

FILED

AUG 22 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Appeal Cause No. 307450

Benton County Superior Court Cause No. 11-2-00586-8

COURT OF APPEALS

DIVISION III, STATE OF WASHINGTON

MATT BAKER and WHITNEY BAKER, husband and wife,
d/b/a BEND IN THE RIVER, LLC,
a Washington for profit limited liability company,

Appellants/Petitioners/Plaintiffs,

vs.

DARREL D. SUNDAY; WES GREEN; HAROLD E. and
LYNN L. TREASE; JOHN S. and LYNNE R. TREADWELL;
JOHN S. and SUSAN J. WILLIAMS; STEWART MACKAY;
LARRY D. and PATRICIA R. McCULLOCH; SAM R. and
LINDA S. SORENSEN; TRACI K. SUNDAY; MARSHALL R. BAKER;
JOE and HILLARY THOMAS; ERNEST L. and
ROVECKA A. VINSON, Jr.; and ROBERT S. TAYLOR,

Respondents/Defendants,

REPLY BRIEF OF APPELLANT

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Mountain Park Homeowner's Association v. Tydings,

125 Wn.2d 337, 883 P.2d 1383 (1994) 1,2

I. INTRODUCTION

For purposes of this brief, the Appellants (“The Bakers”) incorporate the statement of the case as provided in Brief of Appellant.

II. ARGUMENT

A. *MOUNTAIN PARK* DOES NOT PRECLUDE MR. BAKER FROM ARGUING THAT RESTRICTIVE COVENANTS HAVE BEEN ABANDONED *ENMASSE*.

Essentially, Respondents contend The Bakers are precluded from arguing the restrictive covenants have been abandoned *en masse* based on the existence of the severability clause.¹ Respondents rely exclusively on *Mountain Park v. Tydings* to substantiate their argument. 125 Wn.2d 337, 883 P.2d 1383 (1994). However, their argument is critically flawed.

The Supreme Court’s holding in *Mountain Park* does not have the far reaching effect the Respondent’s suggest. In *Mountain Park*, the enforcement of an antenna covenant was at issue. The Tydings argued the Mountain Park Association failed to enforce separate covenants against other violators. *Id.* at 340. The Tidings’ urged the Supreme Court to adopt the analysis of other states which consider violations of other independent covenants as relevant to the establishment of abandonment. *Id.* at 342. For example, the *Tydings* argued storage of disabled vehicles, campers, boats, building materials justified a finding of abandonment of

the restriction on antennas. *Id.* at 339. Ultimately, the Court ruled against the Tydings and held that the application of the severability clause in the covenants mandates separate treatment of each covenant. *Id.* at 344. The Court did not, at any point, extend the scope of their holding to preclude a party from arguing that restrictive covenants have been abandoned *en masse*.

The Bakers' argument extends beyond the scope of *Mountain Park*. The Bakers' contend the restrictive covenants, as a whole, were abandoned, including the severability clause. Neither *Mountain Park* nor any other Washington case precludes this argument. Therefore, a question of fact arises as to whether the restrictive covenants, including the severability, were abandoned. *Green v. Normandy Park*, 137 Wn. App. 665, 697, 151 P.3d 1038 (2007).

B. ALL ACTIONS OF THE HOA ARE RELEVANT.

Respondents try to classify the actions of the HOA as irrelevant because the restrictive covenants provide for individual enforcement by homeowners. (Brief of Respondent at 12, CP 40). However, the record clearly illustrates that the actions of the HOA are inextricably bound with the enforcement or non-enforcement of the restrictive covenants. This is merely an attempt to "split hairs."

¹ *En masse* means in a mass; all together; as a group. Dictionary.com, 2012, available at <http://dictionary.reference.com/browse/en+masse>. (last visited August 20, 2012).

The actions of the HOA are relevant. Although the restrictive covenants do not require the creation of an HOA to enforce restrictive covenants, the homeowners clearly adopted the HOA as a means of enforcing and regulating the restrictive covenants. The record denotes the various actions of HOA demonstrating such. It is disingenuous to now argue that those actions are irrelevant to whether the restrictive covenants have been abandoned. Therefore, an issue of fact arises warranting a trial.

C. THERE IS NO EVIDENCE THAT ANY INDIVIDUAL HOMEOWNER TOOK ANY ACTION TO ENFORCE RESTRICTIVE COVENANTS AFTER 2003.

Similar to the argument above, the Respondent's assert that only the actions of the individual homeowners are relevant to abandonment. (Brief of Respondent at 12. The Respondents have cited no evidence of *any* restrictive covenants being enforced by individual home owners *at any time*. In fact, there is no evidence in the record to suggest that any individual homeowner took action to enforce the restrictive covenants at all. Thus, the inaction of the individual homeowners presents a question of fact further necessitating a trial.

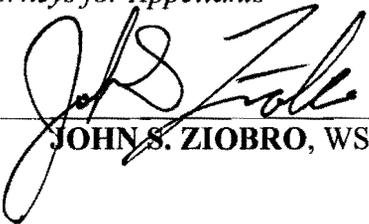
V. CONCLUSION

The law is clear that the abandonment of a covenant presents a question of fact. *See Green*, 137 Wn. App. at 697. If the covenants were abandoned, in total, the severability clause is not applicable. This appeal must be granted to resolve the factual dispute as to whether abandonment

in total has occurred.

SUBMITTED THIS 20th day of August, 2012.

TELQUIST ZIOBRO McMILLEN, PLLC
Attorneys for Appellants

By: 

JOHN S. ZIOBRO, WSBA #25991

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VINSON; and ROBERT S. TAYLOR,

Defendants.

Appeal No. 307450

BCSC No. 11-2-00586-8

DECLARATION OF SERVICE

The undersigned hereby declares as follows: That she is a citizen of the United States of America and is over the age of eighteen (18) years and is not a party interested in the above-entitled action, and that she has on the 20th day of August, 2012, personally sent via legal messenger a copy of the:

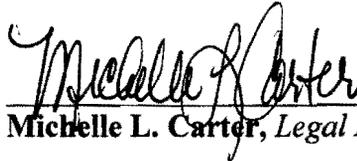
- Reply Brief of Appellant
- Declaration of Service

in the above-entitled action to the following persons:

G. Charley Bowers
Rettig Osborne Forgette, LLP
6725 West Clearwater Avenue
Kennewick, WA 99336-7188

DATED this 20th day of August, 2012.

TELQUIST ZIOBRO & MCMILLEN, PLLC



Michelle L. Carter, Legal Assistant