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Case No. 371794

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

ALEX MAY,

Appellant,

v.

COUNTY OF SPOKANE and VICKY DALTON, Auditor

Respondents.

BRIEF OF APPELLANT

ALEX MAY

UNIVERSITY LEGAL ASSISTANCE
Rick K. Eichstaedt, WSBA No. 36487
721 North Cincinnati Street - P.O. Box 3528
Spokane, Washington 99220-3528
(509) 313-5691 Telephone
(509) 313-5805 Facsimile
(509) 313 3797 TTY
Attorney for Appellant

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I. INTRODUCTION

This case is about addressing the history of racism in housing and its residual documentation in our State’s property records. Appellant Alex May’s (“May”) property deed contains language that provides “[n]o race or nationality other than the white race shall use or occupy any building on any lot.” CP 4. These racially restrictive covenants were sadly common, despite the U.S. Supreme Court’s holding that they were unenforceable under the Equal Protection Clause of the Constitution. See *Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948). In 1969, the Washington legislature further declared racial covenants void. RCW 49.60.227.

In 1987, the Washington Legislature declared these racially restrictive covenants “repugnant” and created a judicial process to remove the language. 1987 Wash. Sess. Laws ch. 56 § 2. Despite the clear language of the statute, the Superior Court erred in denying May’s declaratory judgment action because the mandatory language of RCW 40.60.227 requires the court to strike covenants from the public record and eliminate it from the title of a deed if it is void under RCW 40.60.224.

II. ASSIGNMENT OF ERROR AND ISSUE PRESENTED

Assignment of Error 1: The Superior Court erred in finding that the plain language of RCW 49.60.227 does not authorize a court to enter an

order striking racially restrictive covenants from the public record and eliminating it from a title or lease.

Issue 1: Did the Superior Court erroneously interpret RCW 49.60.227 when it found that this statute does not authorize courts to enter an order striking racially restrictive covenants from the public record and eliminate it from a title or lease?

III. STATEMENT OF THE CASE

May filed a declaratory judgment action in Spokane County Supreme Court to strike a discriminatory provision from the public records for property under RCW 49.60.227. CP 1. Although such discriminatory provisions are void under RCW 49.60.224, they continue to appear on the face of many real property contracts. CP 4.

The Legislature passed RCW 49.60.227 in order to provide a remedy to remove the void provisions from the public record and title or lease of a property. 1987 Wash. Sess. Laws ch. 56 § 2. The statute allows an owner or lessee of real property subject to discriminatory contract provisions to bring an action to strike the discriminatory provisions and remove them completely. RCW 49.60.227(1)(a)-(b),(2). Under RCW 49.60.227(1), if the court finds that the provision of a real property contract in question is void by reason of 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).

May is the owner of property at 3010 South Post Street in Spokane (“Subject Property”) located in Comstock Park Second Addition.¹ CP 4. Like all the lots in that development, May’s home is subject to a real property restrictive covenant created on August 12, 1953. CP 4. Subsection C of the restrictive covenant (the “Discriminatory Covenant”) states “[n]o race or nationality other than the white race shall use or occupy any building on any lot, except that this covenant shall not prevent occupancy by domestic servants of a different race or nationality employed by an owner or tenant.” CP 4.

On May 22, 2018, May filed for a declaratory judgment in the Spokane County Superior Court pursuant to RCW 49.60.227 seeking an order declaring the Discriminatory Covenant void and an order to the Spokane County Auditor to strike it from the public record and title of Subject Property. CP 3. On October 3, 2019, the Superior Court found that

¹That portion of lots 1 and 2, block 1, Comstock Park Second Addition, according to plat recorded in volume 2 of plats, page 84, situated in the City and County of Spokane, Washington, lying easterly of the following described line: beginning at the northwest corner of said lot 1; thence N89°59’27”E, along the north line of said lot 1, 11.00 feet; thence S09°39’47”W, generally along a 6.0° foot board fence, to the south line of said lot 2 and the point of terminus; except a portion thereof described as follows: beginning at the southeast corner of said lot 2; thence southwesterly along the southerly line of said lot 2 to the southwest corner thereof; thence northerly along the westerly line of said lot 2 a distance of 38.0 feet; thence northeasterly to the point of beginning. CP 4.

the Discriminatory Covenant was void, but refused to strike it from the public record, holding:

1. Subsection (c) of the 1953 Declaration of Protective Covenants effecting the above referenced property is void by reason of RCW 49.60.224.
...
2. Petitioners request for an order directing the Spokane County Auditor to eliminate Subsection (c) of the 1953 Declaration of Protective Covenants from the public record or to otherwise alter existing documents is DENIED.
4. A copy of this order may be filed with the Spokane County Auditor on the property records for the impacted property.

CP 85. This appeal followed.

Because the trial court held the Discriminatory Covenant is void under RCW 49.60.224, the appropriate finding in accordance with RCW 49.60.227 would be to eliminate the Discriminatory Covenant from the public record and from May's title to the Subject Property. To hold otherwise is an abuse of discretion that this court must correct.

IV. STANDARD OF REVIEW

This court reviews "a trial court's refusal to consider a declaratory judgment action for abuse of discretion." *Kitsap City. v. Smith*, 143 Wn. App. 893, 902, 180 P.3d 834 (2008). "A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable

grounds.” *Id.* “A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.” *Lu v. King County*, 110 Wn. App. 92, 99, 38 P.3d 1040 (2002).

The trial court abused its discretion by denying May’s declaratory judgment action because the decision is outside the range of acceptable choices because of the mandatory language of RCW 49.60.227, which is manifestly unreasonable. *See generally Id.*

V. ARGUMENT

A. THE SUPERIOR COURT ABUSED ITS DISCRETION WHEN IT DENIED ISSUING AN ORDER STRIKING A RACIALLY RESTRICTIVE COVENANTS FROM THE PUBLIC RECORD.

The racial covenant on the title to May’s real property is a stain of discrimination that must be expunged. Under RCW 49.60.224, “[e]very provision in a written instrument relating to real estate property which purports to forbid or restrict the conveyance, encumbrance, occupancy, or lease thereof to individuals of a specified race . . . is void.” RCW 49.60.224. The Discriminatory Covenant states: “[n]o race or nationality other than the white race shall use or occupy any building on any lot, except that this

covenant shall not prevent occupancy by domestic servants of a different race or nationality employed by an owner or tenant.” CP 4.

The Discriminatory Covenant in May’s deed is clearly within the definition of RCW 49.60.224 of a void provision because it purports to restrict an individual of a specified race from purchasing the Subject Property. RCW 49.60.224(1). The Legislature has explicitly voided racial covenants of this kind through RCW 49.60.224. The Discriminatory Covenant purports to forbid non-white individuals from owning, occupying, or leasing real property in the Comstock Park Second Addition, and so is void under RCW 49.60.224 as a matter of law. RCW 49.60.224. The Superior Court agreed that the covenant here was void. CP 85.

The Legislature provided a mechanism for removal of these racial covenants through the provisions of RCW 49.60.227. RCW 49.60.227 allows an owner, occupant, or tenant of property subject to a real estate contract provision that is void by reason of RCW 49.60.224 to file an in rem, declaratory judgment action in the Superior Court of the county in which the real property lies, seeking an order from the court “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(1)(a) (emphasis added).

When a declaratory action is brought and “[i]f the court finds that any provisions of the written instrument are void under RCW 49.60.224, it shall 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(1)(b) (emphasis added). The mandatory language of RCW 49.60.227(1)(b) requires the court to strike the void provision from the public record and eliminate the void provision from the title or lease of the property. The trial court failed to eliminate the void provision that is present in this case. CP at 85.

1. Courts must follow the plain language of a statute.

It is undisputed that the provision at issue is void and unenforceable under RCW 49.60.224. The plain language of the statute requires an order striking the covenant from the public record and eliminating the void provision from the title or lease of the property. RCW 49.60.227(1)(a).

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. 919, 100 L. Ed. 1242

(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 provide homeowners with a remedy at law 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.

2. The remedy requested is extraordinary, but specifically provided for by the Legislature.

Appellant May recognizes that an order requiring the alteration of property records is not an ordinary remedy. The Legislature expressly provided an extraordinary remedy to expunge “repugnant” provisions of property law that exist today. 1987 Wash. Sess. Laws ch. 56 § 2. This is unlike other provisions of the statute, which do not require court intervention. In contrast, RCW 49.60.227(2) provides an alternative method to the judicial procedure set forth in RCW 49.60.227(1), stating:

[T]he owner of property subject to a written instrument that contains a provision that is void by reason of RCW 49.60.224 may record a restrictive covenant modification document with the county auditor, or in charter counties the

county official charged with the responsibility for recording instruments in the county records, in the county in which the property is located.

RCW 49.60.227(2)(a). This alternative is a tradeoff: the homeowner does not have the burden of going to the court, but the homeowner also does not receive the benefit of having the discriminatory covenant completely eliminated from the deed and property records. If a court is not authorized under RCW 49.60.227(1)(b) to eliminate discriminatory language from the deed, as the trial court held, there would be no difference in outcome between RCW 49.60.227(1) and (2). This runs counter to the principle that statutes should “be construed so ‘no clause, sentence or word shall be superfluous, void, or insignificant.’” *HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 452, 210 P.3d 297 (2009) (quoting *Kasper v. City of Edmonds*, 69 Wn.2d 799, 804, 420 P.2d 346 (1966)). The Legislature created an ordinary remedy that does not require judicial intervention in RCW 49.60.227(2). This makes it clear that RCW 49.60.227(1) is an extraordinary remedy which authorizes courts to alter property records.

3. Chapter 49.60 RCW is remedial in nature.

Washington courts have interpreted Chapter 49.60 RCW as remedial, meaning that it applies to preexisting written instruments. *Niemann v. Vaughn Community Church*, 118 Wn. App. 824, 832, 77 P.3d 1208 (2003). In *Niemann*, the Court of Appeals rejected the appellant’s

argument that the statute voiding a religiously restrictive covenant did not apply to language on a deed the pre-dated the Washington legislature's passing of the statute. *Id.* The same retroactive application applies in the present matter.

Here, the Discriminatory Covenant is void by reason of RCW 49.60.224 because it appears on a written instrument relating to real property and purports to restrict the occupancy to individuals of a certain race. Thus, the Court shall follow the requirements of RCW 49.60.227(1) by entering an order to strike the discriminatory covenant from the public record and eliminating the Discriminatory Covenant from the title to May's real property. Because Chapter 49.60 RCW has a remedial purpose, its retroactive application to instruments already in effect was the intended purpose of the legislature in passing RCW 49.60.227. *See Niemann*, 118 Wn. App. at 832. It is not a valid position to argue that RCW 49.60.227 does not apply to preexisting instruments. *Id.*

4. The trial court's action was an abuse of discretion.

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). 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 of the deed. *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. *See Lu*, 110 Wn. App. at 99.

It was manifestly unreasonable for the trial court to refuse to strike the Discriminatory Covenant from the public record and eliminate it from the deed of 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. *See Kitsap City.*, 143 Wn. App. at 902. This Court should reverse the trial court and order the Discriminatory Covenant be struck from the public record and eliminated from May’s deed.

VI. CONCLUSION

The Discriminatory Covenant purports to forbid the occupancy of the property by anyone other than individuals of the white race, so it is

racially discriminatory on its face and void by reason of RCW 49.60.224. Because the Discriminatory Covenant is void by reason of RCW 49.60.224, 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 3rd day of March, 2020.

s/Rick Eichstaedt
Rick Eichstaedt, WSBA No. 36487
UNIVERSITY LEGAL ASSISTANCE
721 North Cincinnati Street, P.O. Box 3528
Spokane, Washington 99220-3528
(509) 313-5691 Telephone
(509) 313-5805 Facsimile
(509) 313-3797 TTY
Email: eichstaedt@gonzaga.edu

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 March 3, 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.

s/Kathryn Thuong Nguyen _____

Kathryn Thuong Nguyen

UNIVERSITY LEGAL ASSISTANCE

721 North Cincinnati Street - P.O. Box 3528

Spokane, Washington 99220-3528

(509) 313-5691 Telephone

(509) 313-5805 Facsimile

Email: nguyent@gonzaga.edu

UNIVERSITY LEGAL ASSISTANCE

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