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No. 52688-3-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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WALLACE JOHNSON,  
Appellant,

v.

BERNARD McAULEY and LINDA McAULEY,  
husband and wife,  
Respondents.

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REPLY BRIEF OF APPELLANT WALLACE JOHNSON

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## I. REPLY TO INTRODUCTION

In the introductory statement of Brief of Respondent, the McAuleys misstate the assignments of error by the Appellant, Mr. Johnson. This case is not just about nuisance; it is primarily about a landowner that refused to follow the Protective Covenants placed upon his land by the developer and how that landowner further refused to comply with the applicable zoning codes adopted by Thurston County, both of which restrict the manner of use of the land owned by McAuley and Johnson, as well as seven other landowners in the 48<sup>th</sup> Court NW restricted development.

Land use restrictions offend many people who believe it is their fundamental freedom to do what they want on their own property. The evidence presented in the lower Court clearly shows that the McAuleys are just that kind of people; they want to do what they want to do regardless of legitimate land use restrictions.

When property owners, governments and courts do not follow and do not enforce the valid and existing land use restrictions of record, the very structure of our modern society is threatened. It is imperative this Court send a message to McAuleys that they cannot intentionally ignore the law and profit by their actions.

Beyond the intentional violation of the Protective Covenants and Thurston County Zoning regulations, the doctrine of laches is not appropriate to a continuing violation.

## II. REPLY TO STATEMENT OF THE ISSUE

As to the McAuleys' statement of issues, generally as stated above, McAuley does not respond to all issues presented by Johnson. McAuley fails to respond to the following issue presented by Johnson and therefore, Johnson should be awarded his requested relief as to this issue as argued in the Brief of Appellant:

Issue 1.1 Does the continuing violation of a restrictive covenant constitute a new and actionable harm each day it occurs?

A. Respondent's Issue A, combines but misstates two (2) of Appellant's issues presented, namely Issue 1.2 and Issue 1.3. Appellant does not claim that construction of a residence and barn are a nuisance.

B. Respondent's Issue B corresponds to Appellant's Issue 1.4

## III. REPLY TO STATEMENT OF CASE

McAuley misstates that the Complaint filed by Johnson alleged that the construction of modular home as the main dwelling, subsequent construction of a barn that does not conform to the architectural scheme of the main dwelling, and conducting a horse boarding business on the property visible to public view, each constitute a nuisance. The allegation in the Complaint as to those issues is for breach of the Protective Covenants; not nuisance.<sup>1</sup>

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<sup>1</sup> CP 3 MCAULEY violated the protective covenants from the time they put a modular home on their property as their main dwelling, then subsequently constructed a barn on the property that does not conform to the architectural scheme of the main dwelling, then conducted a horse boarding business on the lot that is visible to public view.

McCauley ignores the whole point of their Protective Covenant violations just as they intentionally ignored the Protective Covenants in their actions. The Protective Covenants prohibited a modular home, a barn not conforming to the architectural scheme of the home, and the conduct of any business on the property or the boarding of any horses not owned by the homeowner or having in excess of 4 horses at any time.<sup>2</sup>

#### **IV. ARGUMENT AND AUTHORITIES**

##### **A. CONSTRUCTION OF A MODULAR HOME, CONSTRUCTION OF A BARN THAT DOES NOT CONFORM TO THE ARCHITECTURAL SCHEME OF THE MAIN DWELLING, AND BOARDING OF HORSES THAT MAY BE SUBJECT TO PUBLIC VIEW DO NOT CREATE GENUINE ISSUES OF MATERIAL FACT TO SUPPORT A CLAIM OF NUISANCE.**

As pointed out above, Johnson did not claim this allegation to be a nuisance; it is a violation of the Protective Covenants. The claim of nuisance was the activity of the horse boarding for others that was done in violation of the Thurston County Zoning Code as articulated by Johnson in the Superior Court proceeding<sup>3</sup> and in the Brief of Appellant at pages 13-14.

Johnson's arguments on the violation of Protective Covenants and the continuing nature of the tort are articulated in his Brief of Appellant in Section VII(A) from pages 8-10 and 18-23.

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<sup>2</sup> CP 3 and 24-31  
<sup>3</sup> CP 460-461 and 450-453

B. AT SUMMARY JUDGMENT THE TRIAL COURT CORRECTLY RULED THAT THE CLAIMS BROUGHT BY JOHNSON AGAINST THE MCAULEYS ARE BARRED UNDER THE DOCTRINE OF LACHES AND SUBJECT TO DISMISSAL AS A MATTER OF LAW.

To successfully use the defense of laches, the Defendant must show all three (3) of the following: "(1) knowledge or reasonable opportunity to discover on the part of a potential plaintiff that he has a cause of action against a defendant; (2) an unreasonable delay by the plaintiff in commencing that cause of action; (3) damage to defendant resulting from the unreasonable delay." *Peckham v. Milroy*, 104 Wn. App. 887, 891, 17 P.3d 1256, 1259 (2001), as amended (Mar. 15, 2001); citing *Buell v. City of Bremerton*, 80 Wn.2d 518, 522, 495 P.2d 1358 (1972); and *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 635, 733 P.2d 182 (1987).

From the time Johnson and his wife built their home on Lot 9 and they discovered the Protective Covenant violations of McAuley, Johnson did not unreasonably delay in taking action about McAuley's failure to conform to the Covenants. He tried to work it out face to face with McAuley, who refused to comply. Then he took the issue to the HOA where it languished for a couple of years and the HOA refused to make McAuley comply. Finally, Johnson filed his Complaint against McAuley within the appropriate three (3) year statute of limitations after the HOA failed to take action.<sup>4</sup> But even if

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<sup>4</sup> CP 286-323, 390-393 & 464-466

the Court finds, *arguendo*, that the actual filing of Johnson's lawsuit was unreasonably delayed, that is only one of the elements of the defense of laches. There was no damage to McAuley, and no proof of damage offered by McAuley in the Superior Court proceeding. During the entire time of McAuley's residence on Lot 7 of 48<sup>th</sup> Court NW development they continued to live in their home and use their barn area however they have desired despite their not having complied with the Protective Covenants. McAuleys knew full well they were in violation when they built; they simply refused to comply.<sup>5</sup>

McAuley forwards *Ames Lake Community Club v State*, 69 Wn. 2d 769, 420 P.2d 363 (1966) as controlling in this case. However, *Ames Lake*, is not on point. In that case, the Community Club said and did nothing to enforce restrictions in the protective covenants for 11 years during which time the State of Washington made valuable improvements. Compare that to the instant case, where McAuleys did not rely upon anyone's failure to take action. Johnson started taking action from the time he knew or should have known of McAuley's violation and has been taking action ever since, first by confrontation of McAuley, next through the homeowners association and finally by the subject lawsuit. And, each day the violation continues is a continuing violation as with the doctrine of continuing tort as declared by our Supreme Court,

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5 CP 288 - Bernie McAuley told Johnson and others in the 48<sup>th</sup> Court NW Homeowners Association "the Covenants weren't worth the paper they were written on."

where each day of the violation is a new violation. *Woldson v. Woodhead*, 159 Wn. 2d 215, 219, 149 P.3d 361, 363–64 (2006).

#### **V. AWARD OF ATTORNEY'S FEES ON APPEAL**

There was no basis for attorney's fees in the lower Court and there is no basis here. First, McAuley did not request attorney's fees below, either in their Answer or their Motion for Summary Judgment or their Reply in Support of Summary Judgment.<sup>6</sup> Next, this is not a frivolous appeal, as there are debatable issues upon which reasonable minds might differ as has been presented in the Brief of Appellant, this Reply Brief and the underlying record.

#### **VI. CONCLUSION**

Keeping in mind that this is an appeal from a Summary Judgment where all facts and inferences must be given in favor of Johnson as the non-moving party, there were adequate genuine disputes of material fact favoring Johnson such that Summary Judgment should not have been granted. Additionally, as a matter of law, the doctrine of continuing tort defeats any claim for laches as does the fact that McAuley cannot prove all three elements required to raise the defense of laches.

Because McAuley does not respond to the issue of his breach of Protective Covenants, that issue should be found in favor of Johnson. The issues raised by McAuley in his Response and replied by Johnson here should be remanded to Thurston Count

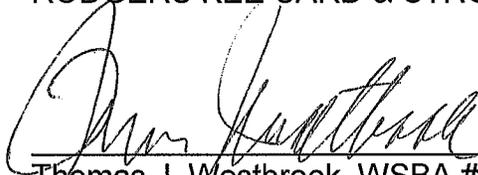
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<sup>6</sup> CP 10-11, 359-360 & 500-501

Superior Court to go to trial on the merits.

RESPECTFULLY SUBMITTED this 24th day of April, 2019.

RODGERS KEE CARD & STROPHY, P.S.

A handwritten signature in black ink, appearing to read "Tom Westbrook", written over a horizontal line.

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## CERTIFICATE OF SERVICE

The undersigned certifies that on the 25<sup>th</sup> day of April, 2019 she caused service of this Reply Brief to be made upon the Respondent by US Mail, postage pre-paid and by e-mail to:

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Dated this 25<sup>th</sup> day of April, 2019.

Catherine Hitchman  
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**RODGERS KEE & CARD, P.S.**

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