RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Aug 14, 2012, 1:13 pm
BY RONALD R. CARPENTER
CLERK

RECEIVED BY E-MAIL

No. 86870-1

SUPREME COURT
OF THE STATE OF WASHINGTON

ROSS WILKINSON and CINDY WILKINSON; MONTE KARNES and KIMBERLY KARNES; DAVID BETHEL and JEANIE BETHEL; DARRELL MCLEAN; JIM PAULUS and KATHY PAULUS; JOE HARGIS and LINDA HARGIS; DANIEL MACINDOE and ISIARA MACINDOE; TED TREPANIER and RUBY AKINS-TREPANIER,

Respondents,

vs.

CHIWAWA COMMUNITIES ASSOCIATION,
a Washington Non-Profit corporation,

Appellant.

RESPONDENTS' RESPONSE/OPPOSITION TO AMICUS CURIAE MEMORANDUM OF GOLD BEACH COMMUNITY CLUB SUPPORTING DIRECT REVIEW

Dennis Jordan, WSBA#4904
Dennis Jordan & Associates, Inc., P.S.
4218 Rucker Avenue
Everett, WA 98203
(425) 252-5554
Attorney for Respondents

TABLE OF CONTENTS

Table of Authorities iii

A. Introduction 1

B. Argument in Favor of Denying Direct Review 1

C. Conclusion 7

TABLE OF AUTHORITIES

Table of Cases

Hagemann v Worth, 56 Wn. App. 85 (1989) 2, 3

Mains Farm Homeowners Ass'n v. Worthington,
121 Wn. 2d 810 (1993) 2, 3

Ross v Bennett, 148 Wn. App. 40 (2008) 2, 3

Shorewood West Condominium Ass'n v Sadri,
140 Wn. 2nd 47 (2000) 3, 4, 5

Rules of Court

RAP 4.2(a) 2, 6

RAP 4.2(a)(3) 1, 2, 5

RAP 4.2(a)(4) 5

Abbreviations

CP - Clerk's Papers

A. INTRODUCTION:

> "Gold Beach agrees with Chiwawa that the trial court's decision is contrary to decisions of this Court and the Court of Appeals and presents a fundamental and urgent public issue that this Court should decide. The Court should grant direct review."[1]

However, as will be discussed below, the "conflict among decisions of the Court of Appeals" or an "inconsistency in decisions of the Supreme Court" is either nonexistent or, alternatively, is artificially created by Gold Beach (as well as the Appellant) through strained interpretations of the cited cases.

B. ARGUMENT IN FAVOR OF DENYING DIRECT REVIEW

1. Under RAP 4.2(a)(3), the standard for direct review does not include conflicts among decisions of the Court of Appeals and the Supreme Court:

> **(a) A party may seek review in the Supreme Court of a decision of a superior court . . . <u>only</u> in the following types of cases:**
>
> . . .
>
> > **(3) *Conflicting Decisions.* A case involving an issue in which there is a conflict among decisions of the Court of Appeals or an inconsistency in decisions of the Supreme Court.**

Clearly, the above rule does not allow the direct review of conflicts between the Supreme Court and the Court of Appeals nor conflicts between a trial court decision and reported appellate cases. To the extent that Gold Beach

---

[1] Page 4 of Amicus Curiae Memorandum.

appears to argue to the contrary, the argument is simply not supported by the plain language of RAP 4.2(a).

2. As argued to the trial court by both parties, in interpreting covenants, a construction that favors the "free use of land" is not the paramount consideration; rather, it is the determination of the intent of the original grantor who drafted the applicable covenants that is controlling.

This was the argument made by both parties to the trial court.[2] That argument provides the framework within which the Court of Appeals would conduct a de-novo review of the trial court's court's decision. If the trial court's decision was wrong because the trial court mistakenly applied the wrong standard to its interpretation of the covenants at issue, then that is something that the Court of Appeals is charged with correcting – however, such an error [which did not occur anyway] by the trial court does not create a basis for direct review under RAP 4.2(a).

3. Within the scope of RAP 4.2(a)(3), there are no conflicting decisions interpreting or analyzing the term "Residential Use."

First, Gold Beach argues that *Ross v Bennett*, 148 Wn. App. 40 (2008) (Rev. Denied) conflicts with *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wn. 2d 810 (1993). But, as pointed out above, even assuming one existed, a conflict between the Court of Appeals and the Supreme Court does

---

[2] CP 101-102; CP 456-465.

not meet the requirements of RAP 4.2(a)(3).

Second, and in any event, in *Ross*, the Court of Appeals did not agree that *Mains* was controlling authority when it stated as follows:

> Ross and Schwartzberg argue that the term "residential" or "residence purposes" in a restrictive covenant prohibits any business use. *Metzner v. Wojdyla,* 125 Wash.2d 445, 886 P.2d 154 (1994) (operation of licensed child daycare facility violated covenants restricting use of property to residential purposes only); *Mains Farm Homeowners Ass'n v. Worthington,* 121 Wash.2d 810, 854 P.2d 1072 (1993) (for profit adult family home violated covenant stating "lots ... shall be used for single family residential purposes only" due to the commercial nature of the use); *Hagemann v. Worth,* 56 Wash.App. 85, 91, 782 P.2d 1072 (1989) (defendant was enjoined from operating a business providing foster care to elderly people on property when restrictive covenant prohibited "business, industry or commercial enterprise of any kind or nature"). The cases cited by Ross and Schwartzberg, do not compel this court to conclude that a vacation rental is a business use. Bennett proposes a rental of the property that is identical to his own use of the property, as a residence, or the use made by a long-term tenant. The owner's receipt of rental income either from short or long-term rentals, in no way detracts or changes the residential characteristics of the use by the tenant.[3]

Third, the Division III case of *Hagemann v Worth*, 56 Wn. App. 85 (1989), as pointed out by the *Ross* Court of Appeals, is also not in conflict with *Ross*. But, more importantly, what Gold Beach characterizes as the holding of *Hagemann* [that is "catering to paying customers is not a residential use of property"] is a statement that is tied to the facts of that case;

---

[3] *Ross v. Bennett*, 148 Wash. App. 40, 51, 203 P.3d 383, 388 (2008).

that is, where the owner actually lives in the property while, at the same time, providing care services to consumers who are paying for the specific services being rendered. Clearly, those facts are not even similar to the facts of this case. To conclude otherwise would mean that even long term residential rentals would constitute a prohibited commercial use because they also make payment to the landlord as compensation for their occupancy.

4. Even assuming that the trial court's decision is contradicted by *Shorewood*, that contradiction does not constitute a justification for direct review under RAP 4.2(a)(3).

First, the trial court's decision is not contradicted by *Shorewood West Condominium Ass'n v Sadri*, 140 Wn. 2nd 47 (2000). *Shorewood* involved the question of whether or not a condominium regime had the right to restrict the leasing of units within the complex. This Court determined that the association did have that right but that decision was specifically not extended to the interpretation of covenants imposed upon non-condominium homeowner's associations:

> All condominiums are statutorily created. Lewis A. Schiller, *Limitations on the Enforceability of Condominium Rules,* 22 Stetson L.Rev. 1133, 1135 (1993). In Washington, the statutory form of condominium was first authorized with the passage of the Horizontal Property Regimes Act. 2 Washington State Bar Ass'n, *Real Property Deskbook* § 41.5 (2d ed.1986). All condominiums created in this state after July 1, 1990 come under another regime: the Condominium Act, RCW 64.34. RCW 64.34.010. Since Shorewood West Condominium was created in 1978, it is governed by the older act.

> **Because condominiums are statutory creations, the rights and duties of condominium unit owners are not the same as those of real property owners at common law.** *McElveen-Hunter v. Fountain Manor Ass'n, Inc.,* 96 N.C.App. 627, 386 S.E.2d 435, 436 (1989), *aff'd,* 328 N.C. 84, 399 S.E.2d 112 (1991). "Central to the concept of condominium ownership is the principle that each owner, in exchange for the benefits of association with other owners, 'must give up a certain degree of freedom of choice which he [or she] might otherwise enjoy in separate, privately owned property.' " *Noble v. Murphy,* 34 Mass.App.Ct. 452, 456, 612 N.E.2d 266 (1993) (quoting *Hidden Harbour Estates, Inc. v. Norman,* 309 So.2d 180, 182, 72 A.L.R.3d 305 (Fla.Dist.Ct.App.1975)). The rights given up by the unit owners are determined by the statute. RCW 64.32 makes all owners subject to the chapter and "to the declaration and bylaws of the association of apartment owners adopted pursuant to the provisions of this chapter." RCW 64.32.250(1). [4] (Emphasis supplied.)

But, in any event, where is the RAP 4.2(a)(3) conflict that allows for direct review? Again, Gold Beach's argument under this section does not provide justification for bypassing the decision making process of the Court of Appeals.

5. This case does not involve fundamental and urgent issues of public importance.

Clearly RAP 4.2(a)(4) involves a judgment call on the part of the Court. However, merely saying that "fundamental and urgent issues of broad public import" are involved is not persuasive. On the other hand, the view of the

---

4 *Shorewood, supra* at 52-53. (The court went on to hold at page 57, however, that the leasing restriction amendment at issue in that case was not enforceable because the Association amended its bylaws rather than the Declaration.)

Respondent in this case is that the underlying issue was and always will be the intent of the drafter of the covenants at issue and "intent" can vary from one set of covenants to the other even if the words that are used are the same or similar.

For example, in this case, the 1988 covenants contained the following language:

> . . . No sign of any kind shall be displayed to the public view on any lot, tract or subdivision thereof in the plat, except one sign of not more than 3 feet square giving the names of the occupants of the lot, tract, or approved subdivision thereof, and one sign of not more than 6 square feet advertising the property for sale **or rent**.[5] (CP 819)

The Court of Appeals has already addressed the meaning of that language when it stated as follows:

> The trial court concluded that the 2008 Amendment was invalid. We agree. (CP 790)
>
> * * * *
>
> The 1988 Covenants also contained a sign restriction under the section entitled "Trash Disposal." Except for this sign restriction, the 1988 Covenants are silent as to the rental of residential property. <u>The sign restriction clearly assumes that rentals were allowed in the community</u>. . . . (Emphasis supplied.) (CP 791)
>
> * * * *
>
> If named homeowners are successful [in this appeal], the covenants will contain no restrictions on the length of rentals. (CP 793)

---

5 Despite its significance to the interpretation of the Covenants at issue, the addition of this language to the 1988 Covenants and/or its inclusion as part of the phase 2 Covenants was not even mentioned in Appellant's Brief.

Therefore, unless that same language is contained in covenants throughout Washington, what is the justification to conclude that these covenants involve "fundamental and urgent issues of broad public import"?

C. CONCLUSION

As a matter of policy, direct review should be sparingly granted. But when granted, the basis for direct review should be supported by RAP 4.2(a). In this case, that support is either very tenuous or is simply non-existent. Direct review should be denied.

Respectfully submitted this 14th day of August, 2012.

DENNIS JORDAN & ASSOCIATES,
INC., P.S.

By_____
Dennis Jordan, WSBA # 4904
Attorney for Respondents

DECLARATION OF SERVICE

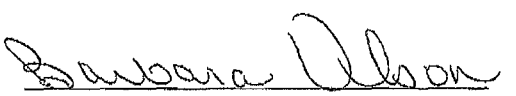
I declare under the penalty of perjury of the laws of the State of Washington that a copy of the foregoing Respondents' Response/Opposition to Amicus Curiae Memorandum of Gold Beach Community Club was on this day transmitted via Email as well as deposited in the U. S. mail to:

Leslie J. Garrison
Attorney at Law
119 1st Avenue South, Suite 320
Seattle, WA 98104-3424

Philip A. Talmadge
Attorney at Law
18010 Southcenter Parkway
Tukwila, WA 98188

Yen B. Lam
Attorney at Law
6100 219th Street S.W., Suite 560
Mountlake Terrace, WA 98043

Executed at Everett, Washington on this 14th day of August, 2012.



Barbara Olson

OFFICE RECEPTIONIST, CLERK

To: Dennis Jordan
Subject: RE: Wilkonson v Chiwawa #86870-1

RECEIVED 8-14-12

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Dennis Jordan [mailto:attyjord@yahoo.com]
Sent: Tuesday, August 14, 2012 1:13 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Yen Lam; Phil Talmadge; leslie@newwaylaw.com
Subject: Wilkonson v Chiwawa #86870-1

Please see attached Response.

Dennis Jordan
4218 Rucker Ave
Everett Wa 98203
T: 425-252-5554
F: 425-258-4060

----- Forwarded Message -----
From: "bj.olson@frontier.com" <bj.olson@frontier.com>
To: Dennis Jordan <attyjord@yahoo.com>
Sent: Tuesday, August 14, 2012 1:07 PM
Subject: Wilkinson v Chiwawa