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No. 86870-1

SUPREME COURT
OF THE STATE OF WASHINGTON

ROSS WILKINSON and CINDY WILKINSON, *et al.*,

Respondents,

v.

CHIWAWA COMMUNITIES ASSOCIATION,
a Washington Non-Profit corporation,

Appellant.

REPLY BRIEF OF APPELLANT

Yen B. Lam, WSBA #32989
Galvin Realty Law Group PS
6100 219th St. S.W., Suite 560
Mountlake Terrace, WA 98043
(425) 248-2163

Philip A. Talmadge, WSBA #6973
Emmelyn Hart, WSBA #28820
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188-4630
(206) 574-6661

Attorneys for Appellant Chiwawa Communities Association

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A. INTRODUCTION

Notwithstanding controlling precedent from this Court¹ articulating an expansive view favoring restrictions on commercial activities in subdivisions, the rental businesses continue to insist that their use of their properties in Chiwawa River Pines (“Chiwawa”) does not violate covenants requiring their properties to be used for single-family residential purposes only and expressly prohibiting nuisances and offensive, commercial, or industrial uses. The rental businesses offer no substantive reasons why this Court should not reverse the trial court order granting their summary judgment motion. They offer sophistry instead of analysis.

The rental businesses argue that their short-term vacation rentals do not violate the 1988/92 covenants because the “dominant use” of their properties is as a residence, and their use of their homes as rentals is only “incidental” to and compatible with that dominant use. Only a tortured reading of the law and Chiwawa’s covenants would support the rental businesses’ contentions. It defies reality to suggest that a business paying business taxes, advertising on the Internet, and operating under a trade name is anything other than a business. This Court’s precedents prohibit *any* commercial or business use of a property subject to a single-family

¹ *Mains Farm Homeowners Ass’n v. Worthington*, 121 Wn.2d 810, 815, 854 P.2d 1072 (1993) and *Metzner v. Wojdyla*, 125 Wn.2d 445, 451-53, 886 P.2d 154 (1994).

residential use restriction. This Court should not grant the rental businesses' plea to depart from those precedents.

B. RESTATEMENT OF THE CASE

Chiwawa Communities Association ("Association") must begin its restatement of the case by pointing out the obvious: the rental businesses' counterstatement of the case violates RAP 10.3(a)(5).² The counterstatement, including the section headings, is hopelessly entangled with inappropriate argument, making it challenging for this Court and the Association to distinguish between the improper arguments and the facts. The rental businesses' arguments are a far cry from the "fair recitation" required by the rules and place an unacceptable burden on the Association and the Court.³ *Lawson v. Boeing Co.*, 58 Wn. App. 261, 271, 792 P.2d 545 (1990), *review denied*, 116 Wn.2d 1021 (1991).

Regardless of the irregularities in the rental businesses' brief, they admit or concede the following:

- Pope & Talbot Development, Inc. ("Pope & Talbot") imposed restrictive covenants in Chiwawa to establish a general plan for the "development, improvement,

² RAP 10.3(b) dictates that the respondent's brief conform to RAP 10.3(a). RAP 10.3(a)(5) requires a brief to contain a "fair statement of the facts and procedure relevant to the issues presented for review, without argument."

³ Based on the rental businesses' blatant disregard for the appellate rules, this Court should strike their statement of the case and impose sanctions. RAP 10.7; *Litho Color, Inc. v. Pac. Employers Ins. Co.*, 98 Wn. App. 286, 305, 991 P.2d 638 (1999).

maintenance and *protection* of all the real property” located in Chiwawa. Br. of Resp’ts at 3 (emphasis added).

- The Association is authorized to amend Chiwawa’s covenants by a majority vote. *Id.* at 5.
- The 1988/92 covenants restrict land use to single-family residential use only. *Id.* at 1.
- The 1988/92 covenants expressly prohibit nuisances and offensive, commercial, and industrial uses. *Id.* at 1, 4 n.3.
- A residential rental no matter its duration has a commercial element to it. *Id.* at 18.
- The rental businesses have even more extensive commercial characteristics including, among others: written rental agreements, rental fees, and reservation requirements. *Id.* at 8-9.
- Use of the rental businesses’ properties for bed and breakfasts or “lodging” facilities constitutes prohibited commercial uses. *Id.* at 10.
- The Association attempted to enforce the covenants. *Id.*

The rental businesses attempt to divert the Court’s attention from these undisputed facts. For example, they complain that the 1988/92 covenants do not define the terms “residential,” “residential use,” “commercial use,” “nuisance,” “offensive use,” or “single family.” Br. of Resp’ts at 5. That the covenants do not define those terms is immaterial. The meanings of those terms are clear by operation of law. *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 876, 784 P.2d 507 (1990) (noting courts may look to standard English dictionaries to determine the ordinary

meaning of undefined terms and if words have both a legal, technical meaning and a plain, ordinary meaning, the latter meaning will prevail unless it is clear that both parties intended the former to apply). The covenants at issue in *Mains Farms* and *Metzner* did not define such terms.

The rental businesses make much ado about nothing when they complain about past and current board members renting their homes or renting other homes in Chiwawa before permanently moving there. Br. of Resp'ts at 11-12. What they neglect to mention is that the identified homeowners did so *before* joining the board and *before* the covenant amendments were passed.⁴

The rental businesses assert as fact that short-term vacation rentals were never considered commercial uses under the covenants because discussions during the Association's August 25, 2007 meeting "clearly indicated that no one knew the answer to that question." Br. of Resp'ts at 11. But as current board president Mike Stanford testified, the rental businesses misconstrue the board's meeting minutes and take them out of

⁴ For example, current board member Mike Standley testified that he started construction on his home in Chiwawa in 2000. CP 1051. He only rented a neighbor's home to accommodate his family during his son's wedding in 2004 because his home was not finished. *Id.* He did not do so again. Although current board member Judy Van Eyk operated her second home in Chiwawa as a short-term vacation rental, she did so before she joined the board. CP 1034. Once the grace period granted to the rental businesses following enactment of the 2008 amendment expired, she voluntarily stopped renting that home as a short-term vacation rental. *Id.* The fact that these isolated, non-commercial rentals may have occurred does not undercut the point that the Association generally enforced the covenants banning commercial rentals.

context. CP 1045-46. Even if “no one knew the answer to that question” as the rental businesses now suggest, they do now. The 2011 amendment, adopted by a majority vote, explicitly bans rentals of less than one month as a prohibited commercial use. CP 175.

The rental businesses disparage the Association’s failure to mention language from the 1988 covenants restricting the size of “for sale or rent” signs, which they claim is indicative of Pope & Talbot’s intent to allow rentals of any duration in Chiwawa. Br. of Resp’ts at 2 n.1, 6 n.5. Their insinuation that the Association is attempting to pull the wool over the Court’s eyes is baseless. The “for rent” sign language is insignificant to the issues before this Court. A “for rent” sign is consistent with an occasional rental or a long-term rental. It is not, however, consistent with the operation of a long-term business like the rental businesses operate here. The rental businesses fail to keep the non-commercial/single-family use restriction in mind when arguing about the sign restrictions in their fact section.

The rental businesses also neglect to mention several key facts. For example, many of them have Department of Revenue accounts and pay business and occupation taxes on the income generated by their rentals. CP 422, 431, 1000-12. They advertise their properties for rent on the Internet and with professional rental agencies like a hotel or motel

advertises to the public, posting nightly or weekend rental rates online. CP 134, 159, 247-49, 251-52, 284, 344-45, 364-65. Their guests pay a 10% lodging tax. CP 160. These are characteristics of a commercial business, which the 1988/1992 covenants expressly prohibit.

C. ARGUMENT IN REPLY⁵

(1) The Trial Court Erred By Granting Summary Judgment to the Rental Businesses

a. Rules governing covenant interpretation

The Court's first task when interpreting a covenant is to determine the drafter's intent. Basic rules of contract interpretation apply. Br. of Appellant at 15-16. Under those rules, this Court must give the words in a covenant their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. *Hearst Commc'ns, Inc. v. Seattle Times*, 154 Wn.2d 493, 504, 115 P.3d 262 (2005).

Although the rental businesses concede that the Association accurately recited the rules of construction applicable to this case, they contend that context evidence is only available to determine the drafter's intent if the language being interpreted is unclear and ambiguous. Br. of Resp'ts at 13. They are mistaken. Context evidence is *always* admissible.

⁵ The rental businesses do not address the standard of review in their response. As the Association noted in its opening brief, this Court reviews summary judgment orders *de novo*. Br. of Appellant at 15 n.7.

Hearst, 154 Wn.2d at 502. See also, *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990) (noting extrinsic evidence may be considered regardless of whether an ambiguity exists). But it is relevant only to determine the meaning of specific words and terms used, not to vary, contradict or modify the written word. *Hearst*, 154 Wn.2d at 503.

The rental businesses argue that only those surrounding circumstances existing at the time the drafting occurred are relevant and suggest that the Association is relying on circumstances that did not exist when the covenants were drafted to support its argument. Br. of Resp'ts at 13-15. They misconstrue the Association's argument. The Association raised their obligation to pay business and occupation taxes not for evidence of the "surrounding circumstances" at the time the covenants were drafted, but as evidence reflecting the nature and existence of their prohibited *commercial businesses*. It likewise offered evidence of their advertising as an additional indication of their *business* enterprises.

b. Permitting the rental businesses contravenes well-established precedent from this Court

This Court has historically approved broad restrictions banning commercial activities in single-family residential subdivisions to preserve the residential character of the neighborhood. In fact, this Court established a bright line rule nearly 20 years ago that prohibits *any*

commercial or business use of a property subject to a residential use restriction. *Metzner*, 125 Wn.2d at 451-53; *Mains Farm*, 121 Wn.2d at 815. That rule remains the law in Washington.

The rental businesses argue that under *Granger v. Boulls*, 21 Wn.2d 597, 152 P.2d 325 (1944), the Court cannot enlarge or extend a restriction that runs with the land even to accomplish what it may be thought the parties would have desired had a situation that later developed been foreseen. Br. of Resp'ts at 14-15. Their reliance on *Granger* is misplaced. First, *Granger* predates *Mains Farms* and *Metzner*. Further, the rule in *Granger* long predates modern authority from this Court shifting away from the strict construction previously given to restrictive covenants. See, e.g., *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 118 P.3d 322 (2005) (noting that Washington courts have, in recent years, tended to give restrictive covenants a broad interpretation).

Despite the rental businesses' efforts to obscure the issue, the 1988/1992 covenants restrict land use in Chiwawa to single-family residential use and expressly ban commercial uses. This language not only establishes the general plan for the community, it also excludes, *by inevitable implication*, any other uses. The covenants do not state, as the rental businesses would prefer to have the Court understand, that homes in Chiwawa are not to be used for any commercial or business enterprises

only if the homes affect the general plan of the area or have a visible adverse effect on the residential character of the neighborhood. Under the plain language of the covenants before the Court, not the covenants the rental businesses apparently prefer, the parties' properties may not be used to operate a commercial or business enterprise. This language could not be more direct or straightforward.

The rental businesses argue that *Mains Farm*, *Metzner*, and *Hagemann v. Worth*, 56 Wn. App. 85, 91, 782 P.2d 1072 (1989), do not require the Court to characterize their rentals as prohibited commercial uses. Br. of Resp'ts at 19. Their attempts to distinguish those cases are unavailing. That the homeowners there co-occupied the homes with paying clients in addition to providing 24-hour onsite services is immaterial. *Id.* at 19-20. A use is either residential or commercial, but not both. As the *Mains Farm* court observed, the intensity of a property's use can change the character of its use. 121 Wn.2d at 821 (elements of commercialism destroyed the single-family residential nature of the use).

The rental businesses' use of their properties is clearly not for single-family residential purposes where their principal purpose is to conduct a for-profit business similar to a hotel or a bed and breakfast. Br. of Appellant at 19-21. As the rental businesses concede, this is a business use prohibited by the covenants. Br. of Resp'ts at 10. *See also*,

Hagemann, 56 Wn. App. at 91 (“to provide residence to paying customers is not synonymous with a residential purpose”). Yet they argue their use should be permitted because it is no different than that of any other homeowner. Br. of Resp’ts at 19-20. This statement begs the question: what effect could possibly be given to the single-family residential use restriction, considered in conjunction with the commercial ban, if the rental businesses are free to use their lots for what amounts to commercial inn? They want to enlarge the concept of a residence as a “place to live” to include a “place in which to make a living.” That is clearly not what Pope & Talbot intended when it created Chiwawa.

The rental businesses continue to fail to recognize that *Ross v. Bennett*, 148 Wn. App. 40, 203 P.3d 383, *review denied*, 166 Wn.2d 1012 (2009), represents a significant departure from the bright line rule this Court established in *Mains Farm* and its progeny and should be overruled. In any event, the case is distinguishable.

In *Ross*, the community had not amended its covenants to explicitly prohibit short-term transient vacation rentals as was the case here. Moreover, Chiwawa’s covenants are broader than those at issue in *Ross*. The covenant at issue in *Ross* merely prohibited nonresidential uses, whereas the covenants at issue here prohibit not only nonresidential uses, but also any commercial, industrial, or business uses. There is a

significant distinction between such restrictions, as more is prohibited here than was prohibited in *Ross*. Not only did the rental businesses covenant not to use their properties for nonresidential uses, they also covenanted not to use their properties for commercial, industrial, or business uses.

Cases from other jurisdictions following this Court's reasoning in *Mains Farm* are instructive. In *Fick v. Weedon*, 613 N.E.2d 362 (Ill.App. 4 Dist., 1993), the homeowners rented two bedrooms as sleeping rooms for transient guests, usually only on weekends. They co-occupied the home with their guests. The Illinois appellate court held that the homeowners' use of their residence for a bed and breakfast violated a covenant providing that "said property shall be used for a private dwelling for one family only." The court found that the covenant was unambiguous, and its intent was to prohibit uses of the premises other than as a single-family residence, so that the commercial use as a bed and breakfast was prohibited by the express language of the covenant. The court rejected the homeowners' argument that they did not violate the covenant because the dominant use remained that of a private dwelling and their use of the home as a bed and breakfast was only incidental to and compatible with the dominant use. The court stated that while the home might remain a private dwelling, its use as a bed and breakfast did not fall within the plain meaning of the covenant.

In *O'Connor v. Resort Custom Builders, Inc.*, 591 N.W.2d 216, *reh'g denied*, 595 N.W.2d 843 (Mich. 1999), residents of a subdivision sought to enjoin another homeowner from selling “timeshare” or “interval ownership” interests in a home there for one or more week-long intervals during the year. The Michigan Supreme Court held, as a matter of first impression, that the interval ownership of a single family dwelling was not a “residential purpose” within the meaning of a covenant restricting the use of property to residential purposes only. The court concluded that characteristics of interval ownership, where the weekly owner has no right to be at the residence at any time other than during the one week purchased, did not fit the definition of a “residence” because it was too temporary. Stating that there was “no permanence to the presence, either psychologically or physically at that location,” the court considered the division into timeshare intervals as not being for residential purposes as that term was used in the covenant restrictions. *See also, Munson v. Milton*, 948 S.W.2d 813 (Tex.App. 1997) (holding that rentals through a professional rental agent were not a residential use because a “residence generally requires both physical presence and an intention to remain.”).

In *Bruni v. Thacker*, 853 P.2d 307, *review denied*, 858 P.2d 875 (Or.App. 1993), a homeowner brought an action to enjoin other homeowners in the subdivision from operating a bed and breakfast

business in their residence in violation of a covenant stating that all lots “shall be used for only single family residential purposes.” The homeowners provided short-term accommodations for a fee. The Oregon Court of Appeals determined that the covenant was not ambiguous and expressly excluded the homeowners’ nonresidential use. The court did not need to decide whether the operation of a bed and breakfast was a nonresidential use of the property, because the homeowners violated a more specific provision of the covenant, the single-family limitation, when they provided accommodations to non-family members.

In *Benard v. Humble*, 990 S.W.2d 929 (Tex. App. Beaumont), *review denied*, (1999), the Texas Court of Appeals held that the homeowners’ short-term rentals of their homes to various vacationing individuals and families violated a covenant providing that no lot in the subdivision could be used except for “single-family residence purposes.” Although the court found that the covenant did not prevent all renting *per se*, it concluded that the nature of the rental activity ran afoul of the single-family residence restriction because the rentals were short-term in the nature of transient housing, contrary to statutory and common law definitions of the term “residence.” Relying heavily on statutory provisions for establishing residency for the purposes of voting or filing

divorce actions, the court affirmed the lower court's determination that the covenant prohibited renting for a period of less than 90 days.

These cases confirm that while the rental businesses' homes may remain private dwellings, their use as short-term vacation rentals is a prohibited commercial use and is inconsistent with the residential character intended for Chiwawa. Pope & Talbot expressly prohibited the use of homes in Chiwawa as anything other than single-family residences. The express language of the covenants prohibits a commercial vacation rental business in the subdivision. But even if Pope & Talbot intended to allow homeowners in Chiwawa to lease or to rent⁶ their properties for residential purposes, it is clear that they did not intend to allow ongoing commercial enterprises to take place on lots designated for noncommercial use. The trial court's order granting summary judgment to the rental businesses was error.

⁶ The rental businesses argue that language in the covenants permitting small "for rent" signs gives them the unrestricted right to operate short-term vacation rentals in Chiwawa of any length. They are mistaken. The law has long recognized distinctions between short-term rentals of less than one month and long-term rentals. *See, e.g.*, RCW 59.18.040(3); WAC 458-20-166(2). Short-term occupants are not tenants under a lease. No landlord/tenant relationship exists when an owner provides an occupant lodging for less than 30 days. Based on existing Washington law, the rental businesses are not "renting" their properties to tenants. They are granting lodgers a license to use the properties for less than 30 days.

- c. The Association had the authority to amend the covenants and acted consistently with Chiwawa's general plan of development when doing so

The trial court's decision to invalidate the 2011 Amendment means the court supplanted the Association's authority to govern the community for the common good and to amend the covenants by a majority vote. Br. of Appellant at 23-29. The Court of Appeals recently reaffirmed the importance of homeowner democracy in *Roats v. Blakely Island Maint. Comm'n, Inc.*, ___ Wn. App. ___, 279 P.3d 943 (2012), noting that covenants provide a homeowners' association board with broad authority to conduct association business with the approval of its members.

The rental businesses do not dispute the Association's broad authority to amend the covenants by a majority vote because they do not address this argument in their brief. They *concede* the argument by failing to respond to it. See *American Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 7, 802 P.2d 784 (1991).

While the parties agree that the Association may adopt new restrictions by less than a 100 percent vote of its members if that power is exercised in a reasonable manner, they disagree whether the 2011 Amendment is consistent with Chiwawa's general plan of development. Br. of Appellant at 29-31; Br. of Resp'ts at 24-25.

The 1988/1992 covenants evidence Pope & Talbot's intent to create a quiet, single-family residential community: the covenants explicitly ban commercial and other non-residential uses, limiting use of properties in Chiwawa to single families. The rental businesses' commercial enterprises, operated for profit and offered to the public for a fee, are inconsistent with that intent. Br. of Appellant at 30-31.

The rental businesses argue that the term "quiet" does not appear in the covenants and that the Association has failed to explain how their businesses are inconsistent with the community being a "quiet" one. Br. of Resp'ts at 25. That is a legitimate point of *argument* for the Association. The whole object and purpose of Chiwawa's general plan of development confirms that characterization. A subdivision of single-family residences would obviously be disrupted by rentals to partying college students, for example, notwithstanding the rental businesses' contention that the rentals may cause no more disruption than would a large family. The Association's right to maintain the residential use restriction is not affected by the extent of the damages the members may suffer for its violation. Contrary to the rental businesses' assertion, the Association documented the disruptive nature of short-term renters in Chiwawa. CP 96, 134-36, 1044.

The rental businesses' claim that *Shorewood West Condominium Ass'n v. Sadri*, 140 Wn.2d 47, 992 P.2d 1008 (2000), is inapplicable is misplaced. Br. of Resp'ts at 26. They forget that single-family homeowner associations, like condominium homeowner associations, are statutorily created. See RCW 64.38. Regardless, the Association offers *Shorewood* for the Court's holding that homeowner associations may amend their declarations to impose leasing restrictions as long as the declaration is amended properly. There is no basis to grant condominium owners the right to impose leasing restrictions as the Court did in *Shorewood*, but to deny that same opportunity to the association of a single-family planned development. If *Shorewood* is applied to condominiums and the trial court's ruling is applied to single-family homeowner associations, then two analogous communities will have vastly different abilities to restrict short-term transient rental activities that impact the residential character intended for the community. The law should not be applied in an inconsistent manner to similarly-situated communities.

(2) The Trial Court Erred by Excluding Evidence the Association Offered on Summary Judgment⁷

The trial court erred by excluding some of the evidence the Association offered on summary judgment. Br. of Appellant at 33-38. In particular, the trial court erred by excluding the comments included in the 2007 member survey attached to the declaration of Mike Stanford because the comments were admissible, even if hearsay. *Id.* at 35-36. The trial court also erred by excluding portions of the declaration testimony of Van Eyk, James Padden, and Gloria Fisk. *Id.* at 36-38.

The rental businesses contend that the survey comments were properly excluded as hearsay offered to prove the truth of the matter asserted. Br. of Resp'ts at 32-33. But even if the comments were not hearsay, the rental businesses contend they are unreliable. *Id.* The rental businesses are mistaken. The comments are admissible and reliable.

As the Association noted in its opening brief at 33, survey evidence is admissible in the appropriate case even if it is hearsay. *Simon v. Riblet Tramway Co.*, 8 Wn. App. 289, 294, 505 P.2d 1291, *cert. denied*, 414 U.S. 975 (1973); 5C Karl B. Tegland, Wash. Prac., *Evidence Law and Practice* § 803.64 (5th ed.). The key issue in determining the

⁷ The rental businesses do not respond to the Association's claim that the Court reviews *de novo* the evidentiary rulings made in conjunction with a summary judgment motion. Br. of Appellant at 33 n.15.

admissibility of evidence is whether the information is reliable. *See, e.g., State v. Smith*, 97 Wn.2d 856, 861, 651 P.2d 207 (1982) (noting reliability is the key when determining whether to admit evidence).

Stanford, as president of the board, provided an adequate foundation for admitting the comments. He testified that the board sent the survey to its members on November 1, 2007 to gather information about nightly rentals in Chiwawa as part of its fiduciary duties to its members. CP 135, 1044. The board then compiled the results and the comments into the 2007 survey shortly after receiving the members' responses. CP 1044. It then mailed the members a copy of the 2007 survey. CP 1044. Stanford asserted under oath that the survey evidence was a true and accurate compilation of the responses that the board received. CP 135, 1044. The rental businesses produced *no evidence* that the comments failed to accurately reflect the comments the board actually received. Importantly, the comments were *admitted* in *Wilkinson v. Chiwawa Communities Ass'n*, 160 Wn. App. 1038 (2011) and the residential businesses did not object. CP 1044. If anything, the rental businesses' concerns cut against the weight of the evidence, not its admissibility. The survey evidence should have been admitted.

The rental businesses also argue the trial court properly excluded portions of the declarations of Van Eyk and Padden because they lacked

personal knowledge. Br. of Resp'ts at 33-34. As for Fisk's testimony, they contend that the trial court properly excluded it because it was inconsistent with the Association's business records. *Id.* at 34. Again, the rental businesses are mistaken. The testimony of the Association's witnesses should have been admitted in its entirety.

Van Eyk, a current board member, testified that she gave a prospective short-term renter the telephone numbers for Lake Wenatchee Hideaways and Comfy Cabins. CP 1082-83. She had direct contact with the renter and thus had personal knowledge of the matter on which she testified. She qualified her testimony that the rental businesses made more money during the winter months with the phrase "it seems apparent." CP 1083. Similarly, Padden testified that his family has lived in Chiwawa since 1968 and has owned their current properties in Chiwawa since 1969. CP 1099. His testimony demonstrates that he is intimately familiar with Chiwawa given his time there. He has the necessary knowledge to testify about rentals in the community and to describe the community where he lives. Van Eyk and Padden's testimony was rationally based on their perceptions of the matters on which they testified and was thus admissible. CR 56(e); *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988). *See also*, ER 602 (noting a witness may not testify to a matter unless evidence is introduced sufficient to support a finding

that the witness has personal knowledge of the matter); ER 701 (requires opinion testimony by lay witnesses to be “rationally based on the perception of the witness[.]”).” Fisk’s testimony that a past enforcement action dealt with the same activity conducted by the rental businesses was likewise admissible. CP 992, 995. That it may have been inconsistent with the Association’s business records goes to the weight to be given to it, not to its admissibility. Where the Association’s witnesses satisfied the evidence rules, the trial court erred by excluding the challenged testimony.

(3) Collateral Estoppel Does Not Apply Here

The rental businesses contend that collateral estoppel somehow precludes the Association from contradicting what it characterizes as certain “ultimate facts” determined by the trial court in the first lawsuit and by the Court of Appeals in the first appeal.⁸ Br. of Resp’ts at 31-32. They are mistaken. While the parties agree on the four elements to be applied in the case of collateral estoppel, they fundamentally disagree on the application of that doctrine here. Collateral estoppel does not apply because the rental businesses fail to satisfy the doctrine’s four essential elements.

⁸ Although the rental businesses raised this issue below, the trial court did not consider it. More to the point, the trial court did not include any findings of fact because they would have been superfluous on summary judgment. *See, e.g., Hubbard v. Spokane County*, 146 Wn.2d 699, 706 n.14, 50 P.3d 602 (2002). The trial court was not asked to make, and did not make, any factual findings.

Collateral estoppel, more descriptively denoted as issue preclusion, has the goal of judicial finality. When it applies, the doctrine bars relitigation of issues of ultimate fact that have been determined by a final judgment.⁹ *State v. Vasquez*, 148 Wn.2d 303, 308, 59 P.3d 648 (2002). It applies when (1) the identical issue was decided in the prior adjudication, (2) the prior adjudication resulted in a final judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication, and (4) precluding relitigation of the issue will not work an injustice. See, e.g., *Williams v. Leone & Keeble, Inc.*, 171 Wn.2d 726, 730-32, 254 P.3d 818 (2011); *Clark v. Baines*, 150 Wn.2d 905, 913, 84 P.3d 245 (2004). All four elements must be proved. *Clark*, 150 Wn.2d at 913. Failure to establish any one element is fatal. *Lemond v. State Dep't of Licensing*, 143 Wn. App. 797, 804, 180 P.3d 829 (2008). The burden of proof is on the party asserting estoppel to show that the determinative issue was litigated in the former proceedings. *Vasquez*, 148 Wn.2d at 308.

⁹ The principle underlying the doctrine is to prevent relitigation of already determined causes, curtail multiplicity of actions, prevent harassment in the courts, inconvenience to the litigants, and judicial economy. See, e.g., *Bordeaux v. Ingersoll Rand Co.*, 71 Wn.2d 392, 429 P.2d 207 (1967). These purposes are balanced against the important competing interest of not depriving a litigant of the opportunity to adequately argue the case in court. *Restatement (Second) of Judgments* § 27 cmt. c. at 252 (1982).

Although the rental businesses refer to collateral estoppel in passing, they do not analyze each required element of the doctrine. Consequently, the Court should decline to address the argument RAP 2.5; *Heesan Corp. v. City of Lakewood*, 118 Wn. App. 341, 356 n.14, 75 P.3d 1003 (2003), *review denied*, 151 Wn.2d 1029 (2004). But even if the Court decides to consider it, the doctrine does not apply because the rental businesses have failed to meet their burden of proof.

Under the first element, the issue decided in the prior adjudication must be identical to the one at hand. Here, the issues are not identical because two different amendments addressing short-term transient rentals are at issue. Where an issue arises in two entirely different contexts, the first requirement is not met. *Luisi Truck Lines, Inc. v. State Utils. & Transp. Comm'n*, 72 Wn.2d 887, 894, 435 P.2d 654 (1987).

In 2008, the Association attempted to enact an amendment prohibiting short-term transient rentals in Chiwawa. The trial court reformed the 2008 Amendment to prohibit the rental of residential property in Chiwawa for fewer than 30 days. The Court of Appeals invalidated that reformation because it concluded the trial court lacked the authority to rewrite the Amendment's terms. It did not address the 1988/92 covenants. Moreover, the issue of the 2011 Amendment was *never actually litigated* in the prior proceeding. It could not have been.

The issues are simply not identical in the two lawsuits as they must be before collateral estoppel applies.

The application of collateral estoppels must not work an injustice. Here, it does. This question has its roots in procedural fairness. Washington courts require that the party against whom the doctrine will be enforced had a full and fair opportunity to be heard on the issues. *See, e.g., Thompson v. Dep't of Licensing*, 138 Wn.2d 783, 795-97, 982 P.2d 601 (1999) (no unfairness in applying BAC results from driver's license proceedings against State in criminal prosecution).

It would work an injustice to apply collateral estoppel here. After the Court of Appeals issued its ruling in *Wilkinson*, the Association presented its members with the 2011 Amendment to address their concerns about rental businesses in the community as it was obligated to do to protect the common good. The Association should not be prevented from litigating the issues surrounding the 2011 Amendment where the circumstances and the issues before the Court have changed.

The rental businesses failed to meet their burden of proof on collateral estoppel. That doctrine is inapplicable here.

D. CONCLUSION

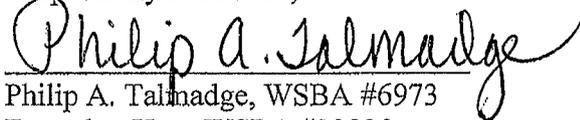
The rental businesses want this Court to ignore its own precedents, which at their core prohibit any commercial or business use of a property

subject to a single-family residential use restriction. The 1988/92 covenants by their terms barred the commercial activities undertaken by the rental businesses here in derogation of the desire for a single-family residential neighborhood in Chiwawa. The 2011 Amendment to the covenants, which were within the authority of the board, make that point even clearer.

This Court should reverse the trial court's summary judgment order in favor of the rental businesses and direct the trial court to enter a judgment in favor of the Association. Costs on appeal should be awarded to the Association.

DATED this 8th day of August, 2012.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973

Emmelyn Hart, WSBA #28820

Talmadge/Fitzpatrick

18010 Southcenter Parkway

Tukwila, WA 98188

(206) 574-6661

Yen B. Lam, WSBA #32989

Galvin Realty Law Group PS

6100 219th St. S.W., Suite 560

Mountlake Terrace, WA 98043

(425) 248-2163

Attorneys for Appellant

Chiwawa Communities Association

DECLARATION OF SERVICE

On the date stated below, I emailed and deposited with the U.S. Postal Service a true and accurate copy of: Reply Brief of Appellant in Supreme Court Cause No. 86870-1 to the following parties:

Yen Lam
Galvin Realty Law Group, P.S.
6100 219th Street SW, Suite 560
Mount Lake Terrace, WA 98043

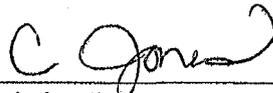
Dennis Jordan
Dennis Jordan & Associates, Inc. P.S.
4218 Rucker Avenue
Everett, WA 98203

Original efiled with:

Supreme Court Clerk
Washington Supreme Court

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

Dated this 9th day of August, 2012, at Tukwila, Washington.



Christine Jones
Talmadge/Fitzpatrick

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Clerk:

Attached for today's filing in Supreme Court case number 86870-1, Wilkinson v. Chiwawa Communities Assoc., is the Reply Brief of Appellant.

Thank you,

Christine Jones
Office Manager
Talmadge/Fitzpatrick
(206) 574-6661

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