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Court of Appeals No. 52486-4-II

In The
Court of Appeals of the State of Washington
Division Two

LANA CHANEY HARMON and SUNSHINE HARMON, husband and
wife,

Appellants/Defendants,

vs.

BENJAMIN A. THOMAS, JR. and LINDA KAE FERRIS, Co-Trustees
of the Benjamin A. Thomas, Sr. Credit Shelter Testamentary Trust,

Respondents/Plaintiffs.

APPELLANTS' REPLY BRIEF

Cowlitz County Superior Court No. 16-2-00203-1

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I. ARGUMENTS IN REPLY

A. THE TRUST CONCEDES IT MADE NO PRE-SUIT DEMAND RELATED TO THE POLE BARN

The Trust concedes it did not make any pre-suit demand that addressed the siding or roofing on the barn. Resp. at 15. Instead, the trust argues the Harmons should have raised this as an affirmative defense. Resp. at 16. However, the Harmons' first affirmative defense in their amended complaint is that the Trust failed to state instances of Defendants' actual violations of Covenants and failed to state a claim. CP 855. (Appendix A-3 to Resp. Br.) Even if this Court finds the Harmons did not raise the issue below, this Court may still review the issue under RAP 2.5(a)(2) because the Harmon's argue the Trust failed to establish facts upon which relief can be granted. RAP 2.5(a)(2). The Trust does not argue that a pre-suit demand is a condition precedent. It simply argues that it did not have to prove that condition precedent because the Harmons failed to plead it as an affirmative defense. This is incorrect.

If the Trust did not send a pre-suit demand, then under the plain terms of the restrictive covenant they are not entitled to attorney's fees. CP 15-16. Further, by its own plain language paragraph 13, the lawsuit itself cannot serve as the pre-suit notice as the Trust suggests. Resp. at 15; CP 545-46.

If the Trust did not make a sufficient pre-suit demand regarding the pole-barn, but did make sufficient demand regarding the temporary structures, it was not entitled to an award of all fees incurred because generally a party is not entitled to recover attorney fees related to the claims they did not win. See Resp. at 16. Fees awarded to a prevailing party should be limited to fees generated by work done of the suit or claim that was necessary to prevail on that particular claim. *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 743-44, 733 P.2d 208 (1987); *Scott Fetzer Co., Kirby Co. Div. v. Week*, 114 Wn.2d 109, 786 P.2d 265 (1990).

In any event, the Trust did not make a sufficient pre-suit demand regarding the temporary structure either, as argued below.

B. THE HARMONS ALSO CHALLENGED THE COURT'S RULING WITH REGARD TO THEIR PLACEMENT OF TEMPORARY STRUCTURES

The Harmons assigned error to the trial court's order granting the Trust's motion for partial summary judgment. This challenged the ruling as to both the pole-barn and the temporary structures. Opening Br. at 2. The Harmons provided evidence they complied with the December 31, 2015 demand to remove their storage container and had not exceeded the 10-day limitation for recreational vehicles. CP 136. Lana Harmon further requested the Trust clarify whether there were items other than the storage container the Trust considered a temporary structure. CP 136. The Trust

responded by filing suit. CP 1-8. Opening Br. at 16. Because the last letter Lana sent indicated that she believed she was in compliance and even took steps to abide by the Trust's interpretation of compliance by removing the storage container, no adequate demand was made. Thus, the trust did not prove it was entitled to attorney fees in relation to the temporary structure.

C. EVEN AS A NAMED DEFENDANT SUNSHINE HARMON IS NOT LIABLE FOR ATTORNEY'S FEES

In Washington, attorney fees may be awarded when authorized by a private agreement, a statute, or a recognized ground in equity. *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 849-50, 726 P.2d 8 (1986).

Even if Sunshine Harmon was appropriately named as a defendant, he is still not liable for attorney's fees because he was not a party to the covenant pursuant to which fees were awarded. *Mr. 99 & Associates, Inc. v. 8011, LLC*, No. 77995-8-I, (Ct. App. Jun 17, 2019), unpublished¹ (Court of Appeals held Plaintiff was not personally liable for attorney fees because he was not a party to the agreement pursuant to which fees were

¹ Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate. See GR 14.1.

awarded).

The trust has not cited any authority to support its assertion that it can recover fees under a contract provision against a defendant who was not a party to that contract. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

Sunshine was not a party to the restrictive covenant and did not agree to be bound by the obligation to pay attorney's fees for any breach of that covenant. CP 9-17. Therefore, the court erred in entering a judgment for attorney's fees against him and this Court should remand to remove his name from the judgment.

D. THE HARMONS RAISED A GENUINE ISSUE OF MATERIAL FACT REGARDING WHETHER THE BARN IS SIMILAR TO THE HOUSE STYLE IN MATERIAL, COLOR AND DESIGN

Whether the Harmons' outbuilding is sufficiently similar to their home under the covenant language presents an issue of fact. *Lakes at Mercer Island Homeowners Ass'n v. Witrak*, 61 Wn. App. 177, 184, 810 P.2d 27, (1991).

The Trust misunderstands the Harmons' argument about the contract language. The Harmons agree the language in paragraph 13 of the restrictive covenant is not ambiguous. That is the reason the trial court

erred in considering Thomas's intent as context evidence; by doing so the trial court imported an intention that was not clearly expressed. *Wimberly v. Caravello*, 136 Wn. App. 327, 336, 149 P.3d 402, 408 (2006). By considering Thomas's subjective intent the court erroneously declared the meaning of what he intended to write and not what he actually wrote. *Wimberly*, 136 Wn. App. at 336.

The contract unambiguously states, "[a]ll outbuildings must compliment (i.e. be similar to) the house style in material, color, and design, which shall include siding and roofing materials." CP 13.

While extrinsic evidence may be considered to explain the context of an unambiguous restrictive covenant, the Trust does not dispute that such extrinsic evidence is limited and excludes evidence of a party's unilateral or subjective intent about the meaning of a contract word or term, evidence showing an intention independent of the instrument, and evidence that would vary, contradict or modify the written contract. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 695, 974 P.2d 836, (1999); Resp. at 35.

However, this is exactly the type of evidence the trial court considered in finding the Harmons did not comply with the restrictive covenant pertaining to their outbuilding as a matter of law. And the Trust has failed to explain how evidence of its enforcement of the covenants many years after the covenant was drafted aided the court in determining

the intent of the original parties. Evidence of the Trust's interpretation of the covenants, independent of the contract, does not make it more or less likely the covenants were breached. The other neighbors are understandably frustrated that they spent tens of thousands of dollars in abandoning their plans for a metal outbuilding in order to come into compliance with the Trust's interpretation of the covenants, but that is not evidence the Harmons breached any covenant. By that logic, the fact the other neighbors even contemplated building a metal building is evidence they did not believe it was restricted. Surely, Mr. Philpot and Mr. Trice did not testify that they planned to violate the restrictive covenants and then decided not to violate them under pressure from the Trust. CP 581, 613-19, 620-28.

The Harmons' defense was that their outbuilding did compliment, and was similar to, their home in style, color, and design. The covenant does not state the outbuilding and the home must be identical in style, material, color, and design.

The Trust mischaracterized the Harmons' argument when it accused the Harmons of confusing the issue. Resp. at 22. The Harmons do not argue that because there is no metal building ban in the covenant it is ambiguous. See Resp. at 22. Instead, the Harmons argue on appeal, as they did below, that they fully complied with the covenants because their

outbuilding is similar. This defense does not make the covenant language ambiguous, but it creates an issue of disputed material fact as to whether the Harmons' outbuilding is sufficiently similar to their home. *Lakes at Mercer Island Homeowners Ass'n*, 61 Wn. App. 177 is illustrative. There, the Court of Appeals reversed the trial court's order granting summary judgment holding that an issue of fact remained as to whether a row of trees planted on a homeowner's boundary line constituted a fence. *Lakes at Mercer Island Homeowners Ass'n*, 61 Wn. App. at 184. Witrack's property was subject to the Homeowners Declaration of Covenant, Conditions, and Restriction (CCR) that prohibited erecting a fence that was over six feet in height. *Lakes at Mercer Island Homeowners Ass'n*, 61 Wn. App. at 179. Witrack planted a row of trees on her boundary line that were 25-30 feet tall. *Lakes at Mercer Island Homeowners Ass'n*, 61 Wn. App. at 178. The Homeowner's Association filed suit seeking an order the trees be removed. *Lakes at Mercer Island Homeowners Ass'n*, 61 Wn. App. at 179.

After reading the CCR the trial court concluded as a matter of law that the trees did not constitute a wall or fence. The Court of Appeals reversed because whether the trees constituted a fence was a question of fact "to be determined after consideration of all relevant evidence." *Lakes at Mercer Island Homeowners Ass'n*, 61 Wn. App. at 184. Importantly,

the Homeowner's Association did not allege the CCR was ambiguous and the Court of Appeals' decision was not based on any ambiguity in the contract language. Instead, it merely held that interpretation of the word "fence" was a question of fact even though treating the trees as a fence seemed "more harmonious with the overall purposes of the covenants." *Lakes at Mercer Island Homeowners Ass'n*, 61 Wn. App. at 184.

Similarly, here, this Court does not have to find the covenant language is ambiguous in order to find there is a material issue of disputed fact. Just as in *Lakes at Mercer Island*, because there was a dispute about whether the Harmons' outbuilding was sufficiently similar to their home to be in compliance with the covenant, remains an issue of fact to be determined after consideration of all relevant evidence. Although the Trust argued that metal is not similar to asphalt and hardi-plank, this is not a question of law and framing the Harmons' position as "nonsense" does not make it a question of law.

Therefore, the court erred in granting summary judgment and this Court should reverse the trial court's order and remand for trial. *Lakes at Mercer Island Homeowners Ass'n*, 61 Wn. App. at 184.

**E. THE TRUST MADE NO SHOWING IT HAD A WELL-
GROUNDED FEAR OF IMMEDIATE INVASION OF THAT
RIGHT.**

Even under *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 699, 974 P.2d

836 (1999), upon which the trust relies, the Trust had to show its well-grounded fear of immediate invasion of a legal or equitable right. Resp. at 29. During the pendency of a lawsuit it is appropriate to preserve the status quo, in this case the Harmons' barn and other temporary structures. If the Trust believed the status quo should have been altered during the course of the lawsuit it could have asked for a preliminary injunction. In absence of a preliminary injunction, the Trust cannot fault use the Harmons actions of preserving the status quo as proof they intentionally breached the covenants and would refuse to remove the structures in the future if the court determined they actually violated the covenant. In fact, at the time of final entry of judgment, the Trust's counsel conceded the violations were abated. CP361. If the violation was abated there is no fear of immediate violation.

II. CONCLUSION

The Harmons respectfully request that this Court reverse the trial court's order granting summary judgment and vacate the award of attorney's fees against them and reverse the permanent injunction issues against them. In the alternative, the Harmons request that this Court reverse the award of attorney's fees against Sunshine Harmon and remand to remove his name from the judgment.

Respectfully submitted this 19th day of July, 2019.

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CERTIFICATE OF SERVICE

I, Corey Evan Parker, certify under penalty of perjury under the laws of the United States and of the State of Washington that on July 19, 2019 I caused to be served the document to which this is attached to the party listed below in the manner shown next to their name:

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