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Court of Appeals
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Case No. 371794

IN THE COURT OF APPEALS, DIVISION III OF THE STATE OF
WASHINGTON STATE

ALEX MAY,

Appellant,

v.

COUNTY OF SPOKANE and VICKY DALTON, Auditor,

Respondents.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

In its response, Spokane County characterizes Mr. May's appeal as a "misguided quest to champion the revision of history" *Brief of Respondents*, pg. 1. To the contrary, Mr. May has simply availed himself of a statutory procedure to remove a repugnant restrictive covenant from his title and the public record. This appeal is not misguided. As the Legislature explained, "It is the intent of RCW 49.60.227 to allow property owners to remove all remnants of discrimination from their deeds." Laws of 1987 c 56 § 1 (emphasis added). The County, through its Auditor, seeks to preserve these monuments of discrimination. Mr. May seeks elimination of a racist, repugnant, and invalid provision from his title, as is his statutory right to do so. *See* RCW 49.60.227(1)(a)-(b).

In its response, the County asserts that RCW 49.60.227 does not support an order to the Auditor striking a void covenant from the public record. This is contrary to the plain language of the statute. There is no issue of statutory construction or issue of whether the statute mandates the trial court to issue an order directing a discriminatory covenant be eliminated from a property's title.

Here, the statute is clear on its face. "If the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *State, Dep't of Ecology v. Campbell &*

Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002). The statute provides that if the court finds that the provision of a real property contract is void by reason by RCW 49.60.224, the court “shall enter an order striking the void provision from the public record and eliminating the provision from the title or lease.” RCW 49.60.227(1)(b) (emphasis added). The statutory language is clear. The trial court’s only option upon finding a provision of a title void by reason of RCW 49.60.224 is to order the void provision struck from the public record and eliminated from the title. RCW 49.60.227(1)(b).

Respondents maintain the County and the Auditor “only opposed Mr. May’s request that the court order the Auditor to literally locate the void provision in the public records and literally alter the documents by striking/removing the language.” *See Brief of Respondents*, pg. 3-4. That is exactly what Appellant seeks. The trial court erred in agreeing with the County on this point finding that “the plain language of RCW 49.60.227 creates no duty for county auditors to remove void provisions from the public record or otherwise alter existing records and provides no authority for the Court to order the Spokane County auditor to take such action.” CP 84.

To the contrary, the plain language of RCW 49.60.227(1)(a)-(b) requires the court order the void provision be struck and eliminated from public record and the title of the property. The property owner cannot

unilaterally alter a title; thus, the Auditor would be required and authorized by the court to eliminate the provision from the title once presented with a court order identifying the provision as void by reason of RCW 49.60.224.

Additionally, Respondents cite the standard of review for summary judgment. *See Brief of Respondent*, pg. 6. This appeal is specific to the trial court's refusal to order the Discriminatory Covenant eliminated from the title and public record. CP 85. As the plain language of RCW 49.60.227(1)(a)-(b) requires the court order covenants void for reason of RCW 49.60.224 be struck and eliminated from the title, the trial court abused its discretion by denying Mr. May's declaratory judgment. *See Lu v. King County*, 110 Wn. App. 92, 99, 38 P.3d 1040 (2002).

Moreover, the Respondents concede that RCW 49.60.227 is a remedial statute that applies retroactively. *See Brief of Respondent*, pg. 12. As such, there is no dispute that RCW 49.60.227 applies to the present matter.

Finally, the Respondents fail throughout its brief to adequately address the statutory authority for a trial court to issue an order requiring the striking and eliminating of void provisions from the public record and the title of the property found in RCW 49.60.227(1). As a result, this Court should reverse the trial court's order, in part, and grant the elimination of the void provision from the property's title.

II. ARGUMENT

A. RCW 49.60.227 PROVIDES THE PROPER REMEDY FOR MR. MAY'S SUIT.

Mr. May's action for declaratory judgment was brought pursuant to RCW 49.60.227 which states the action "shall be an in rem, declaratory judgment." The Legislature has made it clear that "[t]he necessary party to the action shall be the owner, occupant, or tenant of the property or any portion thereof." RCW 49.60.227. No other requirement for standing is required.

1. Mr. May has Standing under RCW 49.60.227.

Respondents argue that the Uniform Declaratory Judgments Act, Chapter 7.24 RCW, applies only if the Plaintiff has standing and if there is a justiciable controversy. *See Brief of Respondents*, pg. 7-9. This argument is irrelevant at this point because the trial court found "1. Petitioner, Alex May, has standing under RCW 49.60.227 to bring this action." CP 84. Respondents did not appeal this point. Thus, Respondents cannot raise the argument of lack of standing now and the argument remains irrelevant to Mr. May's appeal.

Moreover, it is beyond dispute that Mr. May is a property owner and meets the requirements of RCW 49.60.227, as a current owner of the property.

2. The Action of the Former Owner did not Eliminate the Discriminatory Covenant from the Public Record.

Respondents additionally argue that the discriminatory covenant was removed by Ms. Gregory and, as a result, Mr. May's property is no longer subject to the Discriminatory Covenant and the action is moot. *See Brief of Respondents*, pg. 8. However, the Discriminatory Covenant remains on Mr. May's title and in the public record. *See* CP 34-36. Ms. Gregory's actions may have had the effect of notifying subsequent owners as to the invalidity of the covenant, but it certainly did not strike or otherwise eliminate the covenant. That is why Mr. May discovered it and that is why Mr. May seeks to eliminate it.

B. THE PLAIN LANGUAGE OF THE STATUTE SUPPORTS APPELLANT'S INTERPRETATION BECAUSE IT REQUIRES THE COURT TO STRIKE AND ELIMINATE THE VOID PROVISION.

Respondents agree that a literal reading of RCW 49.60.227(1)(b) requires the court to issue "... an order striking the void provisions from the public records and eliminating the void provisions from the title or lease of the property described in the complaint." *Brief of Respondents*, pg. 9 (quoting RCW 49.60.227(1)(b)). Respondents further agree that the trial court ordered that the void provisions be struck pursuant to that statute. *Id.* However, Respondents fail to acknowledge that after ordering this void

provision be struck from the public record, the trial court shall order the void provision be eliminated from the title of the property. *See* RCW 49.60.227(1)(b); CP 85. Here, the trial court refused to order the Spokane County Auditor to effectuate this order and denied Mr. May's request that it do so.

Courts are clear that the plain language of a statute must control. "Legislative intent is first to be deduced, if possible, from what [the Legislature] said." *In re Lyons' Estate*, 83 Wn.2d 105, 108, 515 P.2d 1293 (1973). "If the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *State, Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002); *see also Jay v. Boyd*, 351 U.S. 345, 76 S. Ct (1956). "Where the statute's meaning is plain and unambiguous, we derive legislative intent from the statute's plain language." *Matter of K.M.M.*, 186 Wn.2d 466, 490, 379 P.3d 75 (2016) (quoting *In re Welfare of L.N.B. -L.*, 157 Wn. App. 215, 238, 237 P.3d 944 (2010)); *see also City of Seattle v. St. John*, 166 Wn.2d 941, 945, 215 P.3d 194 (2009).

Here, the plain language of the statute as well as the note regarding legislative intent support the conclusion that, by enacting RCW 49.60.227, the Legislature intended to provides homeowners with a remedy to eliminate and remove repugnant and void provisions from their title and

from the public records. See 1987 Wash. Sess. Laws ch. 56 § 2, RCW 49.60.227.

Here, the trial court agreed that the covenant was invalid and ordered that the provision be “struck.” CP 85. However, it disagreed that the covenant should be eliminated from the title by denying an order that the Spokane County Auditor eliminating the provision from the title of the property. CP 85.

Respondents agree that statutes must be read to give effect to each word so no portion of the statute is rendered meaningless or superfluous. *See Brief of Respondents*, pg. 10. Respondents further agree that statutes must also be construed to avoid absurd results. *Id.* Respondents argue that Mr. May should have asked for clarification on what public records the void provision shall be struck from, however, there is nothing in the statute that suggests some public records would be exempted from the void provision being struck and eliminated. *See RCW 49.60.227(1)(b); Brief of Respondents*, pg. 10.

The Court and Respondents appear to confuse the meaning of “strike” and disregard the requirement of the statute to “eliminate” the covenant. RCW 49.60.227. Merriam-Webster defines “eliminate” as: “to put an end to or get rid of; to remove from consideration”. Merriam-Webster similarly defines the word “strike” as: “to delete something”. Both strike

and eliminate require something be removed or deleted. Functionally, strike and eliminate within RCW 49.60.227(1)(b) mean the discriminatory covenant should be deleted and removed from the public record and from the title of Mr. May's property. Therefore, to carry out the trial court's order in part, the Auditor shall strike the discriminatory covenant from the public record. CP 85. The trial court should also order the discriminatory covenant eliminated or removed from the title to Mr. May's property.

Respondents further agree that the trial court ordered that the void provisions be struck pursuant to that statute. *See Brief of Respondents*, pg. 9. However, Respondents failed to acknowledge that after ordering this void provision be struck from the public record, the trial court shall order the void provision be eliminated from the title of the property. *See* RCW 49.60.227(1)(b); CP 85. The trial court refused to order the Spokane County Auditor to effectuate this order and denied Mr. May's request that it do so. CP 85.

Respondents admit that the trial court failed to follow the plain language of the statute and contest only an allegation that the trial court denied an order striking the void provisions of the covenant. *Brief of Respondents*, pg. 10. Respondents' argument falls glaringly short by failing to acknowledge the phrase "and eliminate from the title . . . described in the complaint." RCW 49.60.227(1)(b). While the trial court did order the void,

the trial court failed to order the void provision be eliminated from the title. CP 84-85. The trial court failed to order the Auditor to carry out its order to strike the discriminatory covenant from the public record in addition to failing to order the elimination of the void provision from the title. This failure is where the trial court did not comply with the plain language of the statute, and the plain language of the statute further supports Mr. May's argument.

C. APPELLANT HAS AN ADEQUATE REMEDY UNDER RCW 49.60.227 WHICH NEGATES THE NEED FOR A WRIT OF MANDAMUS.

Respondents state that the Supreme Court has stated declaratory judgment actions are limited to cases where there is no satisfactory remedy at law available. However, RCW 49.60.227(1)(a) provides that declaratory judgment is the proper remedy, stating:

If a written instrument contains a provision that is void by reason of RCW 49.60.224, the owner, occupant, or tenant of the property which is subject to the provision or the homeowners' association board may cause the provision to be stricken from the public records by bringing an action in the superior court in the county in which the property is located. The action shall be an in rem, declaratory judgment action whose title shall be the description of the property.

Id. (emphasis added). Here, the Legislature intended by the plain language of the statute to provide people in Mr. May's position the ability to initiate a declaratory judgement, just as he has in this suit.

Respondents helpfully include that Mr. May could avail himself of the procedure in RCW 49.60.227(2)(a) and file a restrictive covenant modification document to address the discriminatory covenant. *See Brief of Respondents*, pg. 11. However, the statute itself states RCW 49.60.227(2) is an “alternative to the judicial procedure” set forth in RCW 49.60.227(1)(a)-(b). RCW 49.60.227(2)(a). The existence of the restrictive covenant modification document has no bearing on Mr. May’s use of the judicial procedure in RCW 49.60.227(1)(a)-(b).

The remedy provided in RCW 49.60.227(1)(a) is not the same as the remedy provided in RCW 49.60.227(2)(a). RCW 49.60.227(1)(b) provides the superior court the ability “to enter an order striking the void provisions from the public records and eliminating the void provisions from the title or lease of the property described in the complaint.” RCW 49.60.227(2)(a) on the other hand provides the owner of property subject to a written instrument that contains a provision that is void by reason of RCW 49.60.224 with the option to “record a restrictive covenant modification document with the county auditor.” A court order that a void provision be struck from the public record is not the same as a modification document filed with the county auditor. Mr. May sought the judicial remedy of RCW 49.60.227(1)(a)-(b) and this court should provide relief consistent with the judicial procedure therein.

Additionally, Respondents claim the order proposed by Mr. May is akin to a writ of mandamus. *See Brief of Respondents*, pg. 16. However, a writ of mandamus is only appropriate “to compel the performance of an act which the law especially enjoins as a duty resulting from an office.” RCW 7.16.160. “A party seeking a writ of mandamus must show that (1) the party subject to the writ has a clear duty to act; (2) the petitioner has no plain, speedy, and adequate remedy in the ordinary course of law; and (3) the petitioner is beneficially interested.” *Seattle Times Co. v. Serko*, 170 Wn.2d 581, 588–89, 243 P.3d 919 (2010) (citing RCW 7.16.160).

A writ of mandamus is not appropriate in this case because Mr. May has a “plain, speedy, and adequate remedy in the ordinary course of law” through RCW 49.60.227 in the form of an in rem, declaratory judgment action. *See Id.* at 588; RCW 49.60.227(1)(a). Mr. May is not seeking to circumvent the requirements of a writ of mandamus as the Respondents suggest. *Brief of Respondents*, pg. 17. Mr. May availed himself of the procedure provided in RCW 49.60.227(1)(a)-(b), which necessarily requires an order directing the elimination of the void provision from the title of the property. The remedy provided in RCW 49.60.227(1)(b) is adequate if fully granted by the trial court. The County’s argument Mr. May should have sought a writ of mandamus is misguided.

D. THE TRIAL COURT ABUSED ITS DISCRETION BECAUSE IT DID NOT COMPLY WITH THE MANDATORY LANGUAGE OF RCW 49.60.227.

Respondents offered in their reply brief that under RCW 40.16.010 it is a Class C felony to injure a public record. *Brief of Respondents*, pg. 15. They further suggest that the effectuation of Mr. May's Proposed Order Granting Plaintiff's Motion for Summary Judgment would cause a public record to be injured. *Brief of Respondents*, pg. 15. However, the statute provides that:

Every person who shall willfully and unlawfully remove, alter, mutilate, destroy, conceal, or obliterate a record, map, book, paper, document, or other thing filed or deposited in a public office, or with any public officer, by authority of law, is guilty of a class C felony.

RCW 40.16.010 (emphasis added). Mr. May is not asking the Spokane County Auditor to unlawfully strike the void provision from the public record. On the contrary, Mr. May asked the court to issue an order pursuant to RCW 49.60.227(1)(b) compelling the auditor to eliminate the void provision from the title of the property. An Auditor acting pursuant to a court order to eliminate a void provision from a title would not be acting unlawfully when the court is statutorily authorized and required to grant an order of this kind. By adopting RCW 49.60.227(1), the Legislature amended the law to create a lawful means to modify the property records. The

Legislature also recognized that this is extraordinary and that is why a court must order it.

Respondents claim that Mr. May abandoned the argument that the trial court erred by failing to order the Auditor eliminate the void provision from the title. *See Brief of Respondents*, pg. 16. However, this argument is addressed throughout Mr. May's opening brief by pointing out the trial court's failure to order the void provision eliminated from the title of the property. *See Brief of Appellants*, pg. 4; 7-9. Additionally, as a practical matter, when the trial court orders the void provision be struck and eliminated from the public records and the title of the property, this order would necessarily need to be effectuated by the County Auditor. The trial court failed to order the elimination of the void provision, which was outside of the range of acceptable choices.

The trial court's decision was an abuse of discretion because the decision did not comply with the mandatory language of RCW 49.60.227(1)(b). As was presented in Appellant's opening brief, the direction of the Legislature is clear in this case. The trial court decides if a covenant is void pursuant to RCW 49.60.224. If the covenant is void, as it is in this case, then the court "shall" strike the covenant from the public record and eliminate the provision from the title. RCW 49.60.227(1)(b). "A court's decision is manifestly unreasonable if it is outside the range of

acceptable choices, given the facts and the applicable legal standard.” *Lu*, 110 Wn. App. at 99.

Here, the trial court had one acceptable choice when it found the Discriminatory Covenant void under RCW 49.60.224, to strike and eliminate the void provision from public record and the title. *See id*; *see also* RCW 49.60.227(1)(b). Given the facts of the present matter and the standard articulated in RCW 49.60.227(1)(b), the trial court’s decision was manifestly unreasonable. *Lu*, 110 Wn. App. at 99. It was manifestly unreasonable for the trial court to refuse to eliminate the void provision from the deed of Mr. May’s property. Because the trial court determined the covenant was void but did not strike and eliminate it in accordance with RCW 49.60.227(1)(b), the trial court abused its discretion. *Kitsap Cty.*, 143 Wn. App. at 902.

III. CONCLUSION

Mr. May seeks to utilize a statutory procedure to remove a repugnant restrictive covenant from his title and the public record, pursuant to the procedure described in that statute and supported by the intent of the legislature. *See generally* RCW 49.60.227; 1987 c 56 § 1. The Spokane County Auditor has stated her position in a Spokesman Review article¹ as

¹ Nicholas Deshais, *South Hill homeowners want racist covenant removed from deed, but auditor says it’s a request she can’t fill*, Spokesman Rev., March 10, 2019.

firmly rooted in the preservation of this and all restrictive covenants, stating: “My job is [to] ensure that those records are maintained in history. We are guaranteeing the preservation of these records”, and “it [the racially restrictive covenant] will stay attached to the home.” This is inconsistent with the plain language of the statute and the legislative intent. *See generally* RCW 49.60.227; 1987 c 56 § 1.

The statute is intended to clear property records of a historic wrong. Mr. May is entitled to declaratory judgment in his favor and an order of this Court to strike the Discriminatory Covenant from the public record and eliminate the Discriminatory Covenant from any title or lease of May’s Subject Property containing the Discriminatory Covenant.

Respectfully submitted this 29th day of April, 2020.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

I hereby certify that on April 29, 2020, I electronically filed the foregoing with the Clerk of the Court by using the Court's electronic filing portal. Participants in this case who are registered eportal users will be served by the appellant system.

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