ORAL ARGUMENT - 02/25/97

96-1092

PILARCIK V. EMMONS, ET AL.

LAWYER: May it please the court. We are here today on a case of significant importance to both the people of the State of Texas and Texas jurisprudence. The lower court in this particular case in reaching its opinion has rejected the well established rules of construction regarding restrictive covenants as enunciated by this court as recently as in the Wilma Wilcox case. If left unreversed the lower court's opinion will cause confusion not certainty with regards to deed interpretation, and will lead to an improper limitation on a property owner's rights to free and unrestrictive use of the land.

The facts of this case are quite simple. Back in the Spring of 1992, a major hail storm devastated North Texas, destroying 1,000s if not 10s of thousands of homes and roofs. The Pilarciks lost their roof because of that particular hail storm. They decided not to go back with a wood shingle roof because of the safety hazards, not only in sales but their neighbors in their neighborhoods. They therefore turned to their restrictive covenants to determine what roof types were available to them. They saw two provisions. Article 1, paragraph 9 stated: that roof's composition shingle types would not be permitted, and that all roofs would be made of wood shingles, unless alternate roofing materials were approved by the Architectural Control Committee (ACC), the committee created within the document we're speaking. Article 2, paragraph 1, more particularly stated that the architectural control committee shall have the right to waive any restrictions pertaining to roof types. During this same period of time, Debbie Pilarcik attended a homeowner's meeting with Mr. Jones being one of their neighbors, at which the whole issue of composition roofs came up. Mr. Jones espoused that it was his belief there were only two ways a homeowner could get a composition roof on their house. First to amend the restrictive covenant, to provide the composition roofs, or alternative 2) to petition the ACC for a waiver and thereby approval of composition roofs. It is this second method that the Pilarcik's chose to follow.

In compliance with article 2 of the restrictive covenants, they sent out a letter in September 1982, to the members of the ACC at the addresses provided and respectfully requested the right to use a timber line or equivalent composition roof type material. A very specific type of composition roof.

GONZALEZ: Along with that request did you also submit class specifications or plot plan?

LAWYER: It is our interpretation and I think when you apply the proper construction to this particular document that in requesting the type of roof, that by stating the timberline or equivalent composition roof type, that was the specification of the type of roof they were seeking to have put on their house.

GONZALEZ: There is only one type of composition roof?

LAWYER: No, the timberline or equivalent is in sense a characteristic of a composition roof. And that is what they requested of the architectural control committee. Having received no response in the 30 days, they followed the procedure under art. 2, paragraph 2, ...

PHILLIPS: They received no response, but it is undisputed that all of the letters came back to them?

LAWYER: No your honor. That was a point I was going to make. The evidence is to the contrary. The Sept. 1992 letter was never returned. The evidence is clear on that. Appellee is mistaken and has misled this court by suggesting that. What happens is later on and we will get to a second letter was sent after the lawsuit, and that letter was returned to them.

CORNYN: What does the evidence show about the state of the Pilarcik's knowledge about the ACC being all but defunct?

LAWYER: First of all there was no evidence that this ACC was defunct.

CORNYN: There were only 3 members remaining wasn't there?

LAWYER: Correct your honor

CORNYN: How many were originally on the ACC?

LAWYER: Originally there were 5. The Pilarcik's had no knowledge as to who these 5 individuals were, what the status was. Therefore, they submitted their request in accordance with the restrictive covenants requirement of sending the letter to the 5 at the addresses shown. And as I stated received no response.

OWEN: Was it a single address or 5 different addresses?

LAWYER: Five different addresses.

OWEN: Did they get any of the first letters back?

LAWYER: No. None of the 5 came back.

CORNYN: Does it make any difference that the approval or disapproval wasn't in writing?

LAWYER: This first presumption, the 30 day under article 2, paragraph 2, is a presumption if you have no response, that you have approval.

CORNYN: But the first sentence said that the approval or disapproval as required by this covenant shall be in writing?

LAWYER: Correct your honor.

CORNYN: You're saying that if they don't respond, that even though that's not...I mean there's no writing obviously if they don't respond, but that is still consistent with the requirement of a writing?

LAWYER: If you proceed on into art. 2 at the very bottom it says that: After you have sent your request, if you fail to receive a response, if no suit to enjoin the construction has been commenced prior to completion, approval will not be required and the restrictive covenant herein contained shall be deemed to have been fully complied with. It was based on that reading that they proceeded with the construction. They ordered, based on that presumption, the composition roof material and had it delivered in front of their house where it sat for 10 days before the project ever was undertaken.

OWEN: If in fact the committee had not acted in awhile, are there any provisions for reenacting or reconstituting the committee, or naming new members to the committee?

LAWYER: The procedures are emphatic that these are the 5 members, that if in the event of death or resignation, the additional members may appoint more members. But there is nothing contained herein that says the remaining members can no longer act, or that the fact that they have to meet every year. There is no requirements of how often they have to meet. So there is nothing contained within the strict reading of the document that provides that type of information.

ENOCH: I've got a couple of questions about the record that I am not clear about. The CA says that of all the homeowners whose roofs were damaged by the hail storm, the Pilarciks are the only ones who failed to comply with the covenant. Now is that a correct statement by the CA?

LAWYER: That is an incorrect statement.

ENOCH: What does the summary judgment record in this case show...what does the record in this case before the court show as to who complied and who didn't comply with the covenants?

LAWYER: What the record shows is that the Pilarciks are the only one that ever obtained approval for an alternate roofing material.

ENOCH: No, that's not my question. The CA says that all of the homeowners whose roofs were damages complied with the covenants except for Pilarcik. Now what you said is the Pilarcik's got a waiver. I am not talking about waiver. But for that wavier were the Pilarcik's the only homeowners who did not comply with the roofing covenant?

LAWYER: If the question is your honor: Are the Pilarcik's the only one that put a composition roof on their house? There was one other house in the addition that had a composition roof.

ENOCH: That wasn't my question. The homeowners that had their roofs damaged by the hail

storm, did all of them comply with the covenants except for the Pilarciks?

LAWYER: No. What I said your honor when you say comply, the procedures set out in art....

ENOCH: Let me read it to you.

> All of the Water Wood Estates residents who suffered roof damage in the hail storm of '92 all complied with the subject covenants with the exception of the appellants, referring to the Pilarciks.

Is that a correct statement?

LAWYER: I can only assume what Justice Carr was writing there is that the Pilarciks were the only ones that put a composition roof on their house.

ENOCH: The CA says citing to our case, Cowling v. Cullegan, that there are two methods assuming there is not a waiver. And I'm not talking about this ACC allows the waiver. I am talking about two conditions that can exist for the ignoring of a restrictive covenant in the deed; and one of those being that the homeowners have acquiesced to substantial violations of this. And I assume that's what the CA was referring to. There was a hailstorm damage to a lot of roofs, a lot of people made the repairs, everybody but the Pilarciks complied with the covenant. And then there's a second part though, that there is such a change in the conditions in the restrictive area or areas surrounding it, that compliance with a covenant no longer secures a substantial degree of the benefits sought to be realized by the covenant. Now it's this second section I want to talk about. There is a statute now that prohibits the use of wood shingles.

LAWYER: That is correct your honor.

ENOCH: So clearly the covenant can no longer be complied with. Correct?

LAWYER: That is correct.

ENOCH: So the thing is that this covenant does permit alternative roofing. Now I am assuming that these homeowners put on this alternative roofing didn't they?

LAWYER: In the evidence it shows that only 10% of the houses in the subdivision have wood roofs. The balance are made up of all other types of roofing materials.

ENOCH: So there are other roofing materials other than composition that these homeowners repaired their roofs with at the time the Pilarcik's used composition materials?

LAWYERS: Others already had types of roofs; some repaired, some haven't repaired, and are awaiting the outcome of this case. And so that is correct your honor if that's what you are asking.

ENOCH: I guess that's the answer to my question. Where the CA says that all the estates residents who suffered roof damage complied with the subject covenants you are saying is not correct because the summary judgment record demonstrates that the homeowners have not repaired their roofs or have their repaired the roofs?

ENOCH: Your honor what I am saying is that the homeowners who have used alternate roofing materials have not obtained approval for those alternate roofing materials from the architectural control committee. And therefore, they have violated the restrictive covenant likewise. That restrictive covenant has been in essence ignored over the several past years because no one accept the Pilarciks have contacted the ACC and requested approval for a particular type of roof other than the wood roof.

ENOCH: I thank you got my question.

GONZALEZ: Let me clear something up. But only your clients have used composition type roofs?

LAWYER: There are two other houses in the subdivision with composition roofs. One, arguably is grandfathered in, the other was put on - no one ever sued them. And they completed that.

GONZALEZ: Under the clause of the covenants if nobody complains, you know they have presumed to have complied?

LAWYER: Correct.

OWEN: What are the other roofs made of?

LAWYER: There are slate, there are tile roofs out there. These are particularly heavy as you know for structure. Evidence presented in the summary judgment is these types of roofs were not available to the Pilarciks because of the pitch of their roof. It was too heavy and structurally unsound. So what happens is that the Pilarciks are in a position of putting a wood roof on, or a composition roof on.

ABBOTT: Or aluminum?

LAWYER: Or an aluminum roof. As we have seen the aluminum roofs are now starting to have the same concern of fire hazards that the wood roofs are having, because they build up heat inside the attic and many of them are put on top of wood roofs. And it's for those reasons, that the Pilarciks went and obtained the approval from the ACC.

GONZALEZ: When you say obtain, this was not in writing?

LAWYER: That's where I think the confusion is. You had two steps. They had the presumption because nobody responded. They were sued. They thereupon contacted the ACC trying to find out

what's going on. They spoke to Frank Richards of the ACC. He came out to their house; he inspected their house; he inspected the roof; he obtained additional specifications from them as to what this roofing material was; he examined the neighborhood and saw that the neighborhood was only 10% wood roofs, and that basically the roof restrictions had been ignored over the past years. He met with the balance of the architectural control committee and they gave them written approval at that time, which is in the record. They did get the written approval for the composition roof they had requested back in Sept. 1992, when they wrote and asked specifically for a timberline or like composition roof.

GONZALEZ: Can you cite me to the record for me to look at what the approval you are talking about?

LAWYER: I can get that to you real quick. It is in the record. It was at that point after the Pilarciks had done every thing set out in the procedures and had the written approval from the ACC, that Mr. Jones his neighbor...

GONZALEZ: They had already been sued?

LAWYER: They had already been sued. That is correct. At this point in time they had complied...

GONZALEZ: And they were already on notice that the homeowners association was against changing the covenant?

LAWYER: That's a misnomer. The misnomer there is there was no knowledge that the homeowners association was against a change. Post the lawsuit, they've been sued, they have gotten written approval from the ACC. At that point there was a move made in the neighborhood also to get an amendment of the parties contacted, the vast majority wanted the amendment. However at that same time, Mr. Jones sent out a letter to everyone, which was in our estimation as the record shows, somewhat of an intimidating letter and everybody decided at that point they were not going to proceed. So our client had gotten the written approval, had gone to the point of trying to get the amendments, but then everybody backed off and said: No, in light of the letter I am not going to do that. So that's where we were.

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RESPONDENT

LAWYER: It's my privilege to represent the 12 homeowners from Waterwood Estates Addition in Arlington, who are the original plaintiffs in this cause of action, and now come to you as the respondents.

This is not a wood/roof case. This case involves an outright prohibition against composition shingles contained within a neighborhood's deed restrictions.

CORNYN: Isn't it the concern of the restrictive covenants basically to maintain the value of the homes in the neighborhood?

LAWYER: Absolutely, and there is uncontradicted testimony at the injunction hearing by a certified appraiser that composition roofs do diminish a home's value.

CORNYN: Isn't it also part of the record though, that the Grand Manor shingle roof, the composition material that the Pilarciks were going to put on their home is in fact more expensive than wood or aluminum roofs?

LAWYER: There is that allegation, yes, in the record.

CORNYN: How do you reconcile those two?

LAWYER: I think that it's quite clear that the prohibition against composition shingles is a very objective standard. I think it would be an unfortunate mistake to start allowing subjective standards on a composition roof is fine if it's expensive, or if it has a lifetime warranty as opposed to just the outright prohibition which appears in the covenants. It's an objective standard. No composition roof.

GONZALEZ: Is it your position that the ACC cannot waive that provision?

LAWYER: Yes, sir.

GONZALEZ: What is your response to the numerous amicus briefs that says that's bad policy, bad law?

LAWYER: I would be happy to address that. In fact I think this court has already addressed that in the Stergio case, which was a decision out of Dallas written by CJ Gittard enforcing and affirming a mandatory injunction by then Judge Hecht removing a composition roof. In Stergio the deed restriction was no composition roof shall be allowed under any dwelling. The homeowners put on a composition roof and just like the petitioners they argued that it was superior to wood from the point of safety. They recognized aluminum and tile as alternatives, but admitted that those options would be more expensive, and would require changes to their substructure. Like the amicus curiae, the infringing homeowners argued that the prohibition against composition shingles was violative of public policy. As a practical effect would require them to put on the wood, which became void by the property code section voiding a requirement of wood shingle roofs.

Again in affirming, then Judge Hecht's permanent injunction, removing the composition roof, Chief Justice Gittard wrote: The fact that in this instance the material used may have been preferable to other materials for one reason or the other is not controlling so long as the restriction itself has a reasonable basis. The practical disadvantages of other alternatives to wood shingles for a structure of a particular design do not establish that the restriction in question is void.

OWEN: Does the question void verses the committee's authority to waive it, the issue in that case is not one that the ACC can waive for a restrictive covenant?

LAWYER: That's correct. It was whether or not public policy required that the prohibition against composition be removed because of the practical effect of requiring wood. We would point out that in this case there are alternatives to wood materials that are uniformly used throughout the neighborhood.

I think it's interesting that the TC observed that the ACC is moot, the ACC is no longer operating, and that any authority which the ACC may have had to waive composition roofs applies only to new construction.

CORNYN: Why shouldn't that be chargeable then against those who seek to enforce the restrictive covenant? In other words why isn't that a waiver in essence of the restrictive covenant if in fact the only procedure by which a waiver might be obtained is now essentially defunct?

LAWYER: I was going to point out that the homeowners now control the neighborhood - not the ACC. The ACC is defunct and has not met for some 13...

BAKER: Do I understand that you represent 12 separate homeowners but that the homeowners association is not a plaintiff; is that correct?

LAWYER: That is exactly correct and that's a clarification that Mr. Sheehan clarified for I believe Justice Gonzalez. The homeowners association is an unincorporated entity and is not a party.

BAKER: Isn't it the homeowners association that has the power to amend the deed restrictions?

LAWYER: No, sir. The homeowners themselves have the power to amend the deed restrictions. And in fact the petitioners themselves tried to change and were unsuccessful in doing so.

BAKER: What I mean is everybody that's a resident of the subdivision is a member of the homeowners. Is it mandatory?

LAWYER: No, it's not. It's not a strong homeowners association that required dues and lien rights, and that type of things. It's a very loose assembly that frankly hasn't met in some time.

BAKER: So it's not a mandatory homeowners?

LAWYER: No, it's not. Justice Cornyn back to your questions. It's our point and it was a tenant of Judge Tice's ruling in the TC that the ACC is moot, is dormant, is no longer operating. And one of the points that I was going to make is that the responsibility for enforcing the covenants has now shifted to the homeowners.

OWEN: What summary judgment evidence is there to support that conclusion?

LAWYER: That's just argument. It's just argument, contract interpretation.

CORNYN: So how would you go about getting a waiver? Is it impossible to get a waiver anymore?

LAWYER: I think it is.

CORNYN: I guess you could get all the homeowners to agree?

LAWYER: Well that's exactly what we did.

CORNYN: Buy if you had one object, then you would be out of luck?

LAWYER: We had a homeowner's meeting and everybody had to replace their roofs. So what do we as we replaced the roofs what are the requirements? Well this was post-1979. So the prohibition against wooden roofs were void. That's still however left to clear prohibition against composition roofs. So it was the consensus and everyone followed that you could put on virtually anything you wanted tile, aluminum, hardy shake, accept you could not put on composition roofs, and that's what everybody did accept for the petitioners. And at this meeting in May, 1992, Mrs. Pilarcik one of the petitioners attended the meeting and it was very clearly announced at that meeting that the deed restriction was there and would be enforced.

SPECTOR: It's your position that the roof covenant and the ACC only applies to new construction?

LAWYER: Yes it does. And that's the very ruling that Judge Kice made in the TC.

SPECTOR: Could you then construe it to mean that once the house is constructed with a wood shingled roof, that any type of, which I assume would last 20 or 30 years, that you could then put on any kind of roof that you wanted?

LAWYER: Absolutely you can accept for the prohibited composition roof. And that's what the homeowners did. There has been a great argument about the testimony about what percentage of homes or what.

SPECTOR: Your argument is that that only applies to new construction?

LAWYER: The deed restrictions say that roofs of composition type shingles will not be permitted. And then it goes onto say that wood roofs will be required unless the ACC allows an alternate material.

SPECTOR: It seems to me your position is that only as applying to new construction?

LAWYER: That's exactly correct. If you build a house with wood shingles or tile, or aluminum and you needed to replace your roof, you don't need to get ACC approval for anything. You can put on any material that you wish so long as it is not composition materials.

SPECTOR: Well again it seems to me your argument is this only applies to new buildings and you could replace a roof with whatever, including composition?

LAWYER: Well that's not my argument. I have not made myself clear. The prohibition against composition roofs stands on its own. And then you go into the requirement of a wood roof, which has now been voided, and which goes on to provide that an alternate roofing material can be allowed by the ACC. But then it goes on in sec. 2.1 that talks about it has the right provided that the appraised value of the proposed house is not less than $50,000. So it's our interpretation and it's the TC's ruling that any authority the ACC has to waive these deed restrictions applies only to proposed houses and not to replacement of existing houses.

SPECTOR: You might read these together as only applying to new construction.

GONZALEZ: I am not clear about your argument. In response to my question you said clearly the ACC does not have the power, the authority to waive this provision. But the next provision _____ says that this committee shall have the right to waive any restriction, underline <u>any</u> in plain English. Now how do you get around that?

LAWYER: You get around that by contract construction. There's three tenants of contract interpretation, which would affirm the decision of the CA. First is that specific and exact language is to be given precedent over general language. Specific: roofs of composition type of materials will not be allowed. General: Any materials as it relates to type of roof or quality of masonry. Quality of masonry was in the preceding paragraph and required 75% stone. The type of roof in our interpretation is a required wood. More importantly, the second tenant is that none of the contract provisions shall be rendered meaningless. If you adopt petitioner's position that it can waive any type of materials, that sentence is out. It means nothing. Put it back in. When the direct prohibition reappears, the only logical interpretation is that found by the CA which is that all roofs shall be made with the required wood unless an alternate material is allowed so long as it is not the prohibited composition shingles. That's the only interpretation which does not render that sentence meaningless.

ABBOTT: At what point in time did the ACC become moot?

LAWYER: The ACC quit meeting I believe the testimony was in 1980, some 13 years prior to this time.

ABBOTT: So they became moot as of the last meeting date?

LAWYER: They had not met since then.

ABBOTT: That doesn't matter. What is it that makes it become moot on the last meeting date? Does the whole world know that it is moot at that time? At what point in time does it become moot?

LAWYER: The deed restrictions are silent on that point. It doesn't say.

ABBOTT: And so are we to just make up the concept that the ACC is now moot?

LAWYER: No.

ABBOTT: Then what can we rely upon in the documents to determine that they are now moot?

LAWYER: You can rely upon contract interpretation.

ABBOTT: Specifically?

LAWYER: Petitioner's position would allow two representatives from the developer's now defunct lender remnants of an ACC that have not met for 13 years to change after build-out of the neighborhood the very residential scheme agreed to and followed by developers - no composition roofs as the homeowners begin the process of repairing their existing residences. We don't believe this is what the developers intended. If as petitioners allege they can waive this prohibition, then why doesn't it also follow that they can waive the prohibition against frame houses or the prohibition against hotels, or chain link fences, or advertising signs all which are expressly prohibited.

ABBOTT: So what you are saying then is that there is nothing in the deed restrictions or in any other document anywhere that renders the ACC moot?

LAWYER: That is correct.

ABBOTT: And if the ACC is not moot, then if we conclude that the ACC has the power and the ability to waive any restrictions, then you would agree that the wavier that was provided by the two members of the ACC constitutes a waiver?

LAWYER: Absolutely not.

ABBOTT: Tell me why?

LAWYER: First of all, as Justice Gonzalez noticed, the waiver provision is very specific. Ordinary minds cannot differ as to the conclusions to be drawn from the evidence, the petitioners did not follow these procedures. First, it is obvious from petitioner Frank Pilarcik's own admissions at the injunction hearing that he did not receive the ACC's approval in writing.

Q Did you ever get any approval or disapproval in writing?

A No sir.

They now come in and claim that they received after the fact approval, that they received approval after they were enjoined.

ABBOTT: And that was in writing?

LAWYER: That was in writing.

ABBOTT: As best as I can determine, the other homeowners in the addition or subsection that added new roofs to their houses, did not obtain any type of wavier?

LAWYER: That is correct.

ABBOTT: And they did not follow the procedures and because they did not follow the procedures that were required, why does that not render moot the procedures? In essence why have the procedures not been waived by the subsection, by their nonenforcement?

LAWYER: I really don't have an answer for your question.

ABBOTT: Let me put it this way. You are familiar that if deed restrictions are not enforced they can be waived?

LAWYER: Yes.

ABBOTT: And the deed restrictions were not enforced when it came to the other homeowners?

LAWYER: I believe that they were.

ABBOTT: Tell me how the other homeowners followed the procedure in these deed restrictions?

LAWYER: They didn't need to. Because the requirement of wood shingled roofs was voided. Leaving only the prohibition against composition roofs. There was no requirement that they obtain an alternate material. There was no requirement that they put on wood shingle roofs, so that there was no requirement to obtain approval for an alternate leaving the prohibition against composition roofs. There is no requirement for that procedure.

OWEN: I am confused about the time. This was at the temporary injunction hearing where Mr. Pilarcik testified that he had not gotten written approval?

LAWYER: Yes it is.

OWEN: And then in Jan, 1992, he did get written approval?

LAWYER: That's their position, yes.

OWEN: Is that in the record or not?

LAWYER: Yes, it is in the record.

OWEN: And that was before summary judgment was entered?

LAWYER: Yes.

OWEN: Was the written approval part of the summary judgment record?

LAWYER: I believe it was

ABBOTT: The specific decision of the TC was that the waiver procedure did not matter because the ACC had no authority to waive it on an existing home. If the ACC is not moot, how would the homeowner go about getting a waiver from the deed restrictions?

LAWYER: Well they would have to do more than just send a letter and because they didn't get a response assume they had approval.

ABBOTT: What more would they have to do other than getting a waiver from two of the three remaining members?

LAWYER: Sturgeo's case requires them to exercise due diligence before deliberately disregarding the restrictive covenant which they know about. This is just logic. I think it would be appropriate to go find these ACC members, obtain their approval in writing, give them the plot plans, the specifications that are required by the deed restrictions, which Mr. Pilarcik again at the temporary injunction hearing testified that he did not do.

ABBOTT: But isn't it in the agreement or the deed restrictions that all of this information can be provided to the ACC orally? It's not required to be in writing in the presentation to the ACC?

LAWYER: That's exactly right. There is no requirement that it be provided in writing. But Mr. Pilarcik himself testified that:

Q You have never submitted plat specifications or plat plans to the ACC have you?
A No, I did not.

OWEN: But again that was at the temporary injunction hearing?

LAWYER: Exactly.

OWEN: And there is summary judgment evidence that indicates that after this temporary injunction hearing that he did contact the committee, he did provide them information?

LAWYER: Gave them information about the grand manner shingle. Yes. We would like to point out to the court the Wilmeth decision which was decided by this court in 1987. Justice Wallace wrote that: We note the covenants restricting the free use of land are not favored by the courts, but when they are confined to a lawful purpose and are clearly worded they will be enforced. Confined to a lawful purpose clearly worded. It can be no more unlawful to prohibit composition shingles than it can be to prohibit a hotel, or a billboard, or an RV from parking in the neighborhood all which are direct prohibitions. We certainly think that it can be no more clearly worded than: roofs of composition type shingles will not be permitted. Independent of the Texas Property Code §2.002, .003, which was adopted in 1987 requiring that restrictive covenants will be liberally construed, we think that even under the prior Wilmeth test that these deed restrictions meet the requirements for approval.

ABBOTT: Why should it not be incumbent upon the homeowners in the subdivision to amend the deed restrictions to eliminate the ACC?

LAWYER: That opportunity is certainly there.

ABBOTT: And without that being done, why would it not then be true that the ACC should continue in viability?

LAWYER: It may. But again we don't think that's dispositive.

ABBOTT: So it's your position changing points here, that the Sept. 3 letters that went out did not comply with the type of information that is required under the deed restrictions?

LAWYER: Yes. And Mr. Pilarcik has testified that he did not know whether or not those letters were ever received. And after he got sued he sent out certified mail letters all of which came back, and three of the addresses were the same, an address in Dallas, there were two other addresses. And then after those came back as addressee unknown, at that time did he think that he had better go find somebody?

SPECTOR: I thought it was your position that the ACC cannot waive the restriction against composition roofs?

LAWYER: That exactly correct.

SPECTOR: So no matter what he would have done, that waiver would not have been...

LAWYER: Exactly.

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REBUTTAL

LAWYER: I think we seized on at the very end what this case comes down to, and it's the construction of the covenants in applying the Wilmeth test that this court sat down back in 1987, which very clearly said: Covenants restricting free and unrestricted use are not favored, that all doubts must be resolved in favor of the grantee, and that in resolving restrictive covenants we must construe them against the parties seeking to enforce them.

CORNYN: What are we to do with the statute?

LAWYER: I believe that the cases and this court in Wilmeth and the Christian case and the Keeter case, cases that preceded all say the same thing: 2.002, .003 is not in conflict with the Wilmeth line of cases in Texas jurisprudence for the past century. The liberal construction it is speaking of if you look in the context is in favor of the grantee. It is not saying: Liberally construed to make it more restrictive, but to make it less restrictive, which is what the lead case that my adversary has cited the Candlelight case said. It said first there is no conflict. It applied 2.002, .003 to find more power not less power for the association in question in that case. So applying that analysis to the case at hand one would say the ACC has more power to waive the composition roof issue, not less power. So there is not a conflict. I think the Ft. Worth court first of all totally disregarded the Wilmeth line of cases and for that reason should be reversed.

GONZALEZ: The CA cites the Silverspur addition _____ under the statement of contract for the proposition that the specific language in the provision controls over general language; what is your response to that?

LAWYER: Two responses. First, these are both very specific. You couldn't be more specific than saying the ACC has the right to waive any restrictions pertaining to roof types, and the stucco type walls. There are numerous other restrictions that the ACC cannot waive, has not been given the power to waive. That opinion that was cited by the court here was a secondary rule of construction to be utilized only after using the Wilmeth line of questions. There is still an irreconcilable conflict, which there isn't in this case when you apply Wilmeth or 2.002, .003.

GONZALEZ: At the time your client's bought the home, the subdivision had been developed? There were no empty lots?

LAWYER: I think there might have been one.

GONZALEZ: And they bought with either the knowledge or the presumption that they knew that roofs of composition type shingles will not be permitted? They knew that?

LAWYER: They knew that provision was in there.

GONZALEZ: And before they started the construction, before they put one shingle, they knew that a lawsuit was going to be ensued and they said: We'll buy a lawsuit?

LAWYER: That's not necessarily true your honor. They knew that their potential of being sued was there. I think anyone in today's society knows no matter what you do the potential of being sued is there, which is why they went to the extreme of contacting the ACC. And the cite you are asking for in the record is pages 321-322. In January, 1993, prior to the summary judgment written approval as set out in the restrictive covenants to allow them to use that timber line composition roof.

OWEN: Article 2, para. 1 does talk only in terms of a proposed home; is that correct?

LAWYER: It does reference proposed home.

OWEN: You're asking us to read that out of the...

LAWYER: No at all. I am asking you to pick up the Webster's dictionary as this court has said we use common language, and look at what the word "proposed:" means. Proposed does not mean new. It means in this case the house under consideration. This is the project I am proposing. The is what I am proposing we are going to do. And that is what proposed meant. It was a total dereliction to say: Proposed means new. Because if you do that, then what you have done and I think Justice Spector has pointed out, you have an anomaly in a subdivision where one homeowner can have a new roof, which is wood, one can have one that is composition, but across the street neighbor the house burns to the ground. What type of roof do they get to have? Do they get a composition roof or a wood roof because is that a new roof or is that an existing roof? And that's why there was such an anomaly in trying to make that ruling. That is not what all these restrictive covenants say, and I believe that when you apply the Wilmeth line of cases as well as 2.002, .003, that is what you will find.

OWEN: Point in fact, isn't that how it was construed, the ACC ceased meeting after the development of the division? No one went to them any longer for new roofs or anything else?

LAWYER: No one applied anymore. That doesn't mean they ceased to exist. They still existed as a body. That no one was sending applications to them. The last time they had received anything they said was sometime in the early 1980s.

OWEN: Didn't that coincide with the time when new construction had ceased?

LAWYER: Pretty much so your honor. That's exactly right.

ABBOTT: Tell me why you disagree with the respondent that the Sept. 3 letters do not comply with the procedural requirements of what is required to be disclosed?

LAWYER: For two reasons. First of all, it says that you are to submit in your request plans, specifications, the timber line type composition roof or equivalent thereof is a specification. Be that as it may, after the fact they provided to the ACC once asked a mammoth amount of specifications as in the record with the affidavit of Frank Richards, that he obtained all of that before he gave the written approval. So they complied as far as the beginning, the ACC had the right to rely on that or ask for more. They subsequently asked for more, obtained more specifications, and thereupon gave the written approval to our clients to put the composition roof on.