY: 

CERTIFICATE OF SERVICE

I certify that a copy of the document on which this certificate appears was made on the 20th day of May, 2011 by delivering via messenger a true copy thereof to the offices of all attorneys/parties of record and leaving it with the clerk therein, or with a person apparently in charge thereof.

DATED this 20th day of May, 2011.



Quentin Wildsmith, WSBA #25644
Attorney for Respondent/
Cross Appellant