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Court of Appeals No. 54324-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RON JONES and SEPPO SAARINEN,

Respondents/Cross Appellants,

v.

AARON WILCOX and AUBREY WILCOX,

Appellants/Cross Respondents.

BRIEF OF RESPONDENTS / CROSS APPELLANTS

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I. INTRODUCTION

In 1997, the law of covenant enforcement shifted from favoring the free use of land to protecting the homeowners' collective interests, at least in disputes between homeowners other than the original declarant. This shift did not, however, create a patchwork of fiefdoms dominated by homeowner associations. We know this because association discretion is limited to consent-to-construction covenants, which are superseded by specific covenants. Associations may exercise only such discretion as is expressly delegated in governing covenants, or necessarily implied therefrom. Any other result would destroy the very nature of private property, returning fee interest to fiefdom.

The present case involves a homeowner suit to enjoin a neighboring secondary structure, alleging violations of specific covenants prohibiting multiple residences, non-single-family uses, and unnecessary inhibition of homeowner views. The project was approved by a homeowner association, unbeknownst to the respondents, notwithstanding prior requests for plans and specifications. The case was *involuntarily* dismissed under CR 41(b)(3), in reliance upon an unpublished decision holding that homeowner associations are necessary parties in actions to enforce specific covenants.

II. ASSIGNMENTS OF ERROR

Assignments of Error:

Respondents and cross-appellants Ron Jones and Seppo Saarinen (plaintiffs below) assign error to the following:

1. Trial Court's Ruling and Order Denying [Plaintiffs'] Motion for Reconsideration¹ filed November 12, 2019. CP 481-84.
2. Trial court's oral decision granting defendants' motion for involuntary dismissal under CR 41(b)(3) on September 23, 2019. RP 192: 10-16.

* * *

Issues Pertaining to Respondents' Assignments of Error

ISSUE 1: Do specific covenants supersede consent-to-construction covenants governing homeowner associations? (Assignments of Error 1, 2).

ISSUE 2: Are homeowner associations necessary parties in actions between owner-members to enforce specific covenants which explicitly authorize such actions? (Assignments of Error 1, 2).

ISSUE 3: Did the trial court err in ordering involuntary dismissal for nonjoinder of the homeowner association? (Assignments of Error 1, 2).

¹The typographical error referring to "Defendants' Motion" was subsequently corrected by the court.

Issue Pertaining to Appellants' Assignment of Error

ISSUE 4: Did the trial court err when it denied appellants' petition for attorney's fees and costs where the CCRs [authorize an award of fees to "[a]ny party who successfully enforces these CC&R's"] and where the court dismissed all of respondents' claims for failure to join an indispensable party? (Appellants' sole assignment of error).

* * *

III. STATEMENT OF THE CASE

Knight's Pointe is a residential subdivision in Camas, Washington, governed by a *Declaration of Covenants, Conditions and Restrictions* ("CCRs"), including the following provisions:

7.1 Land Use-Building Restriction. . . . Only one single residence may be located on any lot within the planned development. No short platting or subdivision of lots shall be permitted. . . .

7.3 Use of Property. Only single-family residential uses are allowed. . . .

7.15 Square Footage Requirements. . . .
D. Houses are to be of a size and situated on a lot which will be compatible with adjoining properties and which will not unnecessarily inhibit the views of surrounding property owners; . . .

8.1 Enforcement. The Association, or any owner, . . . shall have the right to enforce, by proceeding at law or

equity, all restrictions, conditions, covenants, reservations, liens and charges now or hereafter imposed by the provisions of this Declaration, and to recover damages for violation thereof. . . . Any party who successfully enforces these CC&R's shall be entitled to recover attorney their reasonable costs and attorney fees, whether a lawsuit is filed or not.

Trial Exhibit 1 at 13 (14 of 31), 18, 26; *CP 331, 336, 344.*

Respondent Saarinen purchased Lot 20, Knight's Pointe, in 2007, having a building envelope which allowed construction of a residence enjoying views to the north, south, east, and west. *RP September 23, 2019, 44:7-15.* Mr. Saarinen relied upon the CCRs in purchasing his property, *Id, 30:20-22;* including the limitation of one residence per lot, *Id, 31:25-32:4;* the limitation to single-family residential uses, *Id, 32:7-9;* and protection against unnecessary inhibition of views, *Id, 32:17-19.*

Respondent Jones purchased Lot 15, Knight's Pointe in 1996, because it allowed construction of a residence which enjoys views of downtown Portland and surrounding area. Mr. Jones relied upon the same CCR provisions regarding one residence per lot, single-family uses, and protection of views. *RP September 23, 2019, 101:2-104:3.*

Appellants Wilcox own Lot 19, Knight's Pointe, situated immediately east of, and contiguous with, the Saarinen property; between the Jones property and a view of the Columbia River and downtown Portland.

The Wilcoxes began applying for approval to build an accessory dwelling unit (“ADU”) on June 14, 2016, but were rejected because the Board of Directors, acting as “Architectural Landscape Committee,” “did not like the appeal of a stand alone unit placed on the back of a lot.” *Trial Exhibit 7 at 1*. A second application dated August 10, 2016 was rejected for “similar reasons,” with the Board suggesting “a more integrated approach.” *Id.* On August 5, 2017, the Wilcoxes submitted a third application, including “an integrated concept . . . called a portico.” *Id.* The third application was approved by e-mail among Board members on August 27, 2019. *Id.*; *CP 3:9-12*.

On January 26, 2018, Seppo Saarinen received an e-mail from Aaron Wilcox, discussing a proposed *addition* to the Wilcox residence:

As our family needs and size is growing (we are having a second kid!) we have found the need to make more modifications to our house. We have received HOA board and city approval for an addition on the Northwest side of our house, which is the most feasible place to add on and keep the high quality ascetics [sic] of our house and the neighborhood.

Trial Exhibit 5. On February 11, 2018, Seppo Saarinen responded, expressing concern regarding preservation of views, and requesting copies of proposed plans:

We are now seeing foundation being built and have a question in our minds about if the building will block the view from our daughter's bedroom. It would have been appropriate for you to show the plans during the planning phase to allow us to review them and give you feedback. As you didn't do it earlier, we would like to see the plans and, if possible, I'd like to walk the building site along our property line.

Trial Exhibit 5. On February 19, 2018, Aaron Wilcox promised: “[o]nce Aubrey sends me a copy of the plans[,] I’ll send the elevations your way so you can see what it will look like.” *Id.* Plans for the Wilcox ADU were not provided to the respondents until December 2018, in discovery responses sent to respondents’ counsel. Seppo Saarinen did not realize that the Wilcoxes were constructing a two-story stand-alone ADU until it appeared on April 16, 2018, over the top of an Arbor vitae hedge, ten and one-half feet tall, which separated the properties. *RP September 23, 2019, 37:21-38:10*, (see aerial photo: *Trial Exhibit 8*).

On April 3, 2018, Douglas O. Whitlock, Ron Jones’ legal counsel, sent a letter notifying Aaron and Aubrey Wilcox of CCR violations:

Mr. and Mrs. Jones returned to their home located at 1447 NW Deerfern Street, Camas, WA 98607, and noticed framing of a structure that blocks their view of downtown Portland, Oregon. This is the crown jewel of their view. Article VII paragraph [7.15] “D” requires that houses shall not inhibit the views of the surrounding property owners. The purpose of this communication is to notify you that you appear to be in violation of the CC&R’s of Knight’s Pointe Subdivision.

Trial Exhibit 6 at 2.

The Wilcox ADU comprises 1,480 square feet, including 935 square feet of first floor and 545 square feet of loft:

AREA CALCULATIONS:

FIRST FLOOR ADDITION	935 SF
<u>LOFT FLOOR ADDITION</u>	<u>545 SF</u>
TOTAL CONDITIONED FLOOR AREA	1,480 SF

Trial Exhibit 87 at 2. A comparison of plan sheets A2.2 and A2.3 reveals that the first floor bedroom, bath, walk in closet, vestibule, and covered entry all fit within the dimensions of the loft, 545 square feet. *Id* at 4, 5. There is an additional 390 square feet of living space on the first floor (935 – 545 = 390). Clearly, 935 square feet on the first floor is sufficient to satisfy the Wilcoxes’ admitted intent to add a “bedroom, bathroom and living space.” *CP 91:10-13.* Just as clearly, the loft is unnecessary to satisfy that purpose.

An expansive eastward view from the Saarinen property has been blocked by a two-story wall and roof of the Wilcox ADU. *RP September 23, 2019, 44:7-15*; depicted in *Trial Exhibit 9*. The Wilcox ADU also blocks a large portion of Jones’ view of the City of Portland. *RP September 23, 2019, 110:3-10, 156:22-24; Trial Exhibit 6 at 2* (“This is the crown jewel of their view”); depicted in *Trial Exhibit 10*.

The Wilcox ADU violates CCR paragraph 7.1, limiting improvements to one single residence; paragraph 7.3 limiting uses to single-family residential; and paragraph 7.15 prohibiting unnecessary inhibition of views. The Wilcox ADU eradicates eastern garden views, as evidenced in before and after photographs from the Saarinen property, *Trial Exhibit 9*; and blocks views of Portland, Oregon, from the Jones property, *Trial Exhibit 10*.

After the respondents' rested, the Wilcoxes moved for "directed verdict [alleging] the HOA . . . is a necessary party," and citing *Gurrad v. Klipsun Waters*, 93 Wash.App. 1012 (1998), an unpublished opinion. *RP September 23, 2019, 168:16-18*. The trial court granted the Wilcox motion over respondents' objection and argument that the unpublished opinion was not binding, and overruled by reported decisions in *Primark v. Burien Gardens*, 63 Wash.App. 900, 906, 823 P.2d 1116 (1992); and *Ruston v. Tacoma*, 90 Wash.App. 75, 82, 951 P.2d 805, *review denied*, 136 Wash. 2d 1003, 966 P.2d 902 (1998). Respondents argued that directed verdict should be denied and, if necessary, joinder of the HOA should be ordered. The trial court acknowledged that "*Gurrad* is not binding precedent" under GR 14.1, but ordered dismissal without prejudice in reliance upon the reasoning in *Gurrad*. *RP September 24, 2019, 192:10-16, 193:13-14*.

On November 12, 2019, the trial court denied the Wilcox motion for attorney fees and costs because: “plaintiffs did not decide to dismiss the case and did not control the outcome, the court did.” *CR 472*. On November 14, 2019, respondent filed a separate action against the Wilcoxes and the Knight’s Pointe Homeowners Association, alleging the same claims; proceedings in which have been stayed pending the outcome of the present appeal. *Jones v. Wilcox, et al.*, 19-2-03402-06.

* * *

IV. SUMMARY OF ARGUMENT

Specific covenants supersede consent-to-construction covenants, and homeowner associations may exercise discretion only as to the latter. *Riss v. Angel*, 131 Wash. 2d 612, 625-26, 934 P.2d 669 (1997). Where covenants provide only a *minimum* specification, associations may exercise discretion regarding an unspecified *maximum*. *Id.* Specific covenants “involve a primarily nondiscretionary ministerial procedure,” *id.*; hence, associations should be limited to authority expressly delegated by the covenant, or necessarily implied therefrom. Specific enforcement rights are frustrated if associations are allowed intervene in direct actions between homeowners to enforce specific covenants.

Homeowner associations are not necessary parties in actions to enforce specific covenants. *Saunders v. Meyers*, 175 Wash.App. 427, 437-38, 306 P.3d 978 (2013). Associations are not prejudiced by failing to participate in declaratory actions because “injunctions are binding solely on entities whose interests are represented.” *Wimberly v. Caravello*, 136 Wash.App. 327, 334, 149 P.3d 402 (2006).

The trial court erred in dismissing for failure to join the HOA because “misjoinder of parties is not a ground for dismissal.” CR 21. Had the Wilcoxes actually believed that the HOA was a necessary party, they should have moved for joinder under CR 19(a). Complete determination could be had because the case seeks enforcement only of specific covenants, over which the HOA had no authority, and no claim was asserted against the HOA. The unpublished opinion had no persuasive value under GR 14.1, and the trial court abused its discretion in relying upon an unpublished opinion dating from 1998, which constitutes untenable grounds or reasons.

The court properly denied fees because the Wilcoxes did not successfully enforce the covenant, and because respondents’ refiling of the same claims in a second action against the Wilcoxes and the HOA evidences the fact that dismissal did not change the legal relation between the parties.

V. ARGUMENT

Standard of review

Appellate review of restrictive covenants raises both questions of law and fact, seeking to protect the homeowners' collective interest:

While the interpretation of a restrictive covenant is a question of law, intent is a question of fact. . . . We review questions of law de novo and questions of fact for substantial evidence. . . . We must place special emphasis on arriving at an interpretation that protects the homeowners' collective interests. . . . In Washington, the purpose of the covenant is the paramount consideration, rather than the free use of land.

Saunders, 175 Wash.App. at 439, 306 P.3d 978 (2013); citing *Riss v. Angel*, 131 Wash. 2d 612, 623-24, 934 P.2d 669 (1997)

The Wilcoxes bear the burden of showing that the Board's decision to allow a two-story structure was authorized by the CCRs. *Saunders*, 175 Wash.App. at 444. The *Saunders* decision also addressed the standard of review governing indispensable parties:

We review a court's decision that a party is not indispensable for abuse of discretion.

Saunders, 175 Wash.App. at 437. Finally, *Saunders* addressed attorney fees:

Whether a particular contractual provision authorizes an award of attorney fees as costs is a legal question.

Saunders, 175 Wash.App. at 445.

ISSUE 1: Do specific covenants supersede consent-to-construction covenants governing homeowner associations?

In 1997, the Washington Supreme Court held that strict construction is inappropriate for subdivision covenants; rather, the intent or purpose to protect the homeowners' collective interest controls over the free use of land:

The time has come to expressly acknowledge that where construction of restrictive covenants is necessitated by a dispute not involving the maker of the covenants, but rather among homeowners in a subdivision governed by the restrictive covenants, rules of strict construction against the grantor or in favor of the free use of land are inapplicable. . . . The court will place "special emphasis on arriving at an interpretation that protects the homeowners' collective interests."

Riss v. Angel, 131 Wash.2d at 623-24. The Supreme Court held that association authority under consent-to-construction covenants is superseded by specific covenants:

If covenants include specific restrictions as to some aspect of design or construction, the document manifests the parties' intent that the specific restriction apply rather an inconsistent standard under a general consent to construction covenant.

Riss, 131 Wash.2d at 625-26. The *Riss* decision introduced an important distinction between the *minimum* required under specific covenants, and *discretion* to provide further protection under consent-to-construction covenants:

We construe these covenants to mean that the minimums must be satisfied, i.e., the Board has no discretion to permit anything smaller than a 1,400 square foot house or one having a height over 20 feet above the highest finished grade on the lot, but the Board does have discretion, for example, as to maximum size.

Riss, 131 Wash.2d at 626. Maximum size was not specified in the *Riss* covenant; hence, the board was not prohibited from exercising discretion over maximum size. Homeowner associations may not exercise discretion over specific covenants, which “involve primarily a nondiscretionary ministerial procedure.” *Id.* By analogy, “an agency created by statute has only those powers expressly granted or necessarily implied from the statute.” *Anderson, Leech & Morse v. Liquor Control Board*, 89 Wash.2d 688, 694, 575 P.2d 221 (1978). Likewise, associations created by CCRs should have only those powers expressly granted therein, or necessarily implied therefrom.

Specific covenants must supersede consent-to-construction covenants, or specific covenants will be abrogated, as will specific enforcement by homeowners. CCRs in the present case provide “[t]he Association, or any owner, . . . shall have the right to enforce, by proceeding at law or equity, all restrictions, conditions, covenants, reservations.” *Trial Exhibit 1* at 26 (27 of 31); *CP 344*. The right of owner enforcement is phantasmal if a board or architectural committee can intervene to affect the decision.

Historically, running covenants have been enforceable by successors in interest to original covenanting parties, based upon satisfaction of the following elements:

The prerequisites for a covenant to “run with the land” are these: (1) the covenants must have been enforceable between the original parties, such enforceability being a question of contract law except insofar as the covenant must satisfy the statute of frauds; (2) the covenant must “touch and concern” both the land to be benefitted and the land to be burdened; (3) the covenanting parties must have intended to bind their successors-in-interest; (4) there must be vertical privity of estate, i.e., privity between the original parties to the covenant and the present disputants; and (5) there must be horizontal privity of estate, or privity between the original parties.

Leighton v. Leonard, 22 Wash.App. 136, 139, 589 P.2d 279 (1978).

In the present case, the CCRs provide for owner enforcement. *Trial Exhibit 1 at 26 (27 of 31) paragraph 8.1; CP 344*. The CCRs expressly recite that “[a]ll conditions, covenants, restrictions and reservations shall run with the land,” and the intent and purpose “is to protect property values and existing views.” *Trial Exhibit 1 at 1-2 (2-3 of 31); CP 320-21*. The CCRs touch and concern the land because they enhance value and confer a benefit upon the homeowners’ collective interest:

The main consideration in deciding whether covenants run with the land appears to be whether the covenant in question is so related to the land as to enhance its value and confer a benefit upon it.

Rodruck v. Sand Point, 48 Wash.2d 565, 575, 295 P.2d 714 (1956).

The CCRs provide that they “shall be binding upon all persons having or acquiring any right, title or interest in said property.” *Trial Exhibit 1* at 1-2 (2-3 of 31). “Horizontal privity . . . is present . . . when one of the original contracting parties was a homeowners’ association, even if the association did not have legal title in land at that time.” *Lake Arrowhead Community Club v. Looney*, 112 Wash.2d 288, 295, 770 P.2d 1046 (1989). Vertical privity “between the original parties to the covenant and the present disputants” is present in any succession of ownership. *Leighton*, 22 Wash.App. at 140.

Hence, all of the requisites for enforcement of running covenants are satisfied in the present case. Yet respondents’ contractual right of court enforcement will be frustrated if the board is allowed to intervene and decide the case by fiat. The enforcement provision, *supra*, does not distinguish between association and homeowner rights, but authorizes them equally to proceed at law or equity; hence, the association must be denied discretion to interfere with homeowner enforcement. Specific restrictions manifest intent under the CCRs, which would be frustrated by contrary exercise of board discretion. *Riss*, 131 Wash.2d at 625-26.

ISSUE 2: Are homeowner associations necessary parties in actions between owner-members to enforce specific covenants which explicitly authorize such actions?

In declaratory judgment actions, the general rule requires joinder of “necessary parties,” defined as follows:

A necessary party is defined as one whose ability to protect its interest in the subject matter of the litigation would be impeded by a judgment. Such a party must claim a sufficient interest in the litigation such that the judgment cannot be determined without affecting that interest.

Primark, 63 Wash.App. at 906.

Joinder of a homeowner association was raised in *Saunders*, to which the Court responded: “failure to join affects only the court’s authority over the absent party.” *Saunders*, 175 Wash.App. at 437. The CCRs provide a remedy for “any owner,” in law or equity. *Trial Exhibit 1 at 26 (27 of 31), paragraph 8.1; CP 344*. As in *Saunders*, respondents sued directly to enforce the CCRs, a remedy to which they are entitled under paragraph 8.1, *supra*:

CCR ¶1 explicitly gives Somerset homeowners a legal right to enforce all of the covenants against other homeowners. The Meyerses are correct that CCR ¶10 gives the CRC power to enforce that particular covenant, but CCR ¶1 entitles homeowners to do the same. Therefore, the Saunderses are entitled to bring a legal action directly against the Meyerses for violating the covenants.

Saunders, 175 Wash.App. at 438; *Trial Exhibit 1 at 26 (27 of 31)*; CP 344.

In *Wimberly v. Caravello*, the Court of Appeals held that a homeowner association would *not* be prejudiced by litigation seeking to enjoin a garage addition prohibited by a covenant because “injunctions are binding solely on entities whose interests are represented.” *Wimberly v. Caravello*, 136 Wash.App. 327, 334, 149 P.3d 402 (2006). The decision in *Wimberly* was cited in *Saunders*, which explained joinder in terms of jurisdiction:

Washington superior courts have broad subject matter jurisdiction. . . . The critical concept in determining whether a court has subject matter jurisdiction is the type of controversy. . . . Therefore, a court’s jurisdiction does not turn on the presence or absence of a party. . . . Instead, failure to join affects only the court’s authority over the absent party.

Saunders, 175 Wash.App. at 437; citing Const. art. IV, §6.

In anticipation of the Wilcox response, it is unnecessary to defer to homeowner associations on the interpretation of specific covenants because “decisions . . . based on an incorrect interpretation of the covenant . . . are unreasonable as a matter of law.” *Saunders*, 175 Wash.App. at 444 n. 9. By analogy, courts defer to agency interpretations only to the extent those interpretations are reasonable. *Whidbey Island Manor v. DSHS*, 56 Wash.App. 245, 255, 783 P.2d 109 (1989).

ISSUE 3: Did the trial court err in ordering involuntary dismissal for nonjoinder of the HOA?

The Civil Rules do not authorize dismissal for failing to join necessary parties:

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

CR 21, emphasis added. If the Wilcoxes actually believed that the HOA's presence was vital to the proper disposition of the case, they could have moved to have the HOA declared an indispensable party under CR 19(a):

(a) Persons to Be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (A) as a practical matter impair or impede the person's ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the person's claimed interest. **If the person has not been so joined, the court shall order that the person be made a party.**

CR 19(a), emphasis added. The Wilcoxes admit that they "raised the necessity of joining the HOA before trial." *Brief of Appellants'* at 10, fn. 1.

Of course, “[t]he court may add new parties [even] after the case has closed in its discretion, where it will not be prejudicial to those parties.” *Betchard-Clayton v. King*, 41 Wash.App. 887, 894, 707 P.2d 1361 (1985).

The Court of Appeals has found a court-duty to join necessary parties unless a complete determination may be had without their presence:

When a complete determination of a controversy cannot be had without the presence of other parties, a mandatory duty is imposed upon the court to bring them in. If a complete determination can be had without the presence of other parties, then the right to bring them in is addressed to the sound discretion of the court.

Ruston, 90 Wash.App. at 82. This requirement is repeated in statutes governing declaratory relief:

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.

RCW 7.24.110. Complete determination could be had without the HOA because the HOA had authority only to interpret consent-to-construct covenants, and because the right to enforce specific covenants vested independently in homeowners. *Supra*. As in *Saunders*, “[t]he association would not be prejudiced by the litigation and the homeowners did not assert or defend a claim against the association.” *Saunders*, 175 Wash.App. at 438.

The issue then, becomes whether the trial court erred in dismissing the present case in reliance upon an unpublished 1998 opinion of the Court of Appeals? Review of the trial court's decision is based upon abuse of discretion:

The application of CR 21 is within the sound discretion of the trial court whose decision will not be disturbed on appeal absent a manifest abuse of that discretion.

Shelby v. Keck, 85 Wash.2d 911, 918, 541 P.2d 365 (1975). "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons." *Ameriquest Mortgage v. Attorney General*, 177 Wash.2d 467, 478, 300 P.3d 799 (2013).

The trial court acknowledged that "*Gurrad* is not binding precedent" under GR 14.1, but ordered dismissal without prejudice in reliance upon the reasoning in *Gurrad v. Klipsun Waters*, 93 Wash.App. 1012, unpublished (1998). *RP September 24, 2019, 192:10-16, 193:13-14*. The General Rule prohibits citing unpublished opinions dated prior to March 1, 2013:

Unpublished opinions of the Court of Appeals have no precedential value and are not binding upon any court. However, unpublished opinions of the Court of Appeals filed after March 1, 2013, may be cited as non-binding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.

GR 14.1. Cases having precedential value must be published. RCW 2.06.040.

Gurrad was cited orally, in support of the Wilcoxes second motion for directed verdict (mis-transcribed “Gerrard”). *RP September 24, 2019, 169:16-170:12*. The trial court would not have had *Gurrad* to rely upon had the appellants not violated General Rule 14.1 by citing an unpublished opinion dated prior to March 1, 2013:

THE COURT: . . . It’s an issue that, you know, we discussed a little bit at one of our motions in limine and so I’m going to need an opportunity to read through the citation, through that authority that defendant has given.

RP September 24, 2019, 172:10-22. Even if the court had found the case on its own, it should not have accorded any persuasive value because *Gurrad* dated before March 1, 2013. GR 14.1. In any event, the court abused its discretion in dismissing the present case because an unpublished opinion dating from 1998 constitutes “untenable grounds or untenable reasons” under GR 14.1 and *Shelby. Supra*.

The foregoing discussion raises a sub-issue of whether the trial court could base dismissal upon the *reasoning* of *Gurrad*. Under the doctrine of *stare decisis*, Supreme Court decisions on issues of state law are binding until overruled. *In re LaChapelle*, 153 Wash. 2d 1, 5, 100 P.3d 805 (2004). In discussing conflicting authority between divisions, the Court of Appeals applied the rule of *stare decisis* to appellate decisions:

One approach would be to mandate a trial court to follow the division in which it geographically sits. Another approach would be to allow the trial courts to independently evaluate the conflicting precedent and conclude how our Supreme Court would resolve the conflict. Professor DeForrest favors the latter approach, as do we.

Union Bank v. Vanderhoek Associates, 191 Wash.App. 836, 848, 365 P.3d 223 (2015); citing DeForrest, 48 Gonzaga Law Review at 491-513.

Saunders v. Meyers is a 2013 Division 1 decision which relied upon *Wimberly v. Caravello*, a 2006 Division 3 decision, to hold that homeowner associations are not necessary parties in actions between homeowners to enforce specific covenants:

Like in *Wimberly*, the *Saunderses* did not assert any claim against the CRC. Rather, they sued to enforce the covenant, which they were entitled to do under the plain terms of CCR ¶1. We hold that the trial court acted within its discretion in determining that the CRC was not an indispensable party in an action by homeowners to enforce CCR ¶10.

Saunders, 175 Wash.App. at 438; citing *Wimberly*, 136 Wash.App. 327.

We submit that the Supreme Court would follow the rule articulated in *Saunders* over the assertion in *Gurrad* that homeowner associations have some undefined interest in enforcing covenants:

The Association's interest in enforcing the protective covenants, whether it chooses to exercise that power or not, is affected by this declarative action; therefore, it is a necessary party and the court has jurisdiction over it.

Gurrad, 93 Wash.App. 1012 at 2, unpublished (1998). In *Gurrad*, the homeowner association was sued by a homeowner who objected to *approved* construction on a neighbor's lot, including both attached and detached garages, with the door of the latter opening upon Klipsun Lane; in violation of governing covenants. *Gurrad* at 1. The trial court granted a motion to dismiss claims against the Association, and the Court of Appeals reversed. *Gurad* at 2. The Court also reversed summary judgment dismissing *Gurrad*'s claims, holding the construction clearly violated specific covenants. *Gurrad* at 4. Finally, the Court dismissed claims against the Association under exculpatory clauses in the covenant, noting that "the Gurrads may still bring an action to enforce the covenants, just not against the Association or the ACC." *Gurrad* at 6. Hence, the holding in *Gurrad* left the parties in the same posture as the present case prior to involuntary dismissal: a direct action between homeowners, without participation of the HOA. We suggest that the Supreme Court denied review of *Gurad*, 137 Wash.2d 1036 (1999), because the Court of Appeals reached the correct result notwithstanding the unusual posture. Review of the case would have been a waste of time and expense for an unpublished decision, which has no precedential value and is not binding on any court. GR 14.1.

Moreover, affirming the “necessary party” status of homeowner associations in *Gurad* would conflict with the decision in *Riss v. Angel*, that specific restrictions manifest intent under covenants which would be frustrated by a contrary exercise of board discretion. *Riss*, 131 Wash.2d at 625-26. Contrary to *Gurad*, homeowner associations do not have an interest in enforcing specific covenants, only in enforcing consent-to-construction covenants. The enforcement interest in *Gurad* conflates the *Riss* distinction between specific and consent-to-construction covenants because it invites associations to participate in homeowner enforcement.

In so doing, *Gurad* would also nullify two centuries of decisions governing the enforcement of running covenants. Under *Gurad*, we must prove not only enforceability, touch and concern, intent, vertical privity, and horizontal privity; we must also satisfy the association’s undefined “interest in enforcement.” Yet the *Gurad* decision does not tell us how this institutional interest differs from consent-to-construction. The mere addition of the *Gurad* element converts specific covenants into consent covenants, eviscerating the distinction in *Riss*. Such would be particularly difficult to reconcile with the holding in *Riss* that associations have “no discretion” over specific covenants. *Riss*, 131 Wash.2d at 625-26.

ISSUE 4: Did the trial court err when it denied appellants' petition for attorney's fees and costs where the CCRs [authorize an award of fees to "[a]ny party who successfully enforces these CC&R's"] and where the court dismissed all of respondents' claims for failure to join an indispensable party?

The attorney fee provision in the CCRs expressly requires "successful enforcement:"

Any party who successfully enforces these CC&R's shall be entitled to recover attorney their reasonable costs and attorney fees, whether a lawsuit is filed or not.

Trial Exhibit 1 at 26 (27 of 31); *CP 344*. The Wilcoxes did not "successfully enforce" the CCRs; rather, the case was dismissed upon an erroneous determination that the HOA was a "necessary party." *RP September 23, 2019, 168:16-18; supra*. Reversal of the dismissal should affirm the denial of attorney fees.

The Wilcoxes cite *Kaintz v. PLG* on the issue of mutuality; however, the issue statement in *Kaintz* is revealing as to "successful enforcement:"

[W]hether the principle of mutuality of remedy authorizes the award of attorney fees **where a party prevails** in an action brought on a contract that contains a bilateral attorney fee clause (rendering RCW 4.84.330 inapplicable) **by establishing the invalidity or unenforceability of the contract.**

Kaintz v. PLG, 147 Wash.App. 782, 789, 197 P.3d 710 (2008), emphasis added. The Wilcoxes did not establish invalidity or unenforceability of the CCRs. This distinction is material because it is the basis of the distinction between involuntary dismissal and judgment on the merits. *CR 472: 20-22*.

By analogy, the U.S. Supreme Court holds, under the Civil Rights Act, that a prevailing party must point to some resolution which changes the legal relationship between itself and the opposing party:

[R]espect for ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail.” . . . Thus, at a minimum, to be considered a prevailing party within the meaning of §1988, the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant. . . . Beyond this absolute limitation, a technical victory may be so insignificant . . . as to be insufficient to support prevailing party status.

Texas State Teachers v. Garland Independent School District, 489 U.S. 782, 792, 109 S.Ct. 1486, 1493, 103 L.Ed. 2d 866 (1989). In the present case, the relationship between the parties has not changed whatsoever: if the dismissal were affirmed, the Wilcoxes would be back in Superior Court defending the same claims in *Jones v. Wilcox, et al.*, 19-2-03402-06, filed November 4, 2019, and stayed March 6, 2020, pending the outcome of the present appeal. The Wilcoxes stipulated to the stay at respondents’ request.

In *Day v. Santorsola*, the Court of Appeals reviewed a covenant provision authorizing attorney fees for “successful action:”

[I]n the event a successful action is instituted by any person, the person or persons instituting such action shall be entitled to their costs incurred, together with a reasonable attorney’s fee to be fixed by the Court.

Day v. Santorsola, 118 Wash.App. 746, 769, 76 P.3d 1190 (2003); *review denied*, 151 Wash.2d 1018, 91 P.3d 94 (2004). The Court held “[i]t is reasonable to apply by analogy case law construing ‘prevailing party’ to determine whether the Days were successful.” *Id.* The owner/builders were held to be substantially prevailing, and therefore successful, because “the trial court allowed [them] to build a house nearly in accordance with the house they sought to have approved.” *Day*, 118 Wash.App. at 770.

In the present case, the Wilcoxes had obtained HOA approval and constructed their residence up to the second story plate, unbeknownst to respondents, before present action was filed. In obtaining involuntary dismissal, the Wilcoxes did not succeed on the merits, and the dismissal will have no effect on the ultimate outcome, which will be determined either on remand or in *Jones v. Wilcox, et al.*, 19-2-03402-06. The trial court did not allow the Wilcoxes to construct the residence for which they applied, it held that the HOA was a necessary party in any such decision.

The foregoing interpretation of “successful enforcement” accords with Black’s definition of “prevailing party:”

Prevailing party. The party to a suit who successfully prosecutes the action or **successfully defends** against it, prevailing on the main issue, even though not necessarily to the extent of his original contention. The one in whose favor the decision or verdict is rendered and judgment entered. . . .

Black’s Law Dictionary, 6th Ed., 1990, at 1188, emphasis added.

The Wilcoxes’ argument rests upon the holding in *Hawk v. Branjes*, which affirmed an award of fees after *voluntary* dismissal, based upon a bilateral contract fee provision. *Hawk v. Branjes*, 97 Wash.App. 776, 778, 986 P.2d 841 (1999). According to the Wilcoxes:

Hawk held that a party seeking attorney’s fees under a “successful party provision in a contract was entitled to fees following a voluntary dismissal. If a defendant is “successful” following a voluntary dismissal, then it necessarily follows that the defendant is successful following *involuntary* dismissal.

Brief of Appellant at 2-3.

Contrary to the Wilcoxes’ argument, *Hawk* expressly applies only to attorney fee awards after *voluntary* dismissal, which constitutes a material distinction because the logic of the decision seeks to prevent plaintiffs from avoiding contractual fee awards through *voluntary* dismissal:

While a voluntary dismissal under CR 41(a)(1) generally divests a court of jurisdiction to decide a case on the merits, an award of attorneys' fees pursuant to a statutory provision or contractual agreement is collateral to the underlying proceeding. As a result, the court retains jurisdiction for the limited purpose of considering a defendant's motion for fees. **Any other result would permit a party to voluntarily dismiss an action to evade an award of fees under the express terms of a statute or agreement.**

Hawk, 97 Wash.App. at 782-83, emphasis added. Where the dismissal is *involuntary*, as in the present case, the plaintiff does not control the outcome, and does not evade the contract by his or her own action.

The Wilcoxes argue that the foregoing distinction “improperly conflates two entirely separate analyses from the *Hawk* opinion[:] . . . whether the defendant was successful and prevailed[, and] . . . whether the court retained jurisdiction to hear a fee petition.” *Brief of Appellant* at 21. To the contrary, the decision begins with, and is entirely based upon, retention of jurisdiction to award attorney fees after *voluntary* dismissal:

A trial court retains jurisdiction following a plaintiff's voluntary nonsuit under Civil Rule 41(a)(1)(B) to consider a defendant's motion for attorneys' fees under a statutory or contractual provision.

Hawk v. Branjes, 97 Wash.App. 776, 777-78, 986 P.2d 841 (1999). The first portion of the analysis held RCW 4.84.330 inapplicable to bilateral fee provisions; hence, the statutory definition of “prevailing party” did not apply.

Hawk, 97 Wash.App. at 781-82. The second portion of the analysis reasoned that trial courts retain jurisdiction to award attorney fees after *voluntary* dismissal in order to prevent plaintiffs from dismissing to avoid contract fee provisions. *Hawk*, 97 Wash.App. at 782-83. As evident in memoranda filed on their behalf, respondents did not seek to avoid final judgment; rather, they sought to reserve the attorney fee award for the prevailing party on the merits. CP 446-49. If respondents prevail, either upon remand or in *Jones v. Wilcox, et al.*, 19-2-03402-06, they are entitled to an award of fees for the entire matter, not a split of fees as of the dismissal order; the latter outcome would violate the CCR provision. Under the logic of *Hawks*, the CCRs authorize attorney fees to the party who “successfully enforces these CC&R’s,” which can only be satisfied after final judgment:

[U]nlike in . . . *Hawk*, dismissal of the unlawful detainer action did not leave the parties in the position “as if the action had never been brought.” . . . 4105 filed a separate breach of contract action against Green Depot to recover the past due rent and damages that were still pending.

4105 1st Avenue South Investment v. Green Depot, 179 Wash.App. 777, 787, 321 P.3d 254 (2014); citing *Wachovia SBA Lending v. Kraft*, 165 Wash.2d 481, 492, 200 P.3d 683 (2009). The Wilcoxes cite other decisions involving *voluntary* dismissal which the respondents distinguish on same basis.

The Wilcoxes also cite *Housing Authority v. Bin*, wherein the Court noted that “[a] housing authority must comply with federal regulations and its own grievance procedures before terminating a tenancy,” and awarded attorney fees under a lease provision after dismissing the unlawful detainer action based upon procedural irregularities: the Housing Authority abused its discretion in denying a continuance based upon error of law and information obtained outside of the hearing to which the tenant had no opportunity to respond. *Housing Authority v. Bin*, 163 Wash.App. 367, 371, 260 P.3d 900 (2011).

Even if the civil rules applied, they are inconsistent with the plain meaning of RCW 59.12.030(3). Under CR 81(a), the civil rules apply to all civil proceedings “[e]xcept where inconsistent with rules or statutes applicable to special proceedings.” Unlawful detainer actions are special proceedings.

Christensen v. Ellsworth, 162 Wash.2d 365, 374, 173 P.3d 228 (2007). The respondents distinguish *Bin* due to the special nature of unlawful detainer proceedings and administrative hearings.

Finally, the Wilcoxes cite a recent unpublished opinion in *SE Boise Boat & RV Storage v. Graham*, wherein the appellant did not challenge the legal basis for awarding fees to the prevailing party; “[r]ather, it assert[ed] that the amount awarded was manifestly unreasonable.” *SE Boise Boat & RV*

Storage v. Graham, 79618-6-I, 2020 WL 1917475 at *2 (2020). As no award of fees has been granted, the cited case is irrelevant to the present appeal, just as it is non-binding.

The Wilcox request for attorney fees incurred on appeal should be denied because applicable law does not grant a right to recover fees on review, and the Wilcoxes do not argue to the contrary in brief. RAP 18.1.

* * *

VI. CONCLUSION

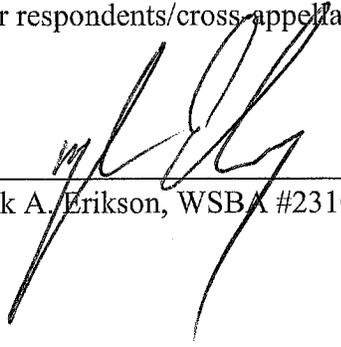
As has been settled law for 23 years, specific covenants supersede consent to construction covenants. Homeowner associations are not necessary parties in actions between owner-members to enforce specific covenants which explicitly authorize such actions. For these reasons, and because it was based upon an abuse of discretion, trial court dismissal of the present case should be reversed, and the case remanded for further proceedings consistent with this Court's order.

Trial court denial of attorney fees should be affirmed because the Wilcoxes did not successfully enforce the CCRs, and because Washington law does not authorize an award of attorney fees upon involuntary dismissal under CR 41(b)(3).

RESPECTFULLY SUBMITTED this 5th day of June, 2020.

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By:



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CERTIFICATE OF SERVICE

#54324-9-II

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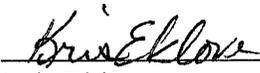
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