

Appeal Cause No. 307450

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

**FILED**

JUN 22 2012

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COURT OF APPEALS

DIVISION III, STATE OF WASHINGTON

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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,*

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**BRIEF OF APPELLANT**

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JOHN S. ZIOBRO  
TELQUIST ZIOBRO McMILLEN, PLLC  
*Attorney for Appellants/Petitioners*  
1333 Columbia Park Trail, Suite 110  
Richland, WA 99352  
Phone: (509) 737-8500  
Fax: (509) 737-9500

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## I. INTRODUCTION

The Appellants, Matt and Whitney Baker ("Baker"), live in a subdivision in rural Benton County called Bend in the River Estates. They filed an Application to obtain a Conditional Use Permit from Benton County to operate a wedding and event center at their residence. Weddings were hosted in 2010 without a permit and without any action taken by the Bend in the River Homeowner's Association ("HOA") to stop these events.

At the hearing for obtaining the Conditional Use Permit, the Defendants attempted to raise the issue that the Bend in the River Restrictive Covenants prohibited the Bakers from operating their business. Benton County did not rule upon this issue. The Bakers filed a Declaratory Action to resolve whether the restrictive covenants have been abandoned.

In support of their case, the Bakers presented evidence that since 2003, no HOA meetings have been held, no dues collected, and no action of any nature taken. Additionally, the HOA President from 2003 to 2011 introduced testimony of his belief that the Homeowner's Association was defunct. Based upon the lack of any HOA activity and the position of the HOA President, the Bakers maintain the Covenants have been abandoned.

Summary judgment was granted in the Defendants' favor, finding: (1) there were no questions of fact; (2) the covenants were not abandoned; and (3) that the severability clause allowed the Covenants to exist irrespective of the abandonment of a portion of those Covenants.

## II. ASSIGNMENTS OF ERROR

### Assignments of Error.

1. The Court erred when it determined that abandonment of the Restrictive Covenants did not present a question of fact.

2. The Court erred in determining that the Restrictive Covenants were not abandoned.

3. The Court erred in determining the severability clause in the Restrictive Covenants required dismissal of Plaintiffs' claims.

### Issues Pertaining to the Assignment of Error

1. The Bakers maintain that under *Green v. Normandy Park*, 137 Wn. App. 665, 697, 151 P.3d 1038 (2007), the abandonment of a restrictive covenant is a question of fact.

2. The Bakers maintain that for eight years the HOA failed to meet, failed to collect dues, did not have a required annual Board of Director's meeting, did not appoint to Architectural Control Committee members, and did not take any enforcement action of any nature. These failure required a finding the covenants have been abandoned.

3. Despite the holding in *Mountain Park Homeowner's Association v. Tydings*, 125 Wn.2d 337, 883 P.2d 1383 (1994), the Bakers argue that the Restrictive Covenants were not abandoned in part, but in total rendering the *Mountain Park* decision inapplicable.

### III. STATEMENT OF THE CASE

The Declaration of Protective Restrictions Covenants and Agreements of Bend in the River Estates ("Covenants") were recorded in 1991. (CP 0096). Condition No. 10 provides:

No part of the properties shall be used directly or indirectly for any business, commercial, manufacturing, mercantile, storage, vending, or other nonresidential purposes except for agriculture or ranching with the limits below. . .

*Id.*

The introduction section to the Covenants also provides, in relevant part, "Invalidation of any of these covenants by judgment or court order shall in no way affect any of the other provisions which shall remain in full force and effect." *Id.*

The Bakers applied to obtain a Conditional Use Permit from Benton County to operate the wedding and event center on their property. (CP 0079 - 0081). The Bakers hosted wedding events in 2010 without a permit. (CP 0059 and CP 0078).

In May 2003, Rovecka "Roe" Vinson became a board member for the Bend in the River Homeowner's Association. (CP 0084). She was succeeded by Stewart Mackay. (CP 0083). After Ms. Vinson's tenure as HOA President ended, no meetings were held, and there were no active issues. (CP 0083 and CP 0072).

Prior to Ms. Vinson's departure, the HOA had an extensive history of waiving covenant violations. For example, in 2003, when the Association learned that several trees violated the minimum distance from private roads, waivers were obtained. (CP 0107 - 0108). In 2004, resident John Treadwell was told that his fence, which extended to the river, was non-compliant with the Covenants which required river access. (CP 0121). Mr. Treadwell did not remedy the situation until 2011. *Id.* No action was taken by the Board in that interim period.

In her deposition, Ms. Vinson, acknowledged that Covenants were not being followed. Specifically:

I was also frustrated because in all fairness to Mr. Baker, he had pointed out other people in the subdivision had had violations, too, and I talked to those people, and in all fairness to him, I thought he had the right, if he was going to have to clean up his backyard, they should do likewise.

(CP 0086 - 0087).

The last known enforcement action taken by the HOA were the issuance of letters dated July 21, 2003 and September 1, 2003, to resident Wes Green. (CP 0102 - 0106).

Interrogatory answers and the deposition of Ms. Vinson confirmed that there were no known board meetings and no Homeowner's Association dues were collected after Vinson's resignation from February 2004 through March 2011. (CP 0061; 0088 - 0090).

The Bend in the River Bylaws require an annual meeting of the Board of Directors on the first Saturday in May of each year. (CP 0094). From 2004 through 2011 the Bend in the River HOA fail to comply with the minimum requirements of this yearly mandatory meeting. (CP 0094 - 0095).

Petitioner, Matt Baker, was a member of the Architectural Control Committee ("ACC"). He stopped attending meetings of the ACC, but only "random" conversations occurred regarding the need to replace him. (CP 0093).

The Restrictive Covenants, as they relate to the ACC, provide:

(1) no building shall be erected, placed, or altered on any lot until the construction plans and specifications and plans showing the location of the structure have been approved by the Architectural Control Committee. . . . The Architectural Control Committee will consist of three land owners that are elected by a majority of the property owners at the annual meeting.

(CP 0096).

Resident John Treadwell became a member of the ACC in 2003.  
(CP 0114).

The ACC members were not elected at the annual meeting for the seven to eight year period the HOA was inactive. (CP 0063; and 0119). Mr. Treadwell also confirms that Matt Baker stopped participating in the ACC approval process in 2007. (CP 0120). Further, Mr. Baker "probably should have" been replaced. *Id.*

In March 2011, Ms. Vinson, who had returned to the neighborhood, circulated an e-mail attempting to take the following action items: (1) elect a new five member Board of Directors; (2) to then elect officers of the Association. These officers will be elected from the Board of Directors; (3) to discuss the current membership dues and resume collection of dues; and (4) to discuss road maintenance issues and to make a decision as to whether any road maintenance is needed. (CP 0111).

Stewart Mackay, the then President, responded to Ms. Vinson as follows:

We believe that the HOA that existed more than five years is now defunct, along with its Covenants. They were signed over 20 years ago by people who no longer represent the community and have certainly been invalidated not just by the fact that everyone flaunted them, but also because of the failure to administer them for the last seven years.

(CP 0110).

When asked what prompted the 2011 HOA activity, Treadwell replied:

I think we finally realized, in light of this lawsuit, that it is important not to let the Homeowner's Association and the Covenants just expire, so we began to revitalize the Homeowner's Association.

(CP 0124).

#### IV. ARGUMENT

The Bakers maintain that the last acts of the Bend in the River Homeowner's Association occurred sometime in 2004 prior to Roe Vinson's resignation. Ms. Vinson continued residing, at least part time, in the Bend in the River subdivision until 2006. However, during this time, no acts were taken by the HOA Board. It was only when Ms. Vinson circulated her e-mail in March 2011 that any activity within the HOA commenced.

##### A. Standard of Review.

The Court of Appeals engages in de novo review of a ruling granting summary judgment and engages in the same inquiry as the trial court. *Green v. Normandy Park*, 137 Wn. App. 665, 681, 151 P.3d 1038 (2007).

Summary judgment is properly granted when the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to summary

judgment as a matter of law. *Id.* All reasonable inferences from the evidence must be construed in favor of the non-moving party. *Id.*

**B. The Trial Court Erroneously Granted Summary Judgment.**

1. Abandonment of a restrictive covenant presents a question of fact.

If a covenant which applies to an entire tract has been habitually and substantially violated so as to create an impression that it has been abandoned, equity will not enforce the covenant. *Sandy Point Improvement Company v. Huber*, 26 Wn. App. 317, 319, 613 P.2d 160 (1980). In *Huber*, the abandonment of restrictive covenants was based upon an estoppel argument. The applicability of estoppel, in this context, presents a question of fact. *Id.*

Likewise, whether the evidence in a case supports a finding of abandonment of a restrictive covenant is a question of fact. *Green v. Normandy Park*, 137 Wn. App. 665, 697, 151 P.3d 1038 (2007). The Bakers argue the restrictive covenants have been abandoned. This dispute can only be resolved through a trial on the merits as such an issue presents a question of fact.

2. The Covenants have been abandoned.

The issue of whether covenants can be abandoned, in total, has not been decided in Washington. However, other jurisdictions have held that violations of restrictive covenants can constitute abandonment of a

neighborhood scheme, in whole or in part. *Citizens Voices Ass'n v. Collings Lakes Civic Ass'n*, 396 N.J.Super. 432, 442, 934 A.2d 660 (2007). Total abandonment occurs when violations are so pervasive as to indicate either a change in the neighborhood or a clear intent on the part of the property owners generally to abandon or modify the plans. *Id.*

For eight years, the Bend in the River Association failed to meet, failed to collect dues, failed to have mandated yearly Board meetings failed to appoint ACC Members, and took no enforcement action of any nature. At the same time, its President considered the HOA and covenants defunct. Eight years of taking no action is so pervasive that it showed a clear intent to abandon.

On facts similar to this case, the finding of abandonment has been upheld. *White v. Wilhelm*, 34 Wn. App. 763, 665 P.2d 407 (1983). In *White*, the issue was raised as to whether the construction of a swimming pool enclosure violated restrictive covenants.

The Wilhelms began construction of an enclosure for their pool so that it could be used year round. The Whites and the Dixons filed a lawsuit seeking an injunction to stop the construction of the building. The Trial Court entered a judgment denying White and Dixon's request for injunctive relief, damages, and attorney fees. *Id.* at 766. It was undisputed that the Whites did not receive architectural control committee approval prior to constructing their pool house. However, the Court

recognized that when a covenant which applies to an entire tract has been habitually and substantially violated so as to create an impression that has been abandoned, equity will not enforce the covenant. *Id.* at 669.

The Court of Appeals reaffirmed, holding (1) a finding of abandonment is based on estoppel principles and (2) whether abandonment has occurred is a factual determination. *Id.* at 770.

The Court noted there was evidence at trial tending to show that the requirement of prior approval of building plans had been habitually and substantially violated over a long period of time. *Id.* at 770. The non-enforcement of these provisions diminished the merit of the conduct of the Plaintiffs in charging the Wilhelms with violation of the restrictions. *Id.*

In so holding, the Court made the following findings:

1. There had been no architectural control committee in existence for several years; and
2. There have been numerous violations of the restrictive covenants in the Malibar Hill Division.

While these facts are different in that the Bakers are seeking declaratory relief as opposed to the Defendants seeking injunctive relief, they stand for the proposition that the abandonment of covenants creates a question of fact which cannot be resolved on summary judgment and legitimizes the Baker's position that abandonment has occurred.

The test in Washington for the abandonment of a covenant is whether it has been habitually and substantially violated so as to create an impression that has been abandoned. The Bend in the River Association's failure to perform any act was pervasive for an eight year period. At a minimum, the Bakers were entitled to a trial as to whether eight years of inaction justifies a finding of abandonment. Accordingly, dismissal was not appropriate and reversal is required.

3. The severability clause contained within the Restrictive Covenants does not require dismissal.

Summary judgment was granted, in large part, due to the Court's interpretation of *Mountain Park Homeowner's Association v. Tydings*, 125 Wn.2d 337, 883 P.2d 1383 (1994). In *Mountain Park*, the enforcement of an antenna covenant was at issue. The Tydings argued that the Mountain Park Association failed to enforce the covenants against other violators. *Id.* at 340. The Tydings urged the 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.

The Court recognized that Washington had not directly addressed the relevance of a violation of one type of covenant to the enforcement of another. *Id.* at 342. The Court avoided this issue by holding that the application of the severability clause in the covenants mandated separate treatment of each covenant. *Id.* at 344. In so doing, the Court dismissed the Tydings' lawsuit.

This case is distinct in that the Bakers argue total abandonment of the Covenants. A severability clause does not negate the Baker's argument. They do not argue the violation of an independent covenant requires the Court to find abandonment of the home-based business covenant. Rather, the Bakers argue the Covenants have been wholly abandoned.

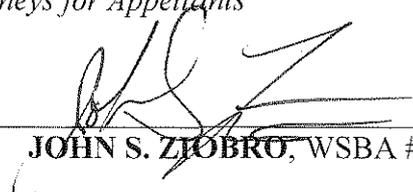
#### V. CONCLUSION

The law is clear that the abandonment of a covenant presents a question of fact. 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 20<sup>th</sup> day of June, 2012.

TELQUIST ZIOBRO McMILLEN, PLLC  
*Attorneys for Appellants*

By: \_\_\_\_\_

  
JOHN S. ZIOBRO, WSBA #25991

FILED

JUN 22 2012

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THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
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MATT BAKER and WHITNEY BAKER,  
husband and wife, and BEND IN THE  
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Plaintiffs,

vs.

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

Defendants.

Appeal No. 307450

BCSC Case 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 20<sup>th</sup> day of June, 2012, personally sent via legal  
messenger a copy of the:

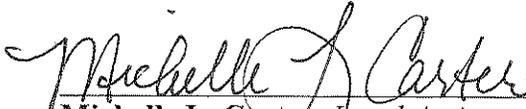
- Brief of Appellant
- Declaration of Service

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 20<sup>th</sup> day of June, 2012.

TELQUIST ZIOBRO & MCMILLEN, PLLC

  
Michelle L. Carter, *Legal Assistant*