THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Allison R. Lee, Circuit Court Judge

Op. No. 2013-UP-297 (S.C. Ct. App. filed July 3, 2013)

Place on the Greene Homeowners Association, Inc., ... Petitioner,

v.

W.G.R.Q., LLC, Easy Coin Laundry, Inc., Eva Nell Berry, and Jeffrey O. Kenney, ... Respondents.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The respondents propose the following as re-statements of the questions presented:

I. Should this Court Grant Certiorari When Any Decision Would Only Reiterate That the Standard of Review in an Equitable Case Is De Novo, Not Abuse of Discretion?

II. Is it Worthwhile for this Court to Consider the Argument That a Non-waiver Clause—which Is a Contractual Provision—ought to Be a Complete Bar to Any and All Defenses to a Claim to Enforce a Restrictive Covenant, Which Is a Claim in Equity?

COUNTER-STATEMENT OF FACTS

The "Place on the Greene" is a condominium building on Greene Street in Columbia. It is near the University of South Carolina's campus, and it is also near the Five Points district. The building contains eight commercial units and several residential units.

This lawsuit is a dispute between the building's homeowners association and the owners of seven of the eight commercial units. By and large, this is the story of a building that has never been used as it was originally designed.

The developers thought they would sell the residential units to "professionals" living and working downtown, but the units drew immediate interest from college students. According to some of the trial testimony, college students and other tenants are the majority of the building's residents today. (R.p.92, lines 17-18; p.98, lines 1-3; p.140, lines 2-15).

The commercial units were intended to be "general office space," but according to the testimony at trial, these units sat vacant after the end of construction. (R.p.141, lines 3-10; p.162, line 17 - p.163, line 9). Six of the units were eventually given to two of the building's developers as part of their compensation. (R.p.153, line 24 - p.154, line 3).

The building's master deed contains a covenant that prohibits several commercial activities including restaurants, bars, and retail shops that draw a volume of walk-in patrons. See (R.p.264, §3). Despite this covenant, there have been walk-in businesses in the building since at least 1988. (R.p.204, line 5 - p.205, line 7) (describing the 24-hour coin laundry that operated in unit A for 11 years). Restaurants have a long history in the building as well; one has been there since at least 1993, (R.p.342), and building's homeowner's association board has even conducted its annual meeting inside one of the restaurants. (R.p.344). In short, it is undisputed that until now, this building's covenant has never been enforced.

It is also undisputed that the homeowners association helped these violating uses continue. In 1993, the association's board voted to authorize the "Duck-In Restaurant" to build a deck in front of two units that were occupied by retail businesses. (R.p.342). The board also voted to allow one of the restaurants in the building to sell beer and wine. (R.p.168, lines 17-23). This vote happened in the mid 1990's. *Id.*

There was more conduct of the same character. The board voted to allow the Blue Cactus to cut a hole in the side of the building for ventilation. (R.p.169, line 20 - p.170, line 13). The Blue Cactus is a restaurant that has been in the building since May of 1994. (R.p.193, line 17). Similarly, the minutes of the board's 1995 meeting reflect that the building's doors had been relocated so patrons of the commercial units could access the building's restrooms. These same minutes reflect that the owners of the commercial units had been notified that they were responsible for maintaining the restrooms. (R.p.344). Then, in 2004, the board published new rules and regulations that governed certain activities in the commercial units. See (R.pp.347-350). Among other things, these rules provided that after

10 p.m., customers of the commercial units were required to be inside the building in order to be served. (R.p.348, ¶4).

This spirit of coexistence ended in June of 2007 when the building's board sent a cease and desist letter to the respondents. (R.pp.328-335). Lawsuits followed roughly six months later, and the suits were consolidated and tried in April of 2009.

As the petition for certiorari describes, the respondents admitted violating the covenant and asserted the defenses of laches, waiver, and estoppel. The circuit court rejected these defenses and issued an injunction. The court repeatedly observed that the respondents were on constructive notice of the covenant, see (R.p.6, ¶5; p.8, ¶11; p.10, ¶17; p.11, ¶22), and the court opined that the respondents' financial harm was not sufficient evidence of prejudice and that they had not been "lulled into a false sense of security" by the fact that for nearly 20 years, nobody made any effort to enforce the rules. (R.pp.10-12).

The Court of Appeals reversed this decision and held that the circuit court erred in rejecting the respondents' laches defense. The decision to reverse was unanimous and unpublished. Op. No. 2013-UP-297 (S.C. Ct. App. filed July 3, 2013).

Although several of the salient facts are uncontested, there are a few considerable factual disagreements in the record.

For example, the petitioner has consistently attempted to place the blame for the board's pattern of non-enforcement on two of the building's developers, Beau Powell and Craig Stonebruner. The petition alleges that these individuals ignored the rules, "dominated" the building's board, and intimidated the board into failing to enforce the building's restrictive covenant.

That is not a factual narrative—it is an argument. The circuit court did not make those findings, and a faithful view of the evidence casts the reasonableness of that argument into serious question. For example, consider the board's 1993 vote to allow the Duck-In to build a deck. The minutes from that meeting reflect that the entire board had a positive opinion of the project, and the minutes also reflect that neither Powell nor Stonebruner was present. (R.p.342). Consider also the board's 1995 minutes. These minutes describe that the building's doors had been relocated to accommodate the commercial units' patrons, and this board meeting actually occurred *inside* one of the restaurants. (R.pp.344-345). Neither Powell nor Stonebruner are listed as being present or members of the building's board. *Id.*

The truth is that this narrative is not particularly credible. This story derives from the testimony of a single witness—Laura Nichols—and her testimony at trial was inconsistent. For example, while Ms. Nichols said that she believed the building's board was ignorant of the covenant, see (R.p.177, lines 13-16), Ms. Nichols was present at the 1991 board meeting when Beau Powell addressed the vacancy problems in the commercial units and openly acknowledged that restaurants were prohibited. (R.p.340). The petition characterizes Ms. Nichols as the "voice in the wilderness" that opposed violating the covenant, but the minutes from the board's 1993 meeting do not reflect that she opposed the Duck-In's request to build a deck. (R.p.342).

This is not a story of bullying. It is the story of a covenant that simply proved unworkable from the beginning. Everyone knew this rule existed. The interested parties acknowledged it and tried to change it, and those changes failed not because they lost a vote, but because only a few people in the building cared enough to attend meetings. Because the

rule caused problems, the board ignored it. As Ms. Nichols described, the board was sympathetic and, until this suit, "tried to make it work." (R.p.190, line 18 - p.191, line 8).

ARGUMENT

The decision of the Court of Appeals was driven by the fact that for over 10 years, nobody did anything to enforce this restrictive covenant. When viewed properly, that history of inaction operates in two ways.

First, it demonstrates how the respondents were prejudiced. Because all of the respondents purchased their units *after* these violating uses began, all of them could not help but rely on this pattern of non-enforcement. Because the covenant has been ignored for so long, everyone could not help but presume that the activities which had previously been allowed would be allowed to continue.

Second, the history of inaction critically weakens the argument that the equities are in the petitioner's favor. These violations were unusually open. Since at least 1993, everyone that has bought a residential unit in this building has known that they would be living over restaurants and retail stores. It is not possible to have looked at this building or to have walked past it without seeing this. The person who buys a condo over a bar and then tries to shut the bar down is not seeking to do equity. That person is seeking a windfall. This illustrates the error in the petitioner's example of the "innocent purchaser." Because noone can look at this building without seeing the businesses that are on the first floor, the innocent purchaser does not exist.

The petitioner offers two reasons why it believes this Court should grant certiorari to review this unpublished decision. First, the petitioner says that the Court of Appeals

applied the wrong standard of review. Second, the petitioner says that the covenant's non-waiver provision prevents laches from applying. Neither argument should be persuasive.

I. It Is Not Necessary for this Court to Grant Certiorari Only to Reiterate That the Standard of Review in an Equitable Case Is De Novo, Not Abuse of Discretion.

The petition argues that the Court of Appeals should have applied the abuse of discretion standard. Respectfully, this view of the law is not correct and has already been rejected by this Court.

An action to enforce a restrictive covenant sounds in equity. See, e.g., *Buffington v. T.O.E. Enterprises*, 383 S.C. 388, 391, 680 S.E.2d 289, 290 (2009). If a case sounds in equity, the standard of appellate review is de novo. This is required by the South Carolina Constitution, which provides that in equitable cases, the court shall review "the findings of fact as well as the law." S.C. Const. art. V, §5.

The petition cites 6 cases which suggest that an appellate court applies the abuse of discretion standard to a decision that involves an injunction. See (Petition, p.11). The argument seems to be that regardless of whether the underlying case is an equitable case, if an injunction is in the mix, the standard of review is abuse of discretion.

This Court has visited this argument before. *Lewis v. Lewis* was a family court case that involved reconciling the de novo standard for equity cases with several previous decisions that used the term "abuse of discretion" to describe appellate review of certain family court orders. *Lewis* described that the "abuse of discretion" language in those previous decisions was merely a recognition of two things—(1) the deference that an appellate court will generally show to the lower court's factual findings, and (2) the fact that

the complaining party bears the burden of proving that the weight of the evidence is against the lower court's findings. The *Lewis* decision speaks plainly. This Court wrote that in the appeal of an equitable case, the previous use of the phrase "abuse of discretion" was "a misnomer" in light of the constitution's mandate for de novo review. 392 S.C. 381, 385-92, 709 S.E.2d 650, 651-655 (2011).

Lewis controls the petitioner's argument. Though this is not a family court case, it is still a case in equity.

The petitioner may say that family court is somehow different, but that argument cannot not be tenable. The authorities that the petitioner is citing are rooted in family court cases. Two of the six cases that the petition cites for the abuse of discretion standard are domestic relations cases. See *Emery v. Smith*, 361 S.C. 207, 603 S.E.2d 598 (Ct. App. 2004) and *Grossman v. Grossman*, 242 S.C. 298, 130 S.E.2d 850 (1963) (cited on page 11 of the petition). Two more of the cases cited in the petition are not family court cases, but those cases use family court cases as their authority for the standard of appellate review. See *Brown v. Butler*, 347 S.C. 259, 265, 554 S.E.2d 431, 434 (Ct. App. 2001) and *Gibbs v. Kimbrell*, 311 S.C. 261, 269, 428 S.E.2d 725, 730 (Ct. App. 1993) (cited on page 11 of the petition).

As for the last two cases cited in the petition, one of them—*Premium Investment Corp. v. Green*—does not list *any* authority for the abuse of discretion standard. See 283 S.C. 464, 473, 324 S.E.2d 72, 78 (Ct. App.1984). The final case—*King v. James*—cites *Premium Investment Corp.* and *Brown v. Butler*. See *King*, 388 S.C. 16, 28, 694 S.E.2d 35, 41 (Ct. App. 2010). *Brown* relied on a family court case for its authority. 347 S.C. at 265,

554 S.E.2d at 434. These decisions are all rooted in the same doctrine. *Lewis* rejected that doctrine and controls this question.

The Court of Appeals did not apply the wrong standard of review, and there is no reason to use this unanimous, unpublished decision as the vehicle to reiterate that which is fairly obvious from a close reading of the *Lewis* decision. In equitable cases, the standard of appellate review is de novo. The respondents respectfully submit that this argument does not counsel in favor of granting certiorari.

II. There Would Seem to Be Little Utility in Considering the Argument That a Non-waiver Clause—which Is a Contractual Provision—ought to Be a Complete Bar to All Defenses to a Claim to Enforce a Restrictive Covenant, Which Is a Claim in Equity.

The petition also offers that the Court of Appeals should have applied the non-waiver clause in the building's master deed to bar the defense of laches. The language of the clause is relatively straightforward. In relevant part, it provides that failing to enforce the covenant will not waive the right to enforce the covenant. (R.p.265, §4).

If this language bars laches, it bars all possible defenses. And if all defenses are barred, this is not really a suit in equity. For a suit to sound in equity, the law has to account for the fact that the violations of this covenant have been unusually open and unusually long-standing. For over a decade, everyone that has walked or driven by the Place on the Greene has been aware of how these units were being used, and as long as this building has been in existence, the building's board either sat silent or helped these uses continue. Equity should not permit a bait and switch. It has to take history into account, and it has to account for the fact that a case's circumstances might be such that enforcing a restrictive covenant will cause

*un*fair harm. The petitioner's argument does not do that. The petitioner's argument says that no matter the circumstances, if you violate a covenant, you always lose.

The petition claims that these non-waiver clauses are uniformly upheld in other jurisdictions, but the principal authorities cited in the petition come from the state of Arizona. See (Petition, pp. 8-9) (citing *Burke v. Voicestream Wireless Corp. II*, 87 P.3d 81 (Ariz. Ct. App. 2004) and *College Book Centers, Inc. v. Carefree Foothills Homeowners' Ass'n*, 241 P.3d 897 (Ariz. Ct. App. 2010)). The petition also cites Indiana cases, but these cases trace their roots to the Arizona court's decision in *Burke*. See *Johnson v. Dawson*, 856 N.E.2d 769, 775 (Ind. Ct. App. 2006).[1]

Of these foreign decisions, the case with the closest similarity to this appeal is the *College Book Centers* case. See 241 P.3d 897. In *College Book Centers*, the party that attempted to escape the no-waiver clause argued that such a clause was only meant to cover *in*action. The argument was that the clause could not apply if the homeowners association had expressly approved the violations. The court of appeals of Arizona rejected this argument. In short, the court applied the clause despite the fact that the homeowners association had employed conduct that someone could reasonably call a bait and switch.

It would seem to be difficult for South Carolina to follow the same view. For one thing, the *College Book Centers* decision notes that in Arizona, ambiguities in restrictive covenants are *not* construed in favor of free use of property. 241 P.3d at 904. This is directly

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[1]Two of the decisions that are cited in the petition are unpublished decisions. See *Speedway Woods Cmty. Ass'n, Inc. v. McVey*, 925 N.E.2d 6 (Ind. Ct. App. 2010) and *Lebamoff v. Twin Eagles Neighborhood Ass'n, Inc.*, 909 N.E.2d 521 (Ind. Ct. App. 2009). Under Rule 65(D) of Indiana's Rules of Appellate Procedure, these decisions are not regarded as valid precedent and may only be cited in certain circumstances, none of which apply.

contrary to the law in South Carolina. See *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 864 (1998) ("[R]estrictions as to the use of real estate should be strictly construed and all doubts resolved in favor of free use of the property[.]"). Thus, it seems that from the outset, South Carolina and Arizona approach these cases from very different viewpoints.

South Carolina law also provides that although a court will enforce a restrictive covenant when the covenant's language is plain, even the most straightforward covenants have always been subject to equitable defenses or offensive attack. See *Buffington*, 383 S.C. at 393, 680 S.E.2d at 291 ("[T]his Court has consistently held that courts should consider equitable doctrines when determining whether to enforce a restrictive covenant."). Using a no-waiver clause to bar all relief from a covenant would change this law and eliminate the principle that even if a court finds a covenant has been violated, it is not mandatory that the court issue an injunction. See, e.g., *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 274-75, 363 S.E.2d 891, 896 (1987). The petitioner's argument leaves no room for equity.

Finally, although they have some similarities, waiver, laches, and estoppel are different doctrines. Waiver is a legal defense and has been described as the "voluntary and intentional relinquishment or abandonment of a known right." *Strickland v. Strickland*, 375 S.C. 76, 86, 650 S.E.2d 465, 470-71 (2007). Laches and estoppel are equitable defenses, and they differ from waiver in a material respect—prejudice. To satisfy either defense, a defendant must show a prejudicial change in his or her position. See *Queen's Grant II Horiz. Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 358-60, 628 S.E.2d 902, 912 (Ct. App. 2006). If the court interpreted the no-waiver clause to apply to estoppel and laches, that would expand the clause beyond its text and cover all defenses, legal and equitable.

This backdrop makes it difficult to see how the petitioner's argument could succeed. The petitioner's view would effectively establish that as long as there is a no-waiver clause, anyone who violates a covenant could not survive summary judgment. That view would be a significant change in South Carolina law, that change would be unwise, and what is more, there is no urgency forcing this Court to consider the question. The decision of the Court of Appeals is unpublished. Denying certiorari leaves South Carolina's jurisprudence as it is. In the circumstances of this case, this view is the better view.

CONCLUSION

At trial, the petitioner's theory of the case was that the delay of the building's board did not matter. The petitioner argued that although a police officer might allow a motorist to speed by him every day, that previous allowance does not affect the officer's ability to issue a speeding ticket. See (R.p.63, lines 1-7).

This is obviously not the law with respect to restrictive covenants, and the law is also not as the circuit court found it to be. The circuit court repeatedly emphasized that the respondents had constructive notice of this covenant because it was included in their deeds, and while that is true, it is not terribly relevant. If constructive notice was the touchstone, the only defense to a covenant would be a lack of notice. The circuit court did not faithfully consider the parties' conduct, and the Court of Appeals was right to reverse.

The parties seem destined to disagree on several things. While the petitioner says that the commercial units cause all of the problems in this building, the owners of the commercial units say that most of the problems are caused by the fact that the building's tenants are primarily college students. See, e.g., (R.p.217, lines 9-14).

But there can be no principled disagreement on the critical point: as long as this building has been in existence, nobody has done anything to enforce the building's restrictive covenant. When they bought their properties, the present owners of the commercial units could not help but presume that the activities which had previously been allowed would be allowed to continue, and on the other side, the person who knowingly buys a condo over a bar and then tries to shut the bar down is not seeking to do equity. That person is seeking a windfall. Because the Court of Appeals reached the correct result, this Court should deny the petition for certiorari.

Respectfully submitted,

October 18, 2013

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Petitioner with a copy of the *Return to Petition for Writ of Certiorari* by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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