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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 289117

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ROSS WILKINSON, et, ux, et al., Appellants

vs.

CHIWAHA COMMUNITIES ASSOCIATION, Respondents

REPLY BRIEF OF APPELLANT

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Abbreviations

CP: Clerk's Papers

I. REPLY TO STATEMENT OF THE CASE

The Respondent often describes the Appellants and the use of their properties in inflammatory tones both in this Appeal and in the Declarations submitted in support of its Cross Motion for Summary Judgment:

A small group of owners would like to operate a disruptive commercial nightly/weekend rental business in a residential and recreational community. (Brief of Respondent, page 1.)

However, the proof to the trial court regarding the rentals of the Appellants's vacation homes being a disruption to the community was disputed. In fact, the "disruptions", it was alleged, were associated almost exclusively with the other owners themselves and their use of their own cabins. (CP 590-592; 552-570; 571-578; 311-316)

The Respondent also likes to lump each of the Appellants into a single category which factually is just not possible. Specifically, some of the Appellants use property managers while some do not; some have a business license while others do not; some own their properties as individuals and others own their properties in a separate entity; and some rent their properties infrequently while others more frequently. Bottom line is that the only thing that each of the Appellants have in common is that they do occasionally rent out their vacation homes when they are not themselves using them. (CP 557)

Further the Respondent likes to emphasize what the Appellants "could

do” not what is actually done. In other words, the Respondent states that two of the Appellants advertise the availability of their properties for rent as accommodating “up to 10 people” but there is no evidence that has in fact ever happened. (Brief of Respondent, page 8.) There is also no evidence that the properties themselves, when rented, are rented to other than a single family. There is further no evidence that whoever rents the Appellants’ properties for the short-term puts any more stress or strain on the community and its resources than does a tenant with a large family who rents a property for the long term. (CP 553)

Finally, the Respondent has provided the Court with no proof of any problem with any tenant (whether short term or long term) since 1991 to the passage of the 2008 Amendment despite the clear proof that rentals of the vacation homes have been going on for many years.

II. REPLY ARGUMENT

A. The Cross Motions for Summary Judgment.

1. Examination of the 1988 and 1991 Covenants. The Respondent states that it is “baffled by Appellants’ insistence . . . that the trial court improperly examined the 1988 and 1991 Amended Protective Covenants.” (Brief of Respondent, page 17.) However, the Respondent misrepresents the position of the Appellants. (See page 6 of Appellants’ Brief.) Clearly, to

determine whether or not a prohibition on rentals of a duration of less than six months unreasonably altered the general plan of development of Chiwawa River Pines, the trial court had to look at the general plan of development initiated by the Pope & Talbot Covenants as well as the confirming 1988 and 1991 Covenants. But again, that “look” was in the context of the answering question regarding the validity/invalidity of the 2008 Amendment and its specific prohibition on rentals of less than six months in duration.

2. The general plan of development. As previously discussed in Appellants’ Brief, the general plan of development of Chiwawa River Pines is established and defined by the Pope & Talbot Covenants and is confirmed by the 1988 and 1991 Covenants. As previously stated, those Covenants collectively dedicated the use of lots within the subdivision to single family residential purposes:

4. LAND USE.

Lots shall be utilized solely for single family residential use consisting of single residential dwellings and such out-buildings . . . as consistent with permanent or recreational residence. . . . (CP 498-516)

That same general plan of development prohibited “commercial uses”:

5. NUISANCES OR OFFENSIVE USE.

No nuisance or offensive use shall be conducted or suffered as to lots subject hereto, nor shall any lot be utilized for industrial or commercial use (CP 498-516)

The above covenants *did not* expressly or impliedly define the rental of a single family residence for single family residential purposes for *any* time duration to be a commercial use.

3. The impact of the 2008 Amendment on the general plan of development. On the other hand, the 2008 Amendment expressly defined *all* single family residential rentals to be a commercial use:

RECITALS

* * * *

WHEREAS, a special meeting was called on September 27, 2008 to vote on three independent exceptions to commercial use: service-oriented businesses, long-term rentals, and short-term rentals; and

* * * *

3. LAND USE.

. . . . Lots shall not be utilized for industrial or commercial EXCEPT for the following:

* * * *

- (2) **Long-term residential rentals for a period of more than six (6) consecutive months:** All residential rentals for a period of six (6) consecutive months or more shall be permitted, shall be in writing, subject to compliance with local zoning and permitting regulations, and subject to the Protective Covenants and By-laws.

All residential rentals for a period of less than six (6) consecutive months shall not be permitted.¹ (CP 449-451; 525-526)

¹

The bolding of text as set forth above is as it appears in the recorded version of the 2008 Amendment.

But, having done that, the 2008 Amendment created *an exception* to the prohibition on commercial uses by allowing “long-term residential rentals” of six consecutive months or more but expressly barring rentals of less than six months. Therefore, if the pre-2008 Amendment general plan of development included the right to rent as part of the bundle of rights included within the concept of “single family residential use”, then the 2008 Amendment altered that general plan in two ways: first by expressly classifying all rentals as prohibited commercial uses subject to approved exceptions; and, second, by prohibiting the ability to rent for residential purposes for periods of less than six months.

4. Respondent has not appealed trial court’s decision in favor of Appellants. In this case, the trial court concluded that the six-month restriction was unenforceable. The Respondent has chosen not to challenge/appeal that decision of the trial court. Therefore, the principal issues on appeal are (1) whether the trial court has authority to re-write the 2008 Amendment; and (2) if it does have that authority, is its actual “re-write” (i.e., the reduction of the rental prohibition from less than six months to less than 30 days) supportable by the undisputed facts and the applicable law.

B. The Scope of the Pleadings Did Not Give the Trial Court Authority to Re-Write the 2008 Amendment.

1. The “main issue” in this case is not concerned with overnight/weekend rentals. Contrary to the Respondent’s characterization on page 17 of its Brief, the “main issue” has never been “whether or not Appellants can operate their nightly/weekend rentals.” Rather, the main issue – indeed the only issue – was and always has been whether or not the 2008 Amendment banning residential rentals of less than six months was valid or invalid.²

2. Limited and specific issue presented by pleadings: On page 17 of its Brief, the Respondent states that it is “baffled by Appellants’ insistence that the parties asked the trial court to resolve limited and specific questions . . .”. (See pages 24 to 25 of Appellants’ Brief.) Yet, on the same page of its Brief, the Respondent acknowledges the limited nature of the issue expressly posed to the trial court:

“Appellants initiated the current suit for declaratory judgment seeking to declare the 2008 Amendment to the Protective Covenants invalid.

²

In the context of the Cross Motions for Summary Judgment, “short-term rentals” referred to rentals of less than six months while “long-term” referred to rentals of more than six months. In the context of this Appeal, as a result of the Respondent’s failure to appeal the trial court’s determination that the less than six month prohibition on renting was invalid, “short-term rentals” now refers to rentals of less than 30 days while “long-term” refers to rentals of more than 30 days.

The Association counterclaimed for declaratory and injunctive relief, seeking defined by the 2008 Amendment as to declaration of validity and injunction against short-term rentals” [i.e., rentals of less than six months under the 2008 amendments]. (Brief of Respondent, page 17.)

C. Washington Law Did Not Give the Trial Court Authority to Re-Write the 2008 Amendment.

1. “Equity” does not provide the trial court with the authority to re-write the 2008 Amendment. In an effort to avoid the limitations inherent in the specificity of the scope of relief as set forth in the parties’ pleadings, Respondent seems to argue that the trial court was justified in expanding the scope of its ruling beyond just that of declaring the validity/invalidity of the 2008 Amendment because “[t]he Association asked the trial court to use its broad equitable powers to resolve the entire case” by asking the trial court to grant “any additional or further relief that the Court finds equitable, appropriate or just.” Equity, however, as discussed on page 8 of this Reply Brief, is not available as a tool to re-write contracts except in the context of an unreasonable non-competition covenant in an employment contract.

2. Exceptions to the mechanical divisibility rule of *Seattle Professional Engineering Employees v Boeing*, 139 Wn.2d 824, 991 (2000) do not provide the trial court with authority to re-write the 2008 Amendment. The Respondent argues that if non-competition clauses in employment contracts are an exception to the mechanical divisibility rule as

set forth in *Seattle Professional Engineering Employees v Boeing*, 139 Wn.2d 824, 991 (2000) than so should be “restrictive covenants” in a real estate context. But no authority is cited for that proposition; nor is any argument made for the extension of the law governing non-competition clauses in employment contracts to restrictive covenants.

Wood v May 73 Wash.2d 307 (1968) provides a good explanation about why the re-write of unreasonable non-competition clauses is an exception to the mechanical divisibility rule. In *Wood*, at pages 310 and 312, the Court explains that in employment situations it is a balancing act between the desire to protect the business or goodwill of the employer with restraints against the employee of his liberty to engage in an occupation along with depriving the public of services and restraint of trade principles that provides the justification for the court to exercise its equitable powers in re-writing an unreasonable non-competition clause - factors that don't exist in this case.

Next, Respondent argues that the Court in *Wood* at page 313 allowed partial enforcement of a non-competition covenant where to do so is “possible without injury to the public and without injustice to the parties.” However, that rule was discussed in *Wood* specifically, and again, only in relationship to the enforcement of non-competition clauses that are nothing more than a restraint of trade:

It is well settled that a court of equity will use its power to enforce a restriction against a former employee's competition only to the extent that such restriction is reasonable and necessary to protect a legitimate business interest of the employer. *Racine v. Bender*, supra, *Schneller v. Hayes*, 176 Wash. 115, 28 P.2d 273 (1934). See also 6A Corbin, *Contracts* s 1394 (1962). But it does not follow that an entire contract must fail because of an unreasonable restriction as to time and area. One line of authority holds that unless the contract is divisible the court will not write a new contract and will refuse to grant any equitable relief against competition. See, e.g., *Wisconsin Ice & Coal Co. v. Lueth*, 213 Wis. 42, 250 N.W. 819 (1933); **591 *Welcome Wagon, Inc. v. Morris*, 224 F.2d 693 (4th Cir.1955); *Restatement, Contracts* s 518 (1932). **However, a substantial number of American courts in later cases have adopted a new and different rule that a contract in restraint of trade will be enforced to the extent it is reasonable and lawful.** See, e.g., *John Roane, Inc. v. Tweed*, 33 Del.Ch. 4, 89 A.2d 548, 41 A.L.R.2d 1 (1952); *Redd Pest Control Co. v. Heatherly*, 248 Miss. 34, 157 So.2d 133 (1963); *Igoe v. Atlas Ready-Mix Inc.*, 134 N.W.2d 511 (N.D.1965).

[8] We adopt the reasoning in the second line of cases. The enforcement of such a contract does not depend upon mechanical divisibility, meaning that offending portions of the covenant can be lined out and still leave the remainder grammatically meaningful and thus enforceable. This is the so-called 'blue pencil test.' The better test is whether partial enforcement is possible without injury to the public and without injustice to the parties. *Ceresia v. Mitchell*, 242 S.W.2d 359 (Ky.1951); *Fullerton Lumber Co. v. Torborg*, 270 Wis. 133, 70 N.W.2d 585 (1955); 17 C.J.S. *Contracts* s 289 p. 1224. (*Wood v. May* 73 Wash.2d 307, 312-313, 438 P.2d 587, 590 - 591 (WASH 1968).)

3. The application of the "blue pencil" test does not provide the trial court with authority to re-write the 2008 Amendment. The Respondent argues that the "blue pencil test" can be applied to the 2008 Amendment and that once it is applied "the Appellants would still be prohibited from operating nightly rentals." The Respondent then includes an illustration of

how the 2008 Amendment could be “lined out” to read in its favor. But, in this case, the Respondent’s “line outs”, while ingenious, are selective and have the effect of re-writing the Amendment. By analogy to severability clauses, our Court has stated as follows:

We give effect to severability clauses if we can easily excise the unconscionable provision without essentially rewriting the contract. See *Zuver*, 153 Wash.2d at 320, 103 P.3d 753 (citing *Ingle*, 328 F.3d at 1180). (*McKee v. AT&T Corp.* 164 Wash.2d 372, 403, 191 P.3d 845, 861 (Wash. 2008).)

Notwithstanding the ingenuity of the Respondent, an insurmountable problem in trying to apply the “blue pencil” to the 2008 Amendment is that the line outs don’t change the fact that the 2008 Amendment classifies *all* renting, even if for single family residential purposes, as a prohibited commercial use subject only to the exceptions set forth in the Amendment itself. Therefore, even after the re-write, residential rentals of “a month or more” are classified as a commercial use and, as such, are subject to regulation as opposed to a permitted residential use.

4. The severability clause contained in the covenants does not provide the trial court with authority to re-write the 2008 Amendment.

Next the Respondent argues that the existence of a severability clause in the covenants at issue provides a contractual basis for the trial court’s action to re-write the 2008 Amendment:

“Additionally, in the present case, there is a severability clause that allows the invalidation of part or parts of the covenants, without affecting the remainder. This severability clause is absolutely fatal to Appellants’ argument against partial enforcement. There is a contractual basis for the trial court’s ruling [that] the 2008 Amendment is partially invalid.”

First, and again, this position is without citation to any authority. Second, and in any event, the language of the severability clause at issue in this case does not provide for an offending covenant to be re-written:

The provisions hereof are severable, and the invalidation of any part or parts hereof shall not thereby disqualify or invalidate the other provisions hereof which shall remain in full force and effect in accordance with their terms.

But, as previously noted –

We give effect to severability clauses if we can easily excise the unconscionable provision without essentially rewriting the contract. See *Zuver*, 153 Wash.2d at 320, 103 P.3d 753 (citing *Ingle*, 328 F.3d at 1180). (*McKee v. AT&T Corp.* 164 Wash.2d 372, 403, 191 P.3d 845, 861 (Wash. 2008).)

D. Even if the Trial Court had Authority to Re-Write the 2008 Amendment, it Erred by Concluding That a Prohibition on Rentals of Less than 30 Days was Consistent With the General Plan of Development.

1. *The Ross v. Bennett*, 148 Wash. App. 40 (2008/2009) review denied at 166 Wash 2nd 1012(2009) decision in general. Respondent’s primary argument on this issue is to distinguish the clear holding of *Ross*. In reaching its holding, the court in *Ross* observed that the appellant’s receipt of rental income from short term or vacation type rental “in no way detracts

or changes the residential characteristics of the use by the tenant” in the case where the rental itself “is identical to [the owner’s] own use of the property, as a residence, or the use by a long-term tenant.” (*Ross, supra* at 51-52.) In fact, the Respondent expressly acknowledges that *Ross* expressly holds that the “frequency of use does not change the nature of [the] use.” (*Ross, supra* at 51.) Notwithstanding the clarity of that holding and without pointing out any supportive language in *Ross*, the Respondent argues that a higher rental frequency and/or higher income production in this case (presumably a result of internet advertising³) distinguishes *Ross*.

In addition to the lack of supportive language in *Ross*, the Respondent cites no undisputed evidence that the “impact” of a higher volume of short term rentals (defined here to refer to overnight or weekend rentals) is any greater than that which a large family might itself engender living at their residence full time - particularly in an area that is known for its recreational opportunities and one where owners often invite other friends to stay for weekends to enjoy the recreational opportunities that exist in the area.

2. The *Main Farm Homeowner’s Association v. Worthington*, 121 Wn.2d 810, 854 P.2d 1072 (1993) and *Hagemann v. Worth*, 56 Wn. App.

³

The *Ross* opinion does not discuss internet advertising one way or the other.

85, 782 P.2d 1072 (1989) decisions. The Respondent next argues that *Ross* is not consistent with the *Main* and *Hagemann* decisions. However, both of those cases were argued to the *Ross* court and were expressly rejected as standing for the proposition that a vacation rental constitutes a business use:

Ross and Schwartzberg argue that the term “residential” or “residence purposes” in a restrictive covenant prohibits any business use. *Metzner v. Wojdyla*, 125 Wash.2d 445, 886 P.2d 154 (1994) (operation of licensed child daycare facility violated covenants restricting use of property to residential purposes only); *Main Farm Homeowners Ass’n v. Worthington*, 121 Wash.2d 810, 854 P.2d 1072 (1993) (for profit adult family home violated covenant stating “lots . . . shall be used for single family residential purposes only” due to the commercial nature of the use); *Hagemann v. Worth* 56 Wash.App. 85, 91, 782 P.2d 1072 (1989) (defendant was enjoined from operating a business providing foster care to elderly people on property when restrictive covenant prohibited “business, industry or commercial enterprise of any kind or nature”). The cases cited by Ross and Schwartzberg, do not compel this court to conclude that a vacation rental is a business use. Bennett proposes a rental of the property that is identical to his own use of the property, as a residence, or the use made by a long-term tenant. The owner’s receipt of rental income either from short or long-term rentals, in no way detracts or changes the residential characteristics of the use by the tenant. (*Ross, supra* at 51.)

In *Main*, the Court observed that in determining the intent of a restrictive covenant, the language of a covenant is to be given its “ordinary and common use.” (*Main, supra* at 815.) In that case, the restrictive covenant at issue stated that “lots . . . shall be used for single family residential purposes only.” The Court went on to conclude that if language is given its “ordinary and

common use”, it was not the job of the judiciary to “read the covenant so as to defeat its plain and obvious meaning.” (*Main, supra* at 816.)

The *Main* court went on and analyzed the term “family” and concluded that it did not include persons, who before they arrived at the residence, were all strangers, who required 24/7 supervision and care by persons with certain language, physical, health, emotional and other professional skills who provided these services/skills as a means of making a living and where the “family” could not be formed without approval from the state who was also free to inspect it at any time.⁴ (*Main, supra* at 818.) In this case, there is no evidence in the record that the tenants actually renting the Appellants’ properties aren’t, in the more traditional sense of a family, related by blood, marriage or adoption.⁵

Next, the *Main* Court addressed the plain meaning of the term “residence”⁶ and observed as follows:

⁴ The Court observed that attempting to use the dictionary to come up with a single, all purpose definition of the word “family” would not provide an acceptable definition.

⁵ The *Main* court did, however, conclude that the traditional definition of “family” was one end of the spectrum of a number of unsatisfactory definitions for purposes of the inquiry before that court.

⁶ Again, a term that it held could not be defined by taking a phrase or two out of a dictionary.

The next focus must be on the second, but separate restriction, i.e. the premises can be used *only* for *residential* purposes. It is most important to note that this focus is on *purposes*. This distinguishes cases where the restriction was on the nature of the *structure*, rather than the *purposes* to which it was put. (*Main, supra* at 819.)

Citing a difference between an “occasional and an habitual and customary use” of the residence, the *Main* court, at 820, noted as follows:

In this case the “main use and purpose” is not to provide a single family residence, but to provide 24-hour protective care and supervision in exchange for money.

The single-family residential nature of defendant’s use of her home is destroyed by the elements of commercialism and around-the-clock care that must be accorded to the unrelated persons who occupy her home. The use to which the defendant puts her house is more institutional in nature than it is familial. (*Main, supra* at 821.)

In this case, there is absolutely no question at all that the Appellants’ vacation homes are being rented and used for rental residential purposes supplemental to the Appellants’ own use as their personal vacation homes. Other than for residential purposes, there is no other “use” that either the Appellants or their tenants are making of their properties. As in *Ross* the fact that the Appellants derive income from the residential use by others of their properties does not change the character of the use itself. Therefore, the *Main* decision does not support the Respondent’s position that renting to tenants who occupy the properties as their residence for either short term or long term use constitutes a violation of the single family residential restriction

and/or constitutes a commercial use.

3. Lodger vs. tenants. And the Respondent's distinction between "lodgers" ("lodging with a duration of less than one month") and "tenants" adds nothing to the analysis. The issue in *Ross* involved a prohibition on rentals of less than one month but the issue was the use of the property, not the duration of the use and not its classification under the Landlord-Tenant act. In fact, it was argued to the *Ross* Court that because vacation rentals were subject to excise tax, they constituted a business and were prohibited by the CPE covenant:

Ross and Schwartzberg fail to establish that Washington business classifications for tax purposes were relied on by the drafters. Likewise, whether the short-term rental is subject to state tax does not alter the nature of the use. We decline to read a distinction between long and short-term rentals into the CPE Covenant, where none expressly exists. (*Ross, supra* at 51.)

And again, these properties are being used as second home vacation rentals that are also used by the Appellants' themselves.

E. The Trial Court Exceeded its Authority in Entering the Following Ruling:

"Rentals for a duration of less than one month violate the single-family residential use restriction and prohibition against commercial use, nuisance, and offensive use in the 1988 and 1991 Amended Protective Covenants."⁷

⁷ CP 858. See also pages 24-25 of Appellants' Brief and pages 17 - 19 of Respondent's Brief.

In its Brief the Respondent now expressly acknowledges the legal principle that the Appellants raised to the trial court when the Appellants objected to the inclusion of the above Rulings: to-wit, that such rulings are superfluous. (See pages 39-40 of Respondent's Brief.) Based upon that belated acknowledgment, it is therefore appropriate for this Court to enter an order striking the trial court's "Ruling" as related to its interpretation of the 1988 and 1991 covenants. Otherwise, if this Court reverses the trial court on the single question of its authority to re-write the 2008 Amendment, the Respondent will use the above "Ruling" as the basis for an argument that it can enforce the 1991 Covenants as barring rentals of less than 30 days.

In support of the trial court's "Ruling", the Respondent relies exclusively on the Declaration of Gloria Fisk. (CP 268-310.) But that reliance is misplaced for two reasons. First, Appellants' attorney submitted a Declaration regarding minutes of a Chiwawa trustee's meeting that he found that appeared to cover a meeting that occurred in August/September, 2007. (CP 593 - 596.) Contrary to the Declaration of Gloria Fisk regarding events that occurred in 1987 and 1991, those minutes disclose that the Board had no idea whether or not a rentals were a commercial use:

Various owners within the Chiwawa own rentals. Mike reviewed the bylaws and pointed out that no lot can be utilized for industrial or commercial use. He wanted the board to determine if rentals are

considered to be a commercial use.

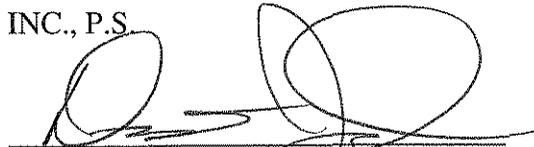
Second, since Gloria's Declaration focused on very short term rentals, it was essentially irrelevant as to the issue before the trial court - that is, the validity/invalidity of the 2008 Amendment - focused on whether or not a prohibition on rentals of less than six months violated the general plan of development.

III. CONCLUSION

The trial court determined that the 2008 Amendment was invalid as written. That should have been the end of this litigation. And it would have been but for the trial court then re-writing the rental restriction to what it felt that it should have been in the first place. The issue of the trial court's ability to do a re-write either from the standpoint of the scope of the pleadings or from the standpoint of the applicable law represents the heart of the issue before this Court. After considering the applicable law as discussed above, the Petitioners ask this Court to reverse the trial court regarding its re-write thereby confirming the trial court's decision that the 2008 Amendment is invalid.

Respectfully Submitted,

DENNIS JORDAN & ASSOCIATES,
INC., P.S.

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

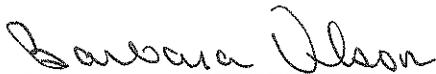
Dennis Jordan, WSBA #4904
Attorney for Appellants

DECLARATION OF MAILING

I declare under the penalty of perjury of the laws of the State of Washington that a copy of the foregoing Reply Brief of Appellants was on this day deposited in the U. S. mail by declarant in a properly stamped and addressed envelope addressed to:

Yen B. Lam
Attorney at Law
6100 219th Street S.W., Suite 560
Mountlake Terrace, WA 98043

Executed at Everett, Washington on this 11th day of November, 2010.

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

Barbara Olson