THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Master-in-Equity

The Honorable Shannon M. Phillips, Master-in-Equity
Case No.: 2018-CP-42-02247

Appellate Case No. 2022-001149

Derrick S. Hester, Debra S. Hester, James H. Nicholls, Emma Viola Nicholls, James E. Gregg, Jr., Paulette J. Gregg, Michael Ben Coley, Ashley Coley, Grady L. Barnes, Sr., Julia W. Barnes, Ewen Lennon, and Amy Lennon, Respondents,

v.

Mark Razzano and Carre Razzano, Appellants.

FINAL BRIEF OF RESPONDENTS

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Following a trial in 2020, Judge Gordon Cooper ruled that Appellants' garage structure, containing living space above the garage bays, consisting of 1,350 square feet, two bedrooms, two bathrooms, and a full kitchen (the "Garage") constituted a violation of the Restrictive Covenants of the Solitude Bay Community and issued a permanent injunction prohibiting Appellants from making residential use of the space. (R. p. 1 – 6). As part of the Order, Judge Cooper retained jurisdiction and allowed that, should the Defendants attach the Garage to the Defendants' main residence (the "Main Residence"), they may seek a ruling from the Court on whether the construction is such that, in the Court's determination, the Garage no longer has the status of an outbuilding and does not violate the Covenants. See id.

Importantly, Appellants did not appeal this ruling. Consequently, it is the law of this case that the Garage is an "outbuilding" under the terms of the Restrictive Covenants. Then, in 2022, Appellants requested a hearing pursuant to the provision by which the Master retained jurisdiction and presented evidence at the hearing before the Master in Equity.[1] When Judge Phillips ruled against them, Appellants filed this appeal.

In the appeal, Appellants complain of the "undefined and unspecified" standard of Judge Cooper's order, arguing they are left shooting at a vague target. See Appellants' Brief, p. 13. Yet, if Appellants had an issue with this standard then they should have appealed Judge Cooper's order. As they did not do so, this is the law of the case. See Lindsay v. Lindsay, 328 S.C. 329, 491 S.E.2d 583 (Ct. App. 1997) (An unappealed ruling – right or wrong – is considered the law of the case and the ruling will not be considered on appeal.) Moreover, not only did they fail to appeal, but the Appellants actually sought relief under this standard and only when they did not get the

[1] At this point, Judge Cooper had retired and the hearing was before his successor, Hon. Shannon M. Phillips.

outcome they wanted did they complain to this Court. Appellants also complain that the 2020 order left the term "outbuilding" undefined but, again, they did not appeal this. Appellants further complain of Judge Phillips's reference to persuasive case law from other jurisdictions in assessing whether their attachment of the Garage to the Main Residence by a simple trellis was a sufficient connection so that the Garage no longer held the status of an "outbuilding" under the Restrictive Covenants. See Appellants' Brief, p.10. It is, of course, common and not an error of law for a judge to refer to persuasive case law.

Judge Phillips's conclusions were thoughtful, reasoned, sound, and based on applicable case law. The remaining complaints should have been raised in an appeal from Judge Cooper's order, but they were not. Appellants' appeal should therefore be rejected.

STATEMENT OF THE CASE

This matter centers on Appellants' construction of the Garage, a structure containing a three-bay garage with a living space above consisting of 1,350 square feet, two bedrooms, two bathrooms, a full kitchen, and a separate entrance, the exterior of which is shown in the photos included in the Record on Appeal (Supp. R. p. 138). The Respondents, other owners within the Solitude Bay neighborhood on Lake Bowen, sought a permanent injunction prohibiting Defendants from making residential use of the living space in the Garage, alleging that this violated the applicable Restrictive Covenants.

This matter came before the Hon. Gordon G. Cooper for trial on February 25, 2020. Following the trial, Judge Cooper issued an order (the "Order") which included a finding that the Garage constituted an "outbuilding" under the Restrictive Covenants. (R. p. 1 – 6). The Court therefore issued a permanent injunction enjoining Defendants from using the Garage, including the living space above, as a residence, either temporarily or permanently. See id. The Court retained jurisdiction over this matter and allowed that, should the Defendants attach the Garage to the Appellants' main residence (the "Main Residence"), they may seek a ruling from the Court on whether the construction is such that, in the Court's determination, the Garage no longer has the status of an outbuilding and does not violate the Covenants. See id. at p. 6. Appellants' Motion for Reconsideration was denied and no appeal was taken.

On March 14, 2022, Defendants filed a Petition for Post Judgment Relief & Declaratory Judgment (the "Petition"). (R. p. 8 – 11). The Petition cited to Judge Cooper's Order and the provision retaining jurisdiction and sought a post-judgment ruling and/or declaratory judgment from this Court on the issue of whether the Garage had been sufficiently attached to the Defendants' Main Residence such that the former no longer held the status of "outbuilding" and that the injunction as to the use of the Garage should therefore be lifted. See id.

At the hearing, Appellants presented evidence that, since the initial trial before Judge Cooper, they had attached the Garage to the Main Residence by a trellis. (R. p.87, ll. 7 – 13; R. p. 58, referenced at p. 87, ll. 2 – 9). Appellants called their contractor, Stephen Poole, who admitted under cross-examination that the Garage and Main Residence were only "mechanically attached" using "[l]umber and screws." (R. p. 99, ll. 22 – 24). Mr. Poole further agreed that this was the full extent of the connection between the two structures:

> Q. Right. But there is no – the electrical doesn't go from one structure to the other, does it?

A. No.

Q. The plumbing doesn't go from one structure to the other, does it?

A. No.

Q. The HVAC doesn't go from one structure to the other, does it?

A. No.

Q. And this trellis doesn't have any walls on it, right?

A. No.

. . .

Q. All right. And if you go outside in the rain, if it is a light rain and it is falling straight down you might not get wet walking from one to the other, but if it is anything else you are going to get wet aren't you?

A. As in any breeze way.

(R. p. 99 – 100, ll. 25; 1 – 7; 20 – 23). Mr. Poole further admitted that the Garage was "completely self-sufficient". See id. at p. 101, ll. 22 – 24.

Appellants then presented Carre Razzano who, on cross-examination, admitted that the two structures do not share water, sewer, electrical, or HVAC. See id. at p. 118, ll. 6 – 16. She further admitted that the structures have separate entrances and that the Garage has its own front door. See id. at p. 118, ll. 17 – 22. Mrs. Razzano also admitted that, at that very moment, the Garage was being used by her parents, the Tilmonts, who had even installed a sign over the front door of the Garage which read: "The Tilmont's". See id. at p. 119, ll. 13 – 22.

Following the conclusion of the trial, Judge Phillips ruled that "the Garage has not been sufficiently joined to the Main Residence to form one residence building and the Garage remains an 'outbuilding.'" (R. p. 166 – 67). In making this ruling, Judge Phillips stated: "I find that the

photographs of the finished property are the most compelling evidence in this case." See id. at p. 166. Appellants then filed this appeal.

ISSUE PRESENTED

Did Judge Phillips err in finding that the addition of a wooden trellis running between the two structures was not sufficient to change the character of the Garage from an "outbuilding"?

STANDARD OF REVIEW

"An action to enforce restrictive covenants by injunction is in equity." See S.C. Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001). The grant of an injunction lies within the sound discretion of the trial court. See City of Columbia v. Pic-A-Flick Video, Inc., 340 S.C. 278, 282, 531 S.E.2d 581, 520-21 (2000). To enforce a restrictive covenant, a party must show that the restriction applies to the property either by the covenant's express language or by plain unmistakable implication. See Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270-71, 363 S.E.2d 891, 894 (1987). A Court shall enforce restrictive covenants unless they are indefinite or contravene public policy. See id. Restrictive covenants are contractual in nature, and thus, the language used in restrictive covenants is to be construed according to its plain and ordinary meaning. See Hardy v. Aiken, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006).

DISCUSSION

I. THE COURT PROPERLY FOUND THAT THE MERE ADDITION OF A WOODEN TRELLIS DID NOT CHANGE THE STATUS OF THE GARAGE FROM AN "OUTBUILDING"

A. Appellants Have the Burden

As noted above, Appellants did not appeal Judge Cooper's order finding that the Garage constituted an "outbuilding" under the Restrictive Covenants. This is therefore the law of the case.

Judge Cooper included in the Order that he retained jurisdiction over the matter and "should the Defendants attach the Garage to the main residence, Defendants' may seek a ruling from this Court on whether the construction is such that, *in this Court's determination*, the Garage no longer has the status of an outbuilding." See Order, p. 6 (emphasis added). Given this, Appellants have the burden of showing that (1) the two buildings have been attached and (2) that the attachment is sufficient such that the two structures are effectively one and the Garage is no longer an outbuilding.

B. Appellants Must Do More Than Show Attachment

Appellants seem to argue in brief that all that is required of them by Judge Cooper's order is to mechanically attach the two structures in any manner whatsoever and they chide Judge Phillips for asking whether the attachment is sufficient to "form one residence building." This is a clear misreading of Judge Cooper's Order.

Appellants argued in brief: "The standard established by the Trial court was to attach (albeit in an undefined or unspecified manner) the [Garage] to the Appellants' residence, not to 'form one residence building.'" See Appellants' Brief, p. 13. Yet Judge Cooper's order very plainly states that once the Defendants attach the Garage to the Main Residence, the Court will then consider "whether the construction is such that, in this Court's determination, the Garage no longer has the status of an outbuilding." (R. p. 6). There is no way to read this language as merely requiring attachment. By looking at whether the attachment (here – a trellis) was sufficient to make the Garage and Main Residence into one residence, Judge Phillips was not committing error of law, she was following the language of Judge Cooper's order which was not appealed by Appellants.

C. Evidence Amply Supports Judge Phillips's Ruling

Furthermore, when the evidence from the trial before Judge Phillips is considered, there is ample support for her ruling. First, Judge Phillips stated in her order that she found "that the photographs of the finished property are the most compelling evidence in this case." (R. p. 166). Many of these photographs are included in the Record on Appeal and within this brief and they speak for themselves. What Appellants chose to construct was a separate structure, distant from the Main Residence, and which appears for all intents and purposes as its own residence. The construction of a mere wooden trellis does not meaningfully change the appearance or character of the structures.

Second, testimony at trial buttressed the fact that the Garage remains an outbuilding. Mr. Poole and Mrs. Razzano agreed that the two structures do not share walls, electrical, plumbing, HVAC, or sewer. (R. p. 99, ll. 22 – 25; p. 100, ll. 1 – 7; 20 – 23; p. 101, ll. 22 – 24; p.55, ll. 6 – 16; p. 118, ll. 17 – 22). Further, it was established that – at the very moment that the trial was ongoing – the Garage was in fact being used as a separate residence by Mrs. Razzanos' parents, who had even installed a sign over the front door of the Garage which read: "The Tilmont's". See id. at p. 119, ll. 13 – 22.

Given this, it cannot be said that Judge Phillips's ruling was erroneous. There mere mechanical attachment of the structures using lumber and screws is not sufficient for Appellants to meet their burden of demonstrating that the Garage is no longer an outbuilding, under the Covenants.

D. Judge Phillips Did Not Err in Considering Case Law From Other Jurisdictions

Finally, it certainly was not error of law for Judge Phillips to consider case law from other jurisdictions in assessing whether the attachment was sufficient. Our courts consider such case law frequently and it is a common practice of the judiciary. Judge Phillips's own research

demonstrates diligence, not error of law. To the extent that Appellants felt that the case law was not relevant or applicable, those arguments should have been raised to Judge Phillips in a motion to reconsider and not, for the first time, in the brief to the Court of Appeals. Instead, Appellants proceeded directly to file a Notice of Appeal.

CONCLUSION

Appellants did not appeal the order of Judge Cooper, yet now complain of the alleged ambiguity and vagueness of the order. The place to raise this concern was in an appeal of Judge Cooper's order. As the Appellants did not appeal, they cannot now complain of the process. They bear the burden to demonstrate, not only that the two structures have been attached, but that they have been attached in such a manner that the buildings now constitute one residence. This they have failed to do through the mere construction of a wooden trellis and the lower court properly found that Appellants' Garage remains, under the law of the case, an "outbuilding" which may not be used for residential purposes. For these reasons, Respondents respectfully submit that the lower court ruling should be affirmed.

Respectfully Submitted,

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August 14, 2023
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PROOF OF SERVICE

I, Kenneth Jay Anthony, counsel for Respondents, certify that I have served the Final Brief on the South Carolina Court of Appeals and on counsel for Appellant, by depositing a copy of same in the United States mail, postage prepaid, addressed as follows:

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CERTIFICATE OF COMPLIANCE

Counsel hereby certifies that the Final Brief complied with Rule 211(b), SCACR.

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