No. 47022-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MARK C. LEWINGTON, a Washington Resident; NOEL P. SHILLITO and LAURIE A. SHILLITO, Husband and Wife and Washington Residents; DANIEL P. OSTLUND and MARIE F. OSTLUND, Husband and Wife and Washington Residents; and ELIZABETH T. WIGHT, a Washington Resident,

Respondents,

v.

FRANK I. PARSONS and NANCY A. PARSONS, Husband and Wife and Washington Residents,

Appellants.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

The Respondents are correct—the facts of this case are simple. But they are not the facts laid out in Respondents' brief. The Appellants did not manufacture a new, self-serving interpretation of the Narrowmoor Third Addition Restrictive Covenants' building height restrictions. Rather, they adhered to the express interpretation of the restrictive covenants that was adopted by this Court over two decades ago.

Twenty-five years ago, the Court of Appeals, Division Two, in a class action lawsuit, ruled on the precise issue before this Court, namely, "whether a basement constitutes a story" under the Narrowmoor Third Addition restrictive covenants.[1] *Lester v. Willardsen*, No. 12172-7-II (Unpublished) (Aug. 23, 1990); CP 348-53. In that case, the Willardsens argued "that their home conforms to the covenant because a daylight basement does not constitute a 'story.'" CP 348 (emphasis added). The Court agreed, holding that "there is no support for a finding that the drafters intended a daylight basement to constitute a story." CP 351. Despite this clear ruling, here we are again, interpreting the exact same restrictive covenant (Narrowmoor Third Addition, Covenant A) with respect to the exact same issue (whether a basement is a story in height).

[1] CP 349.

Respondents' opposition relies on sleights of hand. In this regard:

- They misquote the restrictive covenant at issue, conveniently leaving out the telling phrase, "in height," in describing the restrictive covenant. Respondents' Br. 1 (stating that homes are "not to exceed two stories," rather than stating that homes are "not to exceed two stories in height"). *Compare* CP 151.
- They misrepresent the *Lester* opinion, suggesting that the *Lester* court relied on the fact that the Willardsen house was on an uphill lot in reaching its decision. Respondents' Br. 35 (claiming that the location of the lot "was clearly pivotal to the Court of Appeals' decision..."). The *Lester* court did no such thing. In fact, the *Lester* court only mentioned the location of the home in passing, in a footnote. CP 351 n.1. In its analysis, the court focused on whether a basement was intended to be a story in height, with absolutely no suggestion that the answer would depend upon the location of the home. CP 348-51.
- They ignore the contemporaneous building code in force when the restrictive covenants were drafted. This code provides a practical straightforward method by which to

determine when a basement is a "story." CP 291; *see* App. Op. Br. 25. Under the contemporaneous building code, the Parsonses' basement is not a story. This is a logical result, as the basement is subterranean and does not add height to the house. In fact, the Parsonses could have built the same home on the same footprint on a slab, rather than a basement. As such, it makes little sense to count a subterranean floor as a "story in height."

- They argue that allowing the Parsonses to build a second story will lead to a parade of horribles. No evidence supports this. Indeed, that was not the result after the *Lester* decision. Why? *Lester* did not enable lot owners to build three-story houses. It maintained the status quo, which is to allow houses that are two stories in height. Some of the homes are built on slabs. Some of the homes are built on basements. But none of the homes are three stories "in height." As articulated in Appellants' opening brief and seen in the pictures submitted to the Court, the view impacts of which Respondents complain are not the result of building three stories in height. Instead they show a second story above a garage above a foundation—not a

basement. CP 410. The Parsonses' basement is actually under the far corner of the house, not under the garage.

- They incorrectly argue that the superior court made factual determinations in support of its injunctive relief order. There are no such determinations in the record.

When the Parsonses purchased their lot, they had every reason to believe that they could build a second story, and their plans were consistent with the settled interpretation of Narrowmoor Third Addition's restrictive covenants. The Parsonses respectfully request that the Court reverse the superior court's ruling and reaffirm the established interpretation that a basement is not a "story in height" under Narrowmoor Third Addition restrictive covenants.

II. ARGUMENT

A. The *Lester* Decision Controls.

Respondents do not dispute the most important relevant facts related to the *Lester v. Willardsen* case. There is no dispute that *Lester* was filed as a class action that included all homeowners in Narrowmoor Third Addition. CP 315-18. There is no dispute that the certified class included representation for present and future owners in Narrowmoor Third Addition. CP 312. There is also no dispute that *Lester* revolved around one central issue: whether a second story built above a basement

complies with the Narrowmoor Third covenants. *See, e.g.*, CP 294 (¶ 1.4). As all of the Narrowmoor Third Addition Respondents (or their predecessors-in-interest) were either members of the *Lester* class or expressly declined to attempt to enforce the *Lester* class's interpretation of the restrictive covenants, the superior court's decision should be reversed.

1. Respondents' Claims Are Barred By Collateral Estoppel.

Respondents argue that collateral estoppel does not apply because the *Lester* case involved a different interpretative issue than the question before this Court. This argument is baseless. The central issue in this case is identical to the issue presented in *Lester*—whether a daylight basement is considered a "story in height" under Narrowmoor Third Addition's Covenant A. *Compare* CP 57-63 (Amended Complaint) *with* App'x B at 1-2 (*Lester* opinion).

Likewise, Respondents' assertion that the *Lester* case "pivoted" on the location of the Willardsens' lot is baseless. Respondents' Br. 34-36. To the contrary, the *Lester* decision focused on whether a basement was a "story" under the covenants. CP 348-51. The *Lester* court did not base this analysis on the location of the Willardsen home. The location of the Willardsen home was only mentioned, in passing, in a footnote. CP 351 n.1.

Respondents also do not dispute that Mr. Lewington's predecessor-in-interest in his property was a member of the *Lester* class. This alone provides collateral estoppel against Mr. Lewington and prevents him from participating in the present case. *See Knuth v. Beneficial Wash., Inc.*, 107 Wn. App. 727, 31 P.3d 694 (2001); *United States v. Deaconess Med. Ctr. Empire Health Serv.*, 140 Wn.2d 104, 111, 994 P.2d 830 (2000); *Leighton v. Leonard*, 22 Wn. App. 136, 139, 589 P.2d 279 (1978).

Both Respondent Wight and the Ostlunds' predecessor-in-interest were initially in the *Lester* class and had the opportunity to litigate this issue, but they opted out and chose not to pursue relief for violation of Covenant A. CP 285 (¶ 5), 328, 330. Yet they are still bound by the exact same covenants as the class members. In other words, these Respondents have a mutual or a successive relationship to the same covenant right or property as they or their predecessors had in *Lester*. *See Deaconess*, 140 Wn.2d at 111 (defining privity).

Finally, collateral estoppel does not work an injustice here. This element of collateral estoppel is generally concerned with procedural, not substantive, irregularity. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 309, 96 P.3d 957 (2004). The overarching concern is that the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the first proceeding. *Id.* The *Lester*

plaintiffs prosecuted a multi-day trial in Pierce County Superior Court, defended the trial court's findings and conclusions on appeal, and then pursued relief from the Washington Supreme Court. The fact that they were ultimately unsuccessful in proving their claim is not grounds for relitigating the issue twenty-five years later. *See Hanson v. City of Snohomish*, 121 Wn.2d 552, 852 P.2d 295 (1993) (collateral estoppel will not work an injustice when the party opposing preclusion had the opportunity to present his evidence and arguments on the issue to the trial court and the Court of Appeals).

Respondents' complaints about subsequent modifications to the law are therefore not the real issue when considering potential injustice.[2] To the contrary, application of estoppel here promotes the very purpose of the doctrine—promoting the finality of adjudications. *Christensen*, 152 Wn.2d at 306. The superior court committed error by not applying collateral estoppel in this case.

2. The Opt-Out Parties Acquiesced.

Homeowners do not get to selectively enforce restrictive covenants; rather, restrictive covenants apply equally to all subdivision lots. *See Tindolph v. Schoenfeld Bros.*, 157 Wash. 605, 289 P. 530 (1930);

[2] And, in any event, the *Lester* court was focused on the drafter's intent, which is still the focus of the inquiry today. *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wn.2d 241, 249-50, 327 P.3d 614 (2014).

Ronberg v. Smith, 132 Wash. 345, 232 P. 283 (1925). Even a "slight degree of acquiescence" is sufficient to preclude injunctive relief. *Tindolph*, 157 Wash. at 611.

Respondents' argument that the homeowners who expressly opted out of the *Lester* litigation did not acquiesce by declining to attempt to enforce the height restriction during the *Lester* litigation is meritless. Respondents' Br. 40-43.

Every homeowner in Narrowmoor Third Addition received notice of the *Lester* lawsuit. CP 315-26, 332-36. That notice specifically identified the claim against the Willardsens: "an alleged violation of a restrictive covenant in the Narrowmoor Third Addition, limiting structures to two stories," and seeking an injunction for the Willardsens to remove their addition. CP 322.

For those owners who opted out of the lawsuit, they consciously declined to pursue enforcement of Covenant A. This includes Ms. Wight (who referred to the lawsuit as "frivolous" (CP 330)) and the Ostlunds' predecessor, Signa Simkins. CP 328, 330. These individuals did not pursue enforcement actions after opting out—against the Willardsens or against the other properties in Narrowmoor Third Addition that purportedly violate Covenant A. CP 232-33, 282, 285. The Respondents also admitted that no one sought to enforce Covenant A as to another

Narrowmoor Third home allegedly in violation of the covenant. CP 160 ¶ 9. And, as illustrated by the evidence submitted with Mr. Parsons's declaration, these are not the only violations of Covenant A in Narrowmoor Third Addition under the Respondents' interpretation. CP 230-31, 251-54; *see also* CP 239-49, 256-62, 278.

B. The Plain Meaning of "Two Stories in Height" Supports Appellants.

Respondents' argument regarding the meaning of Covenant A consistently reads out, and at times omits from quotes, the words "in height." *E.g.*, Respondents Br. 1, 4, 7, 8. A plain reading of Covenant A prevents construction that exceeds two stories in height, or rising vertically from the ground. This reading is consistent with common usage, as when entering a building elevator, the first above ground floor is labeled "1" and a basement has a separate designation of "B." It is also consistent with common sense, as held in *Lester*. Below ground floors are not implicated by the covenants. Residents can build as many below ground floors as they wish; the only thing that Covenant A restricts is building stories above the ground.

This same common sense interpretation is found in not only *Lester* but also *Day v. Santorsola*, 118 Wn. App. 746, 76 P.3d 1190 (2003), which was decided after the *Riss* case cited by Respondents. Respondents

fail to persuasively distinguish *Day* in their response. *Day* dealt with a subdivision on a hill and a covenant that prevents building homes more than two stories in height. *Id.* at 749-50. Just as with *Day*, Respondents readily admit that other homes in Narrowmoor Third have daylight basements along with two stories in height, but now they are impermissibly attempting to change the reading of the covenants to enforce them against a new homeowner.

Contemporaneous evidence of intent at the time that the restrictive covenants were drafted supports an interpretation that a basement was not intended to be considered a "story in height." As discussed in Appellants' Opening Brief, the 1939 Tacoma Building Code, the applicable building code at the time that the covenants were drafted, contains a straightforward articulation of when a basement is a story. CP 283-84, 288-89.

> **Story** means that portion of a building included between the upper surface of any floor and the upper surface of the floor next above, except that the topmost story shall be that portion of a building included between the upper surface of the topmost floor and the ceiling or roof above. *If the finished floor level directly above a basement or cellar is more than six feet (6') above grade such basement or cellar shall be considered a story.*

CP 291 (italics added); *see also* CP 290 (defining "basement" and "grade"). Thus, if the floor level directly above a basement is less than

6 feet above grade, the basement is not a "story" under the code. Here, the Parsonses' basement is less than 6' above grade; accordingly, it is not a story. CP 366-81.

Respondents argue that the Court should ignore the contemporaneous Tacoma Building Code and instead look at the Tacoma Zoning Code. The crux of Respondents' argument is that the codes are inconsistent. Respondents' Br. pp. 24-27. Not true; in fact, they are nearly identical,[3] with one important caveat—the building code provides additional language to define when a partially subterranean level (either a basement or cellar) is considered a "story." CP 89, 291. The central dispute in this case is whether a daylight basement is a story; the zoning code does not contain a relevant definition for this issue. Therefore, the building code's language, which does contain a relevant definition, is controlling to determining the drafter's intent.[4]

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[3] The zoning code defines a story as "[t]hat portion of a building included between the surface of any floor and the surface of the floor next above...", CP 89, while the building code defines a story as "that portion of a building included between the upper surface of any floor and the upper surface of the floor next above...." CP 291.

[4] In the *Lester* litigation, a local architect performed a detailed analysis of the interplay between the Tacoma building and zoning codes that reaches similar conclusions. CP 338-46. Although that analysis also incorporates changes made to the codes in the 1980s, the Parsonses do not contend here that current building and zoning codes would illuminate the intent of the drafter of a covenant in 1947.

Respondents' arguments regarding *Riss* rely on several faulty premises. It ignores the contemporaneous evidence of intent, including the plain language of the Covenant A, the distinctions between the view restriction language and height restriction language contained in the restrictive covenants (see Appellants' Br. pp. 23-24), the contemporaneous building code, and analogous case law such as *Day*. In fact, their testimony simply repeats the same problem identified by the Court of Appeals in *Lester*: "Although many of the current homeowners believe that the drafters intended to protect the view, there simply is no evidence to that effect." CP 350-51 (emphasis in original). Finally, *Riss* does not contradict the rule that Courts cannot interpret or revise contracts by reading out the plain words, such as "in height", contained therein. *Evans v. Metro. Life Ins. Co.*, 26 Wn.2d 594, 625, 174 P.2d 961 (1946).

Respondents' assumption that the "greater good" for Narrowmoor Third Addition residents is to treat subterranean levels as "stories in height," is highly flawed. The *Lester* case has not led to an explosion of taller houses. Importantly, taking away subterranean storage and living space will likely lead residents to increase their above ground footprint to make up for that lost space.

The other cases relied upon by Respondents are also inapposite. The house and covenants in *Bauman v. Turpen*, 139 Wn. App. 78, 91-92,

160 P.3d 1050 (2007) did not deal with whether a basement counted as a story; it dealt with a one story restriction that was violated by a house with multiple above ground stories. *Id.* It is also distinguishable from both *Day* and the present case because there were no separate and distinct view restriction covenants (such as the tree restrictions found in *Day* and here) as opposed to height restriction covenants (such as the dwellings height restriction). Additionally, the house in *Bauman* was different from any surrounding house, significantly larger, and had a large view impact. This is distinguished from the Parsonses' home, which is no different than multiple other homes in Narrowmoor Third and which has deliberately limited all view impacts by building a low profile roof well below code limits. The covenant at issue in *Wilkinson* is likewise distinct. *Wilkinson* dealt with short-term rentals, not the size of the home or the impact of a basement. *Wilkinson v. Chiwawa Communities Ass'n*, 180 Wn.2d 241, 254, 327 P.3d 614 (2014)

The Narrowmoor Fourth Addition covenants also support the Appellants' interpretation and the *Lester* court's ruling that a basement is not a "story in height" under the Narrowmoor Third Addition restrictive covenants.

Respondents argue that in drafting the Narrowmoor Fourth Addition Restrictive covenants that Mr. Anderson must have been

clarifying the language used in the earlier-drafted covenants. Respondents' Br. pp. 21-22. If this was the objective, it would have made much more sense for Mr. Anderson to have drafted the covenant to read, "one detached single-family dwelling not to exceed two stories in height, inclusive of a basement story." Instead, he distinguished a "story in height," from a "basement story." By doing so, he makes it clear that a basement is not a story in height.

The Narrowmoor Third Addition (CP 151) and Narrowmoor Fourth Addition (CP 157) height restrictions were intended to be different. The Narrowmoor Fourth Addition covenants prohibit the building of a second story in height, something that is clearly allowed in Narrowmoor Third Addition. The language of the Narrowmoor Fourth Addition supports Appellants' interpretation of Narrowmoor Fouth Addition, Covenant A.

C. The Shillito Respondents Do Not Have Standing.

Respondents do not dispute that the Narrowmoor Third Addition covenants may only be enforced by other Narrowmoor Third Addition property owners. *See also* CP 236 (granting persons owning real property "in said subdivision" the right to pursue enforcement). Respondents also do not dispute that the Shillitos do not reside in the Narrowmoor Third Addition, but instead reside in the Narrowmoor Second Addition. CP 120.

Instead, Respondents argue only that the question of standing was "immaterial." This argument ignores the basic principle that standing is a constitutional requirement that must be satisfied—it cannot be "immaterial." *Lakewood Racquet Club, Inc. v. Jensen*, 156 Wn. App. 215, 223, 232 P.3d 1147 (2010) (finding that a plaintiff must have standing in order to bring an action to enforce a restrictive covenant). As such, the Shillitos never had standing to bring the original action in superior court, and any ruling regarding the Shillitos must be vacated.

D. Injunctive Relief Is Not Appropriate And Was Not Properly Considered.

There is no dispute that to receive injunctive relief Respondents must prove "(1) that he has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of the right, and (3) that the acts complained of are either resulting in or will result in substantial injury to him." *Doyle v. Lee*, 166 Wn. App. 397, 404, 272 P.3d 256 (2012). Further, in cases involving restrictive covenants and innocent defendants, courts are to balance the relative hardships of the parties before ordering any injunctive relief. *See, e.g., Lenhoff v. Birch Bay Real Estate, Inc.*, 22 Wn. App. 70, 74-78, 587 P.2d 1087 (1978) (dissolving mandatory injunction requiring removal of home in light of severe hardship to defendants and minimal hardship to plaintiffs). Here, the superior court

did not conduct any of the above analysis; therefore, institution of injunctive relief is inappropriate.

Respondents do not dispute many of the key facts cited by the Parsonses in opposition to the injunctive relief. They do not dispute that multiple homes in Narrowmoor Third have daylight basements in addition to two stories in height. *See* CP 278. Further, in touring the Narrowmoor neighborhood generally, there are dozens of homes with multiple stories and basements. CP 230-31, 239-62, 278.

Respondents do not dispute that the Parsonses have worked diligently to minimize any view impairment on their neighbors. *See* CP 231, 383. The result of this is an addition that adds only 4.62 feet to the height of the Parsonses' home and complies with all local zoning and permitting requirements. *Id.* This fact is even supported by the pictures submitted by Respondents, which while they show slight view changes, show no drastic destruction of the views from Respondents' homes.[5]

Respondents do not dispute that as the Parsonses complied with these zoning and permitting requirements, their building plans were

[5] Respondents claim that their home values *may* decrease. CP 168-173. This analysis is fundamentally flawed as it ignores the fact that even under Respondents' interpretation, the Parsonses could build the identical house with the same impact on views, without a basement. In fact, in order to make up for lost basement space, homeowners may end up building homes with larger footprints and a *greater* impact on views.

publicly available to any of the Respondents well before the Parsonses began construction. *See id.* Nor do they dispute that the Parsonses contacted their neighbors well before construction and received assurances from their neighbors regarding their proposed construction plans. *See* CP 231-32, 280-82.

Instead, Respondents argue that they did not correctly understand the Parsonses' building plans, which were publicly available and permitted. They place the blame for this misunderstanding on the Parsonses, who have had a good faith belief through the entire process that they are complying with Covenant A. At worst, this is an issue of miscommunication between neighbors that should not result in the drastic remedy of removal of a portion of the Parsonses' home. *See Holmes Harbor Water Co. v. Page*, 8 Wn. App. 600, 605-06, 508 P.2d 628 (1973) (denial of injunction was appropriate as landowner acted innocently and attempted to comply with the restrictive covenants, violation was unintentional, plaintiffs delayed bringing suit, plaintiffs failed to prove any injury, and cost of removing the violation was exorbitant when compared with the slight violation of the covenant).

III. CONCLUSION

The superior court improperly granted summary judgment in the Respondents' favor. It was error to conclude on summary judgment that

the term "stories in height" includes basements under the Narrowmoor Third Addition covenant, particularly in light of this Court's decision in *Lester*. The superior court further erred in failing to bar Respondents' claims through standing defects, or the doctrines of collateral estoppel, acquiescence, or abandonment. Finally, the superior court erred in granting sweeping injunctive relief without properly analyzing whether such relief was warranted under the circumstances.

This Court should reverse the decision of the superior court and enter judgment for the Parsonses. In the alternative, the Court should reverse and remand the matter for further proceedings.

RESPECTFULLY SUBMITTED this 25th day of June, 2015.

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I certify that I am a citizen of the United States of America and a resident of the State of Washington. I am over the age of eighteen, and I am competent to be a witness herein.

On June 25, 2015, I caused the following documents to be served as follows:

1. Appellants' Reply Brief; and
2. Certificate Of Service

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED in Seattle, Washington on June 25, 2015.

Jan Howell

FOSTER PEPPER LAW OFFICE

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