

FILED
COURT OF APPEALS
DIVISION II

No. 41201-2-II

11 MAY -4 PM 12:45

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II, AT TACOMA

STATE OF WASHINGTON
CLERK
DEPUTY

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,

Respondents,

JAMES W. BROWN; ROBERTA D. DAVIS; KAE HOWARD; TRUSTEE OF THE KAE HOWARD TRUST; MICHAEL J. and CHRISTI 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, RICHARD AND CAROL TERRELL, husband and wife,

Appellants.

REPLY BRIEF OF RESPONDENTS

Steven B. Tubbs
Attorney at Law
7001 SE Evergreen Hwy.
Vancouver, WA 98664
(360) 993-0729
Attorney for Respondents

PM 5-2

Table of Contents

Table of Authorities ii

Reply to Appellants’ Response to Respondents’ First Assignment of Error
..... 1

Reply to Appellants’ Response to Respondents’ Second Assignment of
Error..... 2

Reply to Appellants’ Response to Respondents’ Third Assignment of
Error 3

Table of Authorities

Washington Cases:

In re Estate of Boston, 80 Wash.2d 70, 76,
491 P.2d 1033 (1971)2

Kessinger v. Anderson, 31 Wash.2d 157, 169,
196 P.2d 289 (1948) 2

McDaniels v. Carlson, 108 Wn.2d 299, 308,
738 P.2d 254 (Wash. 1987)..... 2

Panorama Village Condominium Owners Ass'n Bd. of Directors v.
Allstate Ins. Co., 144 Wn.2d 130, 143,26 P.3d 910 (2001)..... 3

Saunders v. Lloyds of London, 113 Wn.2d 330, 340,
779 P.2d 249 (1989)..... 2

Seattle First Nat. Bank v. Washington Ins. Guar. Ass'n,
116 Wn.2d 398, 413, 804 P.2d 1263 (1991)..... 3

Statutes:

RCW 4.84.330.....3

Other Authorities:

21 C.J. 1113, Estoppel, § 116 (1920)..... 2

ARGUMENT

1. The Plaintiffs were entitled to declaratory relief on the grounds that the Neighbors were estopped from their claims.

There are no genuine or material issues of fact concerning Respondents' claim of estoppel. Appellants' reference to the 'measure of proof' is irrelevant, as the matter was decided on summary judgment.

It is undisputed that James Brown, an owner within Rivershore, applied for and received approval of a short plat to divide his property into two parcels. CP 8; CP 13. It is undisputed that the owners of property within Rivershore had notice of and took exception to Brown's application to no avail. CP 21-23, CP 13. It is undisputed that no one challenged the final determination by the City of Vancouver to approve Brown's short plat application. CP 25-26. It is undisputed that River Property, LLC, one of the Plaintiffs, purchased one of the short-platted lots from Brown. CP 13. It is undisputed that in purchasing said lot, Plaintiff understood and believed that the lot was a legal lot, and conformed to the requirements imposed upon land owners within Rivershore by recorded covenants. CP 13-14. It is undisputed that Plaintiffs Anderson purchased Lot 2 within Rivershore with the express and sole intent to short plat that property in the same fashion and manner in which Brown had previously and successfully short platted his parcel. CP 14.

These circumstances estop any owner within Rivershore from asserting that the covenants could be construed to preclude short plats of lots within that subdivision. “Estoppel can arise through silence, as well as statements, when one has a duty to speak out. Kessinger v. Anderson, 31 Wash.2d 157, 169, 196 P.2d 289 (1948) (quoting 21 C.J. 1113, Estoppel, § 116 (1920). However, no matter how communicated, the assertion on which estoppel is based must induce reliance by the other party.” In re Estate of Boston, 80 Wash.2d 70, 76, 491 P.2d 1033 (1971). McDaniels v. Carlson, 108 Wn.2d 299, 308, 738 P.2d 254 (Wash. 1987); *see also*, Saunders v. Lloyds of London, 113 Wn.2d 330, 340, 779 P.2d 249 (1989). In this case, the circumstances required the owners of lots within Rivershore to assert their rights, if such rights existed, in a timely and meaningful manner. Their silence in the face of the Brown application, by failing to legally challenge the City’s decision to approve the same, precludes subsequent assertion that such rights were available under the existing covenants.

2. Did the Trial Court properly rule on the authority of the City?

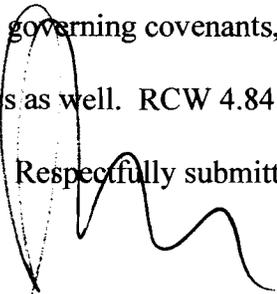
Respondents withdraw their second assignment of error and attending issues and argument. Respondents Anderson have submitted an application for short plat, which application has been approved by the City

of Vancouver, and the question is now moot. See material accompanying Respondents' Motion re dismissal of issues.

3. The Plaintiffs were the prevailing party under the covenants, entitling them to an award of fees

The prevailing party in an appropriate action is entitled to recover their legal fees reasonably incurred. Panorama Village Condominium Owners Ass'n Bd. of Directors v. Allstate Ins. Co., 144 Wn.2d 130, 143, 26 P.3d 910 (2001). In this instance, the grounds for an award of fees are based upon the terms of the covenants in question. CP 40. It has been the long-standing rule that an award of fees is a matter of right if the action in question is "on the contract". Seattle First Nat. Bank v. Washington Ins. Guar. Ass'n, 116 Wn.2d 398, 413, 804 P.2d 1263 (1991)¹. The facile argument urged by Appellants fails to address the context of the question in any meaningful way. Clearly, if Appellants are entitled to recover their fees, where that right is predicated upon the governing covenants, then Respondents are entitled to recover their fees as well. RCW 4.84.330.

Respectfully submitted,



Steven B. Tubbs
WSBA # 7239
Attorney for Respondents

¹ "Under Washington law, for purposes of a contractual attorneys' fee provision, an action is on a contract if the action arose out of the contract and if the contract is central to the dispute."

COURT OF APPEALS
DIVISION II

11 MAY -6 PM 12:45

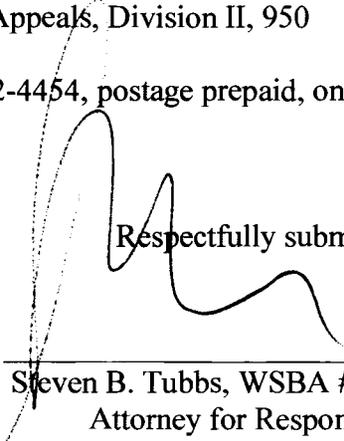
STATE OF WASHINGTON

BY _____
DEPUTY

CERTIFICATE OF SERVICE

I, Steven B. Tubbs, certify that I have mailed a copy of the attached Reply Brief of Respondents to Mr. Stephen G. Leatham, of Heurlin, Potter, Jahn, Leatham & Holtmann, P.S., 211 E. McLoughlin Blvd., Vancouver, WA 98666-0611; and to Mr. Cary Cadonau of Brownstein, Rask, Sweeney LLP, 1200 SW Main St., Portland, OR. 97205; and the original and one copy of said Brief of Respondents to David C. Ponzoha, Clerk of the Court of Appeals, Division II, 950 Broadway, Suite 300, Tacoma, WA 98402-4454, postage prepaid, on this 2nd day of May, 2011.

Respectfully submitted,



Steven B. Tubbs, WSBA #7239
Attorney for Respondents