

1 STATE OF WISCONSIN CIRCUIT COURT ROCK COUNTY

2 * * * * *

3 WISCONSIN ROCK RIVER LEISURE

4 ESTATES HOME OWNERS ASSOCIATION,

5 Plaintiff,

6 vs.

Case No. 2010CV2037

7 ROBERT E. SARTO, et al.,

COPY

8 Defendant.

9 * * * * *

10
11 PROCEEDINGS: Court Trial

12 DATE: May 20, 2011

13
14 COURT: The Honorable Daniel T. Dillon
15 Circuit Court Judge, Presiding

16
17 APPEARANCES: Timothy H. Lindau, Attorney at Law,
18 Appearing on behalf of the plaintiff;
19 Harry C. O'Leary, Jr., Attorney at Law,
20 Appearing on behalf of the defendants,
21 And defendants in person.

22
23
24 REPORTER: Linda M. Blum
25

1 THE COURT: Can we have the appearances for the
2 plaintiff, please?

3 MR. LINDAU: Your Honor, attorney Tim Lindau
4 appearing on behalf of plaintiff, Wisconsin Rock River
5 Leisure Estates Home Owners Association, Inc. In
6 addition, Your Honor, the president of the board of
7 directors of the association, Lester Prisk, is also
8 present in person.

9 THE COURT: Can you spell his name for me?

10 MR. LINDAU: P-R-I-S-K is his last name, Your
11 Honor.

12 THE COURT: For the defendants.

13 MR. O'LEARY: Harry O'Leary appears on behalf
14 of Robert and Susan Sarto, Your Honor. They are also
15 here in person.

16 THE COURT: All right. They will be okay.
17 The original, just let's set the stage for what's before
18 the court today. I'll do this just by giving you a brief
19 background so the record is clear on what's on the
20 docket. The complaint that was filed asks for a
21 declaratory relief. In other words, declaratory
22 judgment, and an injunction asking the court to enforce
23 restrictive covenants as to lots in real estate in the
24 town of Fulton which are owned by the Sartos. Covenants
25 are attached.

1 The answer and affirmative defenses filed by
2 the defendants raise a number of issues, and essentially
3 focuses on the assertion there was some amendment to the
4 covenants. There's no definition of permanent residence
5 in the covenants, and that the corporate board lacks
6 authority to amend covenants without a vote of the
7 membership. There's also some other legal issues raised
8 which are part of that.

9 Court had a pretrial order, scheduled a
10 briefing schedule for dispositive motions. Dispositive
11 motions meaning motions for summary judgment essentially.
12 And those briefs have been filed, and we are now here to
13 decide whatever we can decide, if anything, on summary
14 judgment.

15 By way of briefs, I have received and I've
16 reviewed plaintiff's brief in support of a motion for
17 summary judgment, the defendant's briefs and attachments,
18 and respondent's opposing and reply brief. Now, simple
19 housekeeping question, are there cross motions for
20 summary judgment here?

21 MR. O'LEARY: Yes, Your Honor. Maybe I wasn't
22 clear on my response brief on that, but that was the
23 intent of it. I think at the conclusion of it I think I
24 did make a motion in paragraph requesting dismissal.

25 THE COURT: I thought I saw something about

1 that. But at any rate, this is the way we are going to
2 proceed today. And I'll invite your assistance, counsel,
3 if you think I should do it a little bit differently.
4 There's no hard and fast recipe to follow on these
5 motions.

6 You are the moving party, Mr. Lindau, so
7 obviously you'll get to argue first, and Mr. O'Leary, you
8 get to argue in response and you get to argue in
9 rebuttal.

10 If I have any questions, whether I direct them
11 to one side or the other, rest assured, if I'm not asking
12 you the question you'll get a chance to comment on the
13 question, is that clear to the plaintiff? How about you,
14 Mr. O'Leary?

15 MR. O'LEARY: Yes.

16 THE COURT: Okay. All right. Let's hear your
17 arguments. I've read the submissions. Don't feel in any
18 way limited by that fact that I've read that. I want to
19 give you whatever argument you think you need to give
20 today for the record and also for persuasion, so don't
21 feel like you are stuck and you can't say anything more
22 than you've already argued.

23 Can't go, well, you can't really go outside
24 your brief but you can emphasize any points in your
25 brief. You may begin, counsel.

1 MR. LINDAU: Thank you, Your Honor, and I will
2 not argue too much knowing that you have reviewed the
3 submissions. But I do want to touch on at least one
4 point of clarity that I raised in my reply brief and that
5 I think is crucial for this court's decision here today,
6 that is that what plaintiff is requesting here today is
7 not a general term or a general definition for the term
8 or phrase permanent residence.

9 What the court, what we are asking court to
10 decide today is that given the facts and circumstances
11 before it that are undenied by these defendants, that the
12 court declare that these defendants are violating the
13 declaration by living on the recreational vehicle lot
14 year round, thereby living in, living against the
15 prohibition of permanent residences on recreational
16 vehicle lots. So that's a point of clarity that needs to
17 be made on it at the outset.

18 And the basic premise, Your Honor, is that the
19 declaration that was originally signed, executed and
20 recorded, that restricted the use of the property that
21 holds the Wisconsin Rock River Leisure Estates on which
22 these defendants own property, contained a provision that
23 restricted uses of certain lots on which these defendants
24 admittedly reside, restricted their use as permanent
25 residences.

1 This was done for a reason at the time it was
2 declared and recorded. It was approved by the zoning
3 authorities at the time and continues to be an issue with
4 the zoning authorities that certain lots, including that
5 of the defendants, not be used as permanent residences.
6 And I touch on that, and it was in the declaration,
7 furthermore, the acknowledgement to which I refer in my
8 brief sets forth that the Sartos acknowledged that their
9 lot was not to be used as a permanent residence.

10 The facts as it relates to the Sartos and their
11 admission that they lived there year round makes it clear
12 that this is their permanent residence, there is no
13 dispute of fact as to the fact that they live there year
14 round. But back to the point about why it is that it's
15 prohibition against permanent residence.

16 This is intended as a vacation destination. It
17 is not intended as a place to accommodate permanent
18 residence.

19 As I'm sure you are aware, Your Honor, there
20 are various regulations, various restrictions, various
21 laws, that govern, for example, mobile home parks, which
22 this would be similar to if it indeed allowed permanent
23 residences. This property does not comply with those
24 residence restrictions, they don't comply with other land
25 use requirements that would apply to subdivisions. The

1 water, the sewer, all those things are not in place to
2 accommodate permanent residences.

3 And I only bring that up, Your Honor, because
4 this is not an attempt to pick on these defendants. It's
5 not an attempt to draw them out of a crowd. It is an
6 attempt to enforce declarations that were created for a
7 purpose, and that is the key distinction here. And
8 again, Your Honor, for a point of clarity, we are not
9 asking for a general definition of the term permanent
10 residence, we are asking that the court declare these
11 defendants are using this property, this lot, as their
12 permanent residence, which is in violation of the
13 declaration, and that's what we are requesting here
14 today, and for an injunction prohibiting them from
15 residing permanently at the residence.

16 THE COURT: Can you give me some background as
17 to your facts?

18 MR. LINDAU: Yes.

19 THE COURT: When was the property purchased,
20 and was it purchased subject to the restrictive
21 covenants, and where do the defendants find out about the
22 restrictive covenants?

23 MR. LINDAU: Your Honor, the first and
24 foremost, the declaration, pardon me, the declaration was
25 recorded on June 13th, 1975. So this has been a

1 longstanding planned unit development in Rock County.
2 The, I cannot say, state, for certain that these
3 particular defendants purchased the property on November
4 7th, 1998, but on November 7th, 1998, they executed the
5 acknowledgement that was attached to the affidavit of
6 Robert Buckley that said that we further agree to be
7 bound by and comply with the articles, bylaws, and
8 declaration of covenants and rules of the association,
9 particularly no permanent residence on a recreational
10 lot, and that was completed by these defendants. They
11 themselves have admitted, and as well as the affidavit of
12 Robert Buckley, that their lot is a recreational vehicle
13 lot. Is that sufficient for facts?

14 THE COURT: As is apparently Robert Buckley's
15 lot 66 a recreational vehicle lot.

16 MR. LINDAU: Correct.

17 THE COURT: Yes, that is. Does that complete
18 your argument?

19 MR. LINDAU: Yes, Your Honor.

20 THE COURT: Mr. O'Leary?

21 MR. O'LEARY: Your Honor, plaintiff tries to
22 claim that the defendants have mischaracterized the
23 nature of its motion for summary judgment but and for
24 exactly the same reasons Mr. Lindau just stated, they are
25 trying to clarify saying that they are not asking for the

1 court to change or amend the declaration, and this is in
2 their reply brief, but rather it is requesting that it
3 enforce a clear prohibition against permanent residences.

4 Now, the irony in this is that their complaint
5 in paragraph eight, page 3, of the plaintiff's complaint
6 specifically requests relief for a declaration judgment
7 defining the term permanent residence as used in the
8 covenant and its amendments. That's the crux of the
9 issue as I see it, Your Honor.

10 The plaintiffs wish to have the court enforce a
11 summary judgment motion against my clients here today
12 trying to use the common sense or logical explanation
13 that they are residing year round, therefore, it is a
14 permanent residence. They have admitted in their
15 affidavits that there is no definition for permanent
16 residence within the covenants that were originally filed
17 back in 1975, nor has there before been any amendment to
18 those covenants clarifying that definition. What they
19 are asking the court here to do is a board of directors
20 of six or seven individuals is asking the court to insert
21 their interpretation that year-round living equates
22 permanent residence for my defendants, my clients, and to
23 incorporate that to the covenants, in essence amending
24 the covenants, and we believe that they do not have the
25 authority to do that for residences that consist of

1 approximately five hundred and some lots, because it will
2 have an impact on all those other individuals that own
3 those lots. In essence, in sum, it is a selective
4 prosecution. They say they are not pinpointing my
5 clients, but that's exactly what they are doing because
6 the plaintiffs again have admitted there's at least 49
7 individuals which, in response to the interrogatories,
8 they said that are in similar situation as the
9 defendants. I don't know what similar means to them, or
10 how it differentiates from my client's circumstances, but
11 the point being is no definition exists for permanent
12 residence. And we have 49 other individuals at the very
13 minimum within this association that are in similar
14 circumstances as my clients.

15 Now I've made a motion as well to, excuse me,
16 part of my answer is to incorporate necessary parties.
17 And if the court refuses to approve or denies the summary
18 judgment, either way, we think that at least the 49
19 members should be incorporated as necessary parties.

20 Plaintiff thinks that that would be, you know,
21 over cumbersome essentially to do so, and now argues that
22 well, because the facts and circumstances involving those
23 49 individuals are so much different from the defendants
24 that that begs the question then, Your Honor, is if we
25 have a hearing here today, and the court says permanent

1 residence equals year round, then they have to go and
2 confront 49 other individuals to figure out okay, now
3 that one only is there for 51 weeks out of the year, or
4 this one here is only here for six months out of the
5 year, or whatever the circumstances may be, that now we
6 define that those equate permanent residence and,
7 therefore, we are asking, requesting court to now
8 restrict them or enforce the covenants. Where does it
9 end?

10 And it is our position, and in my brief I
11 address the issue that I believe the decision on who has
12 the authority to amend or define the covenants rests
13 within the members of the association. And I refer to
14 the case that was decided by Judge Farnum back in 1985 in
15 which that particular issue was defined. Now it
16 addresses decks and structures of that nature in that
17 particular case.

18 THE COURT: Was Judge Farnum appealed on that
19 case?

20 MR. O'LEARY: No, he was not, Your Honor.

21 THE COURT: Was that decision ever published?

22 MR. O'LEARY: No, it was not, Your Honor.

23 THE COURT: How do you get past stare decisis
24 declarations, how are you citing an unpublished decision
25 to the court then?

1 MR. O'LEARY: I believe that, Your Honor, it is
2 a judgment of this Rock County circuit court, and I
3 believe the court has the ability to use full faith and
4 credit for the judgment of another court.

5 THE COURT: You mean I have to agree with
6 everything Judge Welker does and every one of his
7 decisions?

8 MR. O'LEARY: I think, Your Honor, if it
9 relates particularly --

10 THE COURT: I think what you are getting at is
11 it is the same parties and it is the same or similar
12 issues, which would mean it doesn't matter who the judge
13 is, you could have issue preclusion.

14 MR. O'LEARY: Yes, Your Honor.

15 THE COURT: Maybe you do and maybe you don't,
16 but I haven't seen issue preclusion very thoroughly
17 briefed on this particular subject. And just because
18 Judge Farnum makes one decision about docks doesn't mean
19 that some other judge ten years later might not make a
20 different decision about septic tanks, or LP gas tanks,
21 or satellite dishes. I think you may be able to make the
22 argument, and I'm not suggesting that you can't, although
23 any judge is going to bring that up, the point that I
24 just brought up. But I'm not so sure I'm bound by
25 anything that Judge Farnum did unless you can pinpoint it

1 as fitting within the Supreme Court has determined the
2 definition of, I think our Wisconsin Supreme Court not
3 all that long ago, not all that long ago, it was 20 years
4 ago made a decision about issue preclusion. There's
5 issue preclusion, of course, which deals with an issue
6 which is what you are talking about, by the way, backing
7 up to get a different perspective on what you are arguing
8 before Mr. O'Leary when you said that there's a number of
9 other individuals in the same position with respect to
10 the restrictive covenants, or ostensibly in the same
11 position as the Sartos are and they are not in a lawsuit.
12 And the risk is that the court could make a determination
13 on the selfsame issue, and then it would be binding upon
14 anybody else who comes before the court, and that's issue
15 preclusion. The issue has been decided.

16 On the other hand, if anybody thinks those
17 other folks are necessary parties, they could have been
18 impleaded by either side, not just by the plaintiffs. So
19 the defense argument is that the plaintiffs should have
20 brought everybody else in, and I'm thinking, well, if the
21 defense thinks they are important, the defense could have
22 brought them all in, I guess.

23 Right now this case is limited to the parties
24 before court. I'm listening to your argument but I don't
25 think that's, that particular point wholly addressing on

1 its own merits is sufficient to block the court
2 proceeding today. But anyway I know I interrupted your
3 argument. I only did so because you are referring to a
4 decision by circuit court judge. Quoting a circuit court
5 judge to another circuit court judge really has no
6 appellate power whatsoever. But I know now that you are
7 not talking about appellate precedents, you are really
8 talking about issue preclusion, so you can go ahead. I'm
9 sorry for the interruption but I had to stop you on that
10 point for clarification. You can go ahead and proceed.

11 MR. O'LEARY: Your Honor, before I forget, with
12 regards to the issue of joining other parties, as I
13 expressed before, I believe this is a situation where
14 they are just picking apart individuals that they
15 disagree with within the association, and they chose my
16 two clients to pursue at this point in time. I think the
17 plaintiff, as the board of directors, has the ability to
18 pick and chose who they wish to join in on this
19 particular action more so than mine, and the reason I say
20 that, Your Honor, is that the party that joins the
21 individuals bears that cost. And the plaintiff's
22 attorney is being paid by the association, by vote of the
23 board of directors, not by the members of the
24 association. So the irony is my clients are going to be
25 paying for Mr. Lindau's services here to pursue the

1 action against them.

2 But pursuing this issue once for a little
3 further, Your Honor, you are correct with regards to
4 Judge Farnum. I'm asking you here today, Judge Farnum
5 already decided an issue with regard to docks, therefore,
6 the judge should honor that decision and follow that. I
7 think that's appropriate.

8 Mr. Lindau cites in his own reply brief that
9 issue preclusion is the doctrine setting forth that once
10 there is a determination as to a specific issue, the
11 determination on that issue is conclusive as to
12 subsequent litigation. And that's citing that page KB ex
13 rel Peterson versus Steven GB case.

14 My point is that that issue is not just a
15 matter of defining what is a permanent residence, or the
16 enforcement of permanent residence which is undefined in
17 the covenants. My point is that if they pursue this, and
18 the court allows them to pursue an undefined term within
19 the covenants, you are allowing them to amend the
20 covenants which that particular issue, who has the
21 authority to amend the covenants was decided by Judge
22 Farnum in his case back in 1985, and clearly states that
23 the covenants, which have remained unchanged since 1985,
24 that the members of the association have the sole
25 authority upon vote of the members as to what changes are

1 going to be brought forth within the covenants.

2 And so our position is that if the board of
3 directors choses to have permanent residence defined,
4 then they should be turning to the members of the
5 association to address their argument, have a meeting,
6 have a vote, and have that issue defined. There's five
7 hundred and some people residing in this establishment.
8 And if that be the case, my clients would have a leg to
9 stand on. But they're overstepping their authority based
10 on what Judge Farnum decided in '85. I believe it is
11 issue preclusion with regard to that ability on anything
12 to do with changes or amends the structure of the
13 covenants. And that is the crux of our argument, Your
14 Honor.

15 The only other issue I would point out, I've
16 already mentioned with regard to the necessary parties,
17 you know, that I believe there's parties that should be
18 brought out there that the association is the one that's
19 paying for the costs of the litigation against my client.
20 I think that the association should be bearing the cost
21 to also pursue it against the other members of the
22 association that they believe are in violation of this.
23 And if the court makes a determination on this, it
24 effectively interferes with property rights of those
25 other members of the association in my opinion.

1 That's all I have, Your Honor.

2 THE COURT: Thanks, Mr. O'Leary. Mr. Lindau?

3 MR. LINDAU: Your Honor, to address first the
4 point about the general definition for the term permanent
5 residence that was included in our complaint. Yeah. We
6 did have that in our complaint, but we didn't move for
7 summary judgment on that portion of our complaint. We
8 would be open to dismissing that request in our complaint
9 if that's what Mr. O'Leary needs or what the court would
10 need, but we don't have to move for summary judgment on
11 every request that we have in our complaint. What our
12 request is in our summary judgment motion is very
13 specific and very clear as to what we're requesting.

14 THE COURT: Well, why don't you repeat it
15 again?

16 MR. LINDAU: As to what we're requesting?

17 THE COURT: Yeah. What is this specific and
18 clear --

19 MR. LINDAU: What we are specifically
20 requesting is that the court declare that these
21 defendants are violating the declaration by living on
22 their lot as permanent residents. That's what we are
23 requesting, Your Honor.

24 THE COURT: Okay.

25 MR. LINDAU: And Mr. O'Leary --

1 THE COURT: Don't I have to, don't I have to
2 define, don't I have to know the definition of permanent
3 residence before I can say somebody is a permanent
4 resident? That's Mr. O'Leary's point, I think.

5 MR. LINDAU: Yeah. Correct. And the answer to
6 that is no because --

7 THE COURT: Well, you are saying in your reply
8 brief if you know what the word permanent is and if you
9 know what the word residence is you don't need a
10 dictionary to put them together. There is no definition
11 of permanent residence though, is there?

12 MR. LINDAU: There is no definition. We admit
13 that.

14 THE COURT: So in plain English the whoever
15 drew the covenant drew it from the point of view that
16 well, people who look at this ought to know what it
17 means, right?

18 MR. LINDAU: Correct.

19 THE COURT: And Mr. O'Leary says maybe not.

20 MR. LINDAU: Well, I would, Your Honor, also
21 say that it, regardless --

22 THE COURT: But you are asking for me to grant
23 the declaratory judgment. To do that I have to make a
24 finding of fact that this is, that these premises have
25 been occupied as a permanent residence by the defendant.

1 Assuming arguendo I make that finding, your argument that
2 it's a permanent residence is that hey, they are not
3 living anywhere else so unless they, well, I don't know
4 where else, basically you've defined that by exclusion,
5 there's no place else that they live, there's no other
6 mailing address, there's no place else connected to any
7 place that they could live, so this has got to be the
8 only place they live and, therefore, that's permanent.

9 MR. LINDAU: And they admit to residing there,
10 Your Honor.

11 THE COURT: Let's assume you get past that.
12 You are asking the court then to make a declaratory
13 judgment, however, you want to define permanent
14 residence. These individual defendants, they don't have
15 any other way to explain what their residence is at all.

16 MR. LINDAU: Correct, Your Honor. As applied
17 to these specific facts.

18 THE COURT: Okay.

19 MR. LINDAU: The covenant is being violated.
20 Or the, I'm sorry. The declaration is being violated as
21 to these specific facts.

22 THE COURT: Why don't you continue your
23 argument?

24 MR. LINDAU: The other point that I wanted to
25 draw on is the issue of joinder. And Mr. O'Leary

1 commented that we have, that we have the ability to pick
2 and choose, and he's right on that. We do have the
3 ability to pick and choose how to prosecute matters.
4 This is not an issue where we need to take the facts and
5 circumstances of 50 different lots and try to establish
6 whether lot A, versus lot G, versus lot C, versus lot X
7 is violating the covenants and restrictions. We can use,
8 and the reason I cite, Your Honor, the reason I cited the
9 definition for issue preclusion is if my client chooses
10 to further litigate this matter, then issue preclusion
11 may be something that we can draw upon and it can be a
12 defense to other parties as well. I'm not in any way,
13 shape or form denying that fact. And I'm not in any way,
14 shape or form arguing that what transpires today is going
15 to solve all the problems out at the Rock River Leisure
16 Estates, but this was a necessary step to take to at
17 least establish, at look, if you are living there year
18 round, it's your permanent residence. I don't need a
19 definition to tell me that.

20 I can look at the declaration, say that a
21 person residing on a recreational lot cannot live there
22 permanently. You living there year round is living there
23 permanently. The declaration prohibits that. That is
24 what we are asking the court to do as to these
25 defendants.

1 And as far as issue preclusion with Judge
2 Farnum's case, I don't see that issue has anything to do
3 with this issue. Again, this term, this phrase permanent
4 residence is in the declaration. There is a prohibition
5 against permanent residence, the defendant doesn't
6 dispute that. What they were trying to do in the Farnum
7 case was add a restriction or add a provision. We are
8 not seeking to amend the declaration, we are seeking to
9 enforce what provision is already in place within the
10 document itself. A document that was recorded,
11 therefore, providing notice to the defendants, not to
12 mention a document that was referred to in an
13 acknowledgement that was completed by the defendants, so
14 knowingly they have been residing there permanently
15 without knowing that it was prohibited they have resided
16 there permanently. So I have nothing further, Your
17 Honor.

18 THE COURT: Do you want to respond to that,
19 Mr. O'Leary?

20 MR. O'LEARY: The only response I have, Your
21 Honor, is the same as I said before. We keep throwing
22 the term permanent residence out there. We don't know
23 what it is. If the court says my clients are living
24 there year round and therefore it is a permanent
25 residence, I submit to the court how do they cure that?

1 We don't have a definition. Can I then advise my clients
2 make sure your mailing address isn't something else,
3 leave for a weekend, you are not there year round and
4 you've now resolved your problem here with permanent
5 residence. It just simply, it is a circular reasoning,
6 Your Honor, it keeps begging the question what is
7 permanent residence, what is permanent residence, and it
8 will be again for the other 49 defendants when they bring
9 them forward as well.

10 THE COURT: All right. Thank you. This
11 action was brought by Wisconsin's Rock River Leisure
12 Estates Home Owners Association, Inc. That's a
13 corporation. How long has that corporation been in
14 existence?

15 MR. O'LEARY: Since 1975, Your Honor.

16 THE COURT: So that corporation was commenced
17 with the original development with the restrictions and
18 platting of the development known as the Rock, Wisconsin
19 Rock River Leisure Estates. Part and parcel home owners
20 association came into existence with the original
21 development. And the original development was organized,
22 restricted and platted into, help me out, I'm trying to
23 get my grasp of these facts here, into three types of
24 residential sites, permanent home sites, vacation cottage
25 sites, and recreational vehicle sites.

1 There was an amendment in 1979 which deleted
2 the permanent home sites definition from the declaration.
3 Now we have vacation cottage sites and recreational
4 vehicle lots. And under the declaration only the
5 vacation cottage sites can be used for permanent
6 residence.

7 Now, there are 496 recreational vehicle lots
8 today and there are 60 vacation cottage sites. So far
9 those facts are undisputed, true? And the defendants
10 reside in a recreational vehicle at 530 East Ellendale
11 Road which is a recreational vehicle lot. The defendants
12 took that property, took ownership of that property
13 subject to the acknowledgements, and restrictive
14 covenants, and whatever the platting restrictions were on
15 the property. At the time they bought their property
16 conceivably they had an option, they could have purchased
17 a recreational vehicle lot or they could have purchased a
18 vacation cottage site. The differential ostensibly one
19 would think had to do with cost and their own personal
20 preference or choice purchasing what they wanted to
21 purchase on the free and open market which the property
22 was sold.

23 I find that to be supported simply by reason
24 and common sense. The same home owners association
25 continues to exist today as existed from the beginning.

1 In other words, there wasn't any dissolution of the
2 original development company and title acquired by
3 somebody else with unsold tracts or property tracts. So
4 the plan or scheme from the development of this property
5 for this mixed residential usage cottage and RV has been
6 unchanged since the permanent home site language was
7 taken out in May of 1979 amendment.

8 So nearly 20 years later the Sartos bought the
9 property, their place in November of 1998, 12 or 13 years
10 ago. And they completed an acknowledgement of membership
11 and home owners association. And the acknowledgement
12 also contained provisions we agree to be bound by and
13 comply with the articles, bylaws and declaration
14 covenants, and rules, and particularly no permanent
15 residence on a recreational lot. They actually signed
16 that as the buyers of a recreational lot. One would
17 expect them to have a particular interest in being aware
18 of that provision. And one would find as a matter of law
19 that they had knowledge of that provision when they
20 bought their property. Moreover, as a matter of
21 economics, that provision had an effect on how much they
22 paid for their property because it would have an effect
23 on how they could use their property in the future, in
24 perpetuity, and also it would have an effect on anybody
25 using the property in the future who would buy it from

1 them.

2 An RV lot, one would think, has different usage
3 characteristics compared to a cottage by definition,
4 although it is not defined, but I think a common sense
5 definition is said an RV is not a permanent structure.
6 It can be moved, it can be driven away, it can be hauled
7 away, and by definition an RV has a temporary
8 characteristic. That's what the word vehicle comes from.
9 Vehicles move around, houses don't.

10 Now, the argument made by the Sartos is
11 everybody ought to get to vote to define what permanent
12 residence means because the Sartos don't think, A, this
13 applies to them apparently, or even if it does, it's not,
14 they don't think it's their permanent residence and let's
15 all have a vote because nobody knows what permanent
16 residence means and let's get everybody, the RV property
17 owners and the cottage lot property owners, let's let
18 them all vote. Let me guess how that vote is going to
19 come out. It is going to be 496 to sixty maybe because
20 my guess is the owners of the recreational vehicle lots
21 will vote their pocketbook and they'll vote their own
22 self-interest and to eliminate this condition. Enhances
23 the value of their property, one would think, because now
24 it's not temporary, it is permanent, and the word
25 permanent residence after the fact now applies to

1 everybody, so it is devalued in terms of the people who
2 own cottages to zero.

3 Maybe it wouldn't be 496 to sixty, but if all
4 of those individual real estate owners have an equal vote
5 as a member of the association, I don't know how that's
6 going to be established. I don't know how you get to be
7 on the board. I don't know if the board originally was
8 set up so the people that own cottages or vacation
9 cottage sites have greater weight to establish the
10 membership of the board, but I know 496 is more than
11 sixty.

12 Now, the conveyance under which the Sartos took
13 the property, in other words, it's a deed and it is an
14 acknowledgement, and this is all recorded, this is a
15 covenant which the law sometimes refers to as something
16 which runs with the land, and it needs to be observed if
17 that's the case, by the occupants and by anybody that
18 they transfer the property to, any grantees as well as
19 any of the heirs or any of the property they assign the
20 property to.

21 Now, it's my understanding that all of the 496
22 recreational vehicle lots have the identical
23 acknowledgement and identical restrictive covenants. So
24 to just pick one of them off, although arguably why
25 didn't you sue all 496 of them? That point can be made.

1 Well, maybe not all 496 of them are using the place
2 permanently. Why do they have to get dragged into a
3 lawsuit, they are not doing anything wrong. So there's
4 that. And I don't necessarily think there's a rule that
5 says all 496 of them have to be sued. If one person is
6 in violation of the covenant, you establish that fact,
7 and then you enforce the covenant.

8 So my understanding from the facts is that I
9 can't tell how long have the Sartos, they bought in '97
10 and '98, did they ever live anyplace --

11 MR. O'LEARY: I'm sorry, Your Honor.

12 THE COURT: Have the Sartos lived anyplace
13 else since '98 where they lived?

14 MR. O'LEARY: They lived there ten years.

15 THE COURT: So they have lived there for ten
16 years. Year round, they own no other real estate, and
17 they admit that they don't rent or lease any other
18 apartment, or home, or vacation place, that can be
19 construed as any other residence. They have represented
20 to the federal bankruptcy court in 2003 that these
21 premises was, in fact, they use this as their driver's
22 license residence, they have a boat which is registered
23 at this address, they have two motor vehicles which the
24 owners of the motor vehicles, namely them, Ms. Sarto,
25 excuse me, lists this property as their mailing address.

1 So I think it is pretty clear that they have no other
2 residence. In fact, basically there's no doubt that they
3 have no other residence. It is more than pretty clear
4 this is it, and that's a solid finding that the court can
5 make. That fact is not in dispute.

6 Apparently now they live in an RV, or trailer
7 house, or what is this?

8 MR. O'LEARY: Are you asking me, Your Honor?

9 THE COURT: I'm asking for the fact.

10 MR. O'LEARY: Well, it's one of the mobile home
11 structures which over the years the association has
12 authorized them to add on.

13 THE COURT: So it's a mobile home structure?

14 MR. O'LEARY: Yeah.

15 THE COURT: All right. And during the years,
16 I didn't see this in the facts, during the years
17 apparently they park there, they park their vehicles
18 there, they maintain it, they have improved it, and they
19 reside in this premises year round. So there's no
20 restriction to place a mobile home on the land and
21 there's no restriction apparently that that mobile home
22 can be there year round, right?

23 MR. LINDAU: Correct.

24 THE COURT: Now, this property in the
25 covenants might be a little bit more specific.

1 Wisconsin's Rock River Leisure Estate facilities, the
2 declaration of covenants and rules from June 13th of
3 1975, according to volume 556, at the Register of Deeds
4 office, page 486 of this volume, contains section 4,
5 covenants relating to recreational vehicle sites. And I
6 think there's an admission that these covenants apply to
7 the recreational vehicle sites. Nobody disputes that
8 fact, am I right about that?

9 MR. LINDAU: Yes, Your Honor.

10 THE COURT: All right. So 4A says the only
11 buildings allowed on these lots are nondwelling such as
12 storage sheds and garages, only buildings; B, all initial
13 site preparation for recreational vehicle lots for
14 extension of sewer and water thereto shall be constructed
15 exclusively by the developers with prime concern for soil
16 conservation. I'm assuming that the Sartos' premises
17 does have water and sewer extended thereto, right?

18 MR. O'LEARY: All of them do, Your Honor.

19 THE COURT: All of them. They all have power?

20 MR. O'LEARY: Yes.

21 THE COURT: What do they do for, what do they
22 do for heat? They have gas, a gasoline or LP gas?

23 MR. SARTO: Natural gas.

24 THE COURT: But is that plumbed to the site
25 or --

1 MR. O'LEARY: It is plumbed, Your Honor. It's
2 a service provided.

3 THE COURT: And in C says, this is moving on
4 from section 4C, only one recreational vehicle for six
5 thousand and nine thousand square feet site; D, they all
6 have to be self-contained, full bath, toilet, shower,
7 tub, no fuel storage is allowed exceeding a hundred
8 gallons of LP gas; E says they have to be a maximum of 40
9 feet in length, eight and a half feet wide maximum. How
10 big is that one, that size?

11 MR. SARTO: 24 by 33.

12 MR. O'LEARY: 24 by 33.

13 THE COURT: No second RV may be parked or
14 stored in any recreational vehicle lot. And then
15 recreational vehicle on a recreational vehicle lot shall
16 not be used as a permanent residence. Now, that's all,
17 there's no factual dispute. That's all in the
18 declaration. Now, nowhere else in the declaration is the
19 phrase permanent residence mentioned, is that true?

20 MR. LINDAU: I don't know that's true. That's
21 not mentioned but it is true that it is not defined.

22 THE COURT: It is not defined. So if you know
23 what permanent residence is going in to signing this, you
24 don't have a problem, but if 35 years later, you do have
25 a, you are not sure what permanent residence is, well,

1 here we are in a lawsuit. One side says that it's the
2 inference I draw from your argument anyway, Mr. Lindau,
3 is that permanent residence doesn't need much of a
4 different definition, it is common sense in plain English
5 and Mr. O'Leary says not so fast, why wasn't it defined,
6 and what's it mean, and this is going to effect a lot of
7 people, and it is going to be discriminatory now to,
8 after all these many years, to enforce this covenant or
9 restriction.

10 I think, I don't know if you've argued
11 estoppel. I think you've also argued estoppel as well.
12 I think I saw that. So the point that the home owners
13 association is making in support of the covenants is that
14 you can make your trailer houses essentially year round
15 trailer houses but you can't live there year round, so
16 your period of residency is not defined. You could be
17 there from December to June or from June to December and
18 we don't know when that permanent is. We don't know if
19 you moved out one day a month, does that make it
20 nonpermanent; or six months of the year, does that make
21 it nonpermanent; or what? And because these places are
22 plumbed, by plumbed I mean they have got running water to
23 them, they are heated, this isn't your typical up north
24 northern Wisconsin type of place where you have to get
25 out in the winter because your pipes are going to freeze,

1 and the pipes are drained and places are buttoned up, as
2 the expression is sometimes used. And the estoppel
3 argument suggests or implies that by never enforcing the
4 covenant or the restriction, for ostensibly it looks like
5 ten years with the Sartos, the home owners association is
6 waiving its right to enforce the covenant.

7 The other side of the argument is that the
8 action of the Sartos, and I find this to be absolutely
9 without factual challenge, I find this is the truth, and
10 any trier of fact would agree with me so if I allowed
11 this case to proceed to trial the jury would clearly
12 agree, if it was a jury, that this is a permanent, this
13 is a permanent residence for the Sartos, if you define
14 permanent that they don't live anyplace else. This is a
15 permanent residence. They basically have self-defined
16 that. They haven't given themselves an out by even
17 leaving the place a weekend a month.

18 They might also argue that the home owners
19 association has argued arbitrarily or capriciously, this
20 is what Mr. O'Leary is suggesting, and singling them out
21 to ask that the court enforce or make a finding that they
22 are occupying these places permanently.

23 I think the real question though is whether the
24 absence of a definition of the term permanent residence,
25 and I'm by the way, I haven't spelled this for you but we

1 are talking about residence, R-E-S-I-D-E-N-C-E, as
2 opposed to people who live there, residents, who are
3 called residents.

4 Question is whether a failure to define that,
5 number one, suggests that it had to be defined to begin
6 with because people using plain English and common sense
7 can't figure out what a permanent residence means, but if
8 that's true, and the failure to give a definition
9 deprives the court of the ability to enforce it or say
10 that it exists because the implication is anybody knows
11 what this means and all some six hundred and some people
12 who may have bought those lots, 496 people bought
13 residential vehicle lots, they knew what permanent
14 residence meant, too.

15 The trailer house obviously doesn't have any
16 means of locomotion. Can't start it up and drive it off.
17 Not only by the fact that it was detached from the truck
18 that must have delivered it to begin with, but I presume
19 it is not on wheels, it is on blocks. It is a permanent
20 installation, and it's been plumbed, which means that the
21 plumbing that goes to it is below the frost line. I
22 presume that's true. Anybody dispute that fact?

23 MR. LINDAU: We do dispute that.

24 THE COURT: You do dispute that? All right.
25 But it is connected to public utilities?

1 MR. LINDAU: Yes.

2 THE COURT: Okay. And it's got beds, a bath,
3 toilet, and cooking facilities. And people can live,
4 eat, and sleep there year round, all true?

5 MR. O'LEARY: Yes.

6 THE COURT: I know we have got a restrictive
7 covenant that says they can't, but they could. It is not
8 like it is a tent living on the frozen tundra.

9 So under those facts you could argue that
10 that's pretty close, it is no longer a trailer house, it
11 is pretty close to a building. But it's, it doesn't
12 violate any restrictions to be built the way it is.
13 That's not what the plaintiffs are seeking to restrain or
14 enjoin the defendants from doing. Their point is you can
15 have it there, but you can't live there as a permanent
16 residence, so it's not an issue of whether it has wheels,
17 or jacks, or blocks, some kind of own foundation, it's a
18 question of whether some people can be in there year
19 round.

20 And the definition of permanent residence I
21 think by elimination of any other residence is met. In
22 other words, Sartos have no other place to live, A and B,
23 they have lived in this house for ten years, and it is
24 therefore apparent that they intend to occupy this
25 trailer and the lot on which it is located as a permanent

1 residence. There's no other way to define that using
2 commonly-accepted English terms.

3 So, you know, maybe nobody else would fit this
4 the way they do. They flat out put themselves in the
5 position where they don't have any other residence and
6 they admit it, this is their permanent residence. Now if
7 we have 496 other people in here, or 495 other people
8 involving recreational vehicle lots, each one of those
9 cases would have to be decided separately, maybe the only
10 one with the permanent residence that fits this neatly
11 into the definition because they don't live anywhere else
12 would be the Sartos.

13 Now, I'm being asked to make a finding that
14 permanent residence doesn't mean the Sartos living there
15 and not living anywhere else. And I can't stretch the
16 English language to draw that conclusion. I find it is
17 their permanent residence and intended to be their
18 permanent residence, and for ten years they haven't had
19 any other residence.

20 On the estoppel question, although I haven't
21 researched this very intensely, I don't think that an
22 equitable estoppel or estoppel exists here. I think it
23 is, estoppel requires a false representation or
24 concealment of material facts made with knowledge, actual
25 or constructive, of the facts, and the party to whom it

1 was made must have been without knowledge or the means of
2 knowledge of the real facts. The false representation
3 must have been made with the intention that it should be
4 acted upon and the party to whom it was made must have
5 relied on it or acted on it to that person's prejudice.

6 In this case I couldn't see any false
7 representation or concealment of material facts. I think
8 that the, if anything, the facts were clear as to what
9 was in the declaration.

10 The question, real question is, is there
11 ambiguity as to permanent residence. And you know, maybe
12 you can argue that that ambiguity is the false
13 representation concealment. But I don't see that as
14 meeting the burden of providing the essential element of
15 estoppel. I think you can conclusively find from the
16 documents that were signed here before the Sartos bought
17 the property or, as when the, as I said way back when we
18 started this, when they closed the deal, the facts are
19 established that they had notice of the truth of the fact
20 that this property was not to be permanent residence, if
21 they only read the documents that they signed.

22 Another argument that embedded in Mr. O'Leary's
23 points is that the restrictive covenant fails to afford
24 any, by not defining permanent residence, fails to afford
25 protection to other individuals or individuals including

1 the Sartos, to define what it is that they need to do to
2 make themselves the opposite of a permanent residence. I
3 guess that would have to be a nonpermanent residence or
4 intermittent resident. There's also some question as to
5 how they are afforded due process in this covenant. But
6 I guess the due process comes from the circuit court.

7 There's nothing in the, that I can tell,
8 there's nothing in these declaration of covenants that,
9 let's see. There's duration, notices, enforcement,
10 severability, there's an enforcement section in article
11 seven, enforcement of these covenants, and this is, by
12 the way, counsel, in the recorded instrument of volume
13 556 page 491, general provisions of article seven. Three
14 is enforcement and it reads as follows: "Enforcement of
15 these covenants shall be by any proceedings at law or
16 equity against any person or persons violating or
17 attempting to violate any covenant either to restrain
18 violation or to recover damages against the land to
19 enforce any lien created by these covenants. And failure
20 by the association or any owner to enforce any covenant
21 herein contained shall in no event be deemed a waiver of
22 the right to do so thereafter," but somewhat goes to,
23 well, it goes to the waiver argument. That's
24 specifically waiver to waiver. But nothing in the
25 general provisions of enforcement gives the right to

1 someone who is not sure if they are in violation to any
2 kind of a hearing other than to come in front of the
3 circuit court for judicial determination one way or the
4 other.

5 Proceeding at law I think is a lawsuit and a
6 proceeding in equity is also a lawsuit, it's just
7 invoking the equitable power of the circuit court. So
8 that's the way it was set up and that's what these folks
9 got into when they bought their property. So there's no
10 alternative methodology to mediate or arbitrate phrases
11 that individual property owners or the home owners
12 association, I said home owners association, yeah, it is
13 a home owners association, they want to have clarified.

14 And Mr. O'Leary was talking about board
15 members, and board members need to have everybody vote,
16 to put it before the group as a whole, the membership as
17 a whole, to change terms of the declarations and I think
18 he's right about that. But this doesn't require a
19 change. In my view that's where I don't completely agree
20 with Mr. O'Leary's thesis because his clients are so
21 pristine in terms of self-defining themselves as
22 permanent residents. If there is a single permanent
23 residence among the recreational vehicle site folks, it's
24 the Sartos. And it's a torturous twist of plain English
25 to say that even they can't be defined as permanent

1 residents because for ten years they haven't lived
2 anywhere else, that's the point the plaintiffs argue. So
3 there might not be anybody else against whom this
4 plaintiff can enforce this restrictive covenant because
5 somebody else might say hey, every Fourth of July I go
6 somewhere else, or one month out of the year I go see my
7 kids, or every other weekend I go to some other location.
8 But the Sartos, by their own lifestyle that made this
9 their permanent residence, and I don't see any
10 alternative but to make that a finding. I don't think
11 there's enough here for court simply to throw out plain
12 English in terms of that application and definition.

13 This is their permanent residence. There's a
14 restrictive covenant that says it can't be a permanent
15 residence, so I'm finding for the plaintiff and granting
16 summary judgment on the facts limited to this case and
17 only this case, and I don't know if you can apply this to
18 anybody else because the Sartos have basically admitted
19 they have no other residence on earth than this one. So
20 in terms of coming back to me or any other judge in
21 circuit court and saying look what Judge Dillon did, what
22 Mr. O'Leary's telling me, look what Judge Farnum did. I
23 don't know if you are going to get very far. This is
24 like Bill Clinton reminding me, the argument is reminding
25 me of President Clinton's infamous deposition testimony

1 in which he was asked the question and his response was,
2 paraphrasing, depends on what the meaning of the word is
3 is. Well, that was an absurd stretch of the English
4 language.

5 The permanent residence applied to folks who
6 don't live anyplace else on earth and haven't for ten
7 years would be almost as absurd to say this isn't their
8 permanent residence, it is. So I'm going to grant the
9 summary judgment, and I'm going to order an injunction
10 against the Sartos, that they can't live there
11 permanently. And that's going to beg the question,
12 because I haven't defined permanent residence for you,
13 but you are past that stage, and you may still be left
14 with covenants for the next person down the road who
15 can't do anything with, and if the Sartos decide to spend
16 every other weekend someplace else, it may not be a
17 permanent residence for them either. Well, Mr. O'Leary's
18 point is going to bring this thing back to the circuit
19 court, I suspect.

20 MR. O'LEARY: Your Honor, if I could just ask
21 one clarification on one of the comments you made.

22 THE COURT: I'm surprised you only want one.

23 MR. O'LEARY: I, just so I can advise my
24 client. Mr. Lindau made reference to the fact that they
25 have the various mailing addresses for vehicles, boats,

1 whatever, there's no case law that he was able to find or
2 I was able to find that talks about mailing address being
3 an establishment of permanent residence.

4 THE COURT: I think that goes to the totality
5 of circumstances.

6 MR. O'LEARY: Okay. That one element, the
7 court is not relying on that?

8 THE COURT: No, I'm not. That's part of the
9 package. And if this case had been tried to a jury, the
10 jury could have considered all of that stuff. They'd
11 wonder where they put their boat.

12 Now, in terms of further proceedings, with this
13 determination if there are further proceedings I'll order
14 mediation. You amenable to this, Mr. O'Leary?

15 MR. O'LEARY: Yeah. We'd be amenable to that,
16 Your Honor. It saves money for both parties.

17 THE COURT: All right. I'll let you decide who
18 your mediator is going --

19 MR. O'LEARY: If there's further issues,
20 correct.

21 THE COURT: If there's further issues, this
22 goes to mediation before it comes back to me because I'm
23 not making any order today that the Sartos have to be out
24 by any time at all. But I'm making a finding based on
25 the incredibly unique circumstances of this case, they

1 don't have any other residence, this is their permanent
2 residence. So I will specifically tell you, Judge
3 Fitzpatrick gets the next case coming down the line or
4 Judge Welker, whatever, don't count on my fact findings
5 because they don't apply to anybody else. Anything else?

6 MR. LINDAU: No, Your Honor.

7 THE COURT: All right. You draw the order.
8 The order can be pretty simple just based on the court
9 having heard the arguments of counsel and make the
10 following findings. Court is in recess.

11
12
13
14
15 (9:04 a.m.)
16
17
18
19
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATE OF WISCONSIN)
ss.)
COUNTY OF ROCK)

I, LINDA M. BLUM, Official Court Reporter,
hereby certify that I reported in Stenographic shorthand
the proceedings had before the Court on this 20th day of
May, 2011, and that the foregoing transcript is a true
and correct copy of the said Stenographic notes thereof.

Dated this 31st day of May, 2011.

LINDA M. BLUM - - - - -
Official Court Reporter

The foregoing certification of this transcript does not
apply to any reproduction of the same by any means unless
under the direct control and/or direction of the
certifying reporter.