

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 23, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 99-1869-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

JOHN C. O'NEILL AND SHIRLEY A. O'NEILL,

PLAINTIFFS-RESPONDENTS,

v.

ARTHUR N. KRATTIGER AND MAXINE KRATTIGER,

DEFENDANTS-APPELLANTS,

ROUNTREE REALTY, S.C.,

DEFENDANT.

APPEAL from a judgment of the circuit court for Grant County:
GEORGE S. CURRY, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

¶1 PER CURIAM. Arthur and Maxine Krattiger appeal from a judgment allowing the buyers of real estate to withdraw their offer without forfeiting their earnest money deposit. The issue is whether the buyers had a valid

objection to a deed restriction imposed without their knowledge or consent. This is an expedited appeal under Rule 809.17, STATS. We affirm.

¶2 The Krattigers purchased a City of Platteville lot from the Brodbecks with the following restriction: “This property should be used for one single family dwelling only. Should this condition be violated, the property reverts back to Grantor or Grantor’s heirs-at-law.” Three years later, John and Shirley O’Neill contracted to buy the property from the Krattigers, and deposited \$16,000 in earnest money. However, upon learning of the above-quoted restriction, the O’Neills objected to what they considered a cloud on the title.

¶3 The Krattigers responded by bringing suit against the Brodbecks, seeking a judgment voiding the restriction. Pursuant to stipulation between the Krattigers and the Brodbecks, but without the O’Neills’ approval, the trial court ordered the restriction replaced with the following provision:

The premises shall be used and occupied in compliance with the requirements of the city ordinance of the City of Platteville R-1 residential district, as said ordinance may be amended and modified in the future. Either party, his successors and assigns, of the parties, shall have the right to enforce these restrictions by private action.

¶4 The O’Neills asserted that the title remained clouded by this restriction as well, and refused to purchase the property. When the Krattigers refused to return their earnest money, the O’Neills sued. The Krattigers appeal from the trial court’s determination that the title remained unmerchantable with the replacement deed restriction quoted above.

¶5 The trial court properly ordered the earnest money returned. The Krattigers’ warranty of title in the contract to sell exempted governmental restrictions such as zoning ordinances, and “recorded building and use restrictions

and covenants.” The restriction here was not a governmental restriction because it imposed a permanent, privately enforced R-1 zoning on the property, even if the city decided to rezone it or the surrounding area. Nor can the Krattigers rely on the exception for recorded restrictions and covenants because the restriction at issue did not exist when the O’Neills entered into the contract, and they never consented to it. The Krattigers cannot reasonably contend that they could unilaterally attach a material, after the fact condition to a contract and still enforce it. *See Lakeshore Commercial Fin. Corp. v. Drobac*, 107 Wis.2d 445, 458, 319 N.W.2d 839, 845-46 (1982) (modified contract is a nullity as to non-consenting parties). Only those restrictions and covenants in effect and lawful at the time the contract was signed were valid exceptions to the warranty.

¶6 “[A] marketable title is one that can be held in peace and quiet; not subject to litigation to determine its validity; not open to judicial doubt.” *Baldwin v. Anderson*, 40 Wis.2d 33, 43, 161 N.W.2d 553, 558 (1968) (citation omitted). The Krattigers did not have the ability to convey a title that satisfied those criteria, despite promising to do so; and consequently, they forfeited their claim to performance of the contract by the O’Neills.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

