

STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM SUMTER COUNTY

Court of Common Pleas

Honorable Michael M. Jordan, Master in Equity

Case No. 2026-000451

Lakewood Links Property Owners Association, Inc.,

Respondent,

v.

Jason M. Josey and April W. Josey,

Appellants.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. The Appellants knew the procedure for filing for the required architectural review of their request for the erection of a wooden fence. The Appellants failed to submit a request to the Architectural Review Board for the erection of a wooden fence before they constructed the fence. Does the June 13, 2022, letter of the Appellants constitute a valid request for retroactive approval of their wooden fence?
2. South Carolina law provides that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document. The Respondent presented evidence of its case-by-case review, consideration and reasoning for removal of fence erected by the Appellants. Does the enforcement of the Covenants on purely aesthetic grounds defeat the plain and obvious purpose of the instrument?

STATEMENT OF THE CASE

This is an appeal from the Master's order requiring the Joseys to remove their wooden privacy fence from their real property located at 3020 Tidewater Drive, Sumter, South Carolina. (Order, Jul. 8, 2025; p.41) This real property constitutes one lot in the Lakewood Links Subdivision which is composed of 273 lots subject to the 1988 Restrictive Covenants (Covenants) for the Lakewood Links Property Owners' Association, Inc. (POA) filed in the Register of Deeds Office for Sumter County on December 29, 1988. (Order, Jul. 8, 2025; p.1)

On December 29, 2022, the POA commenced this lawsuit against the Joeys seeking a permanent injunction requiring the Joseys to remove the privacy fence they had erected upon their above-described real property. (Complaint) Referencing and incorporating a copy of the Covenants filed on December 29, 1988, as Exhibit P-1, the Complaint alleged that Joseys had violated these Covenants filed on December 29, 1988, by unilaterally, and without approval of the Architectural Review Board (ARB) and or/the POA, installing a privacy fence around the back yard of 3020 Tidewater Drive. (Complaint; p. 6.; Ex. P-1)

The Joseys' Answer was filed on March 3, 2023, and asserted a general denial and affirmative equitable defenses. (Answer) Thereafter, the Joseys sought to amend their Answer and assert counterclaims by motion dated July 18, 2024. (Mot. to Amend) The Amended Answer asserted Counterclaims seeking: (1) Declaratory Judgment that the POA's rules and regulations were unenforceable because they were not recorded as required by the S.C. Code §27-30-130; (2) a Declaratory Judgment that the POA may not

prohibit wooden privacy fences without amending the Covenants; (3) a Declaratory Judgment that the POA cannot prohibit the Joseys from installing a wooden privacy fence because no common scheme exists within the Lakewood Links community; (4) A Declaratory Judgment that the POA waived its right to exercise architectural review and control of the Joseys' fence because the POA failed to approve or deny Joseys' request within thirty days as required by the Covenants. (Am. Answer and Counterclaim)

The POA filed an Amended Summons and Complaint on September 26, 2024, (Am. Complaint) and a Reply to the Amended Answer and Counterclaim on October 4, 2024. (Reply) No Order was entered approving the POA's Amended Complaint or the Joseys Amended Answer and Counterclaim, but neither party objected, and the pleadings were accepted by consent.

This case was referred under Rule 53, SCRCP, to Michael M. Jordan, Master-in-Equity for Sumter County, by order dated May 10, 2023. (Order of Reference, May 10, 2023) The Master conducted a non-jury trial on October 7-9, 2024, and by Final Order filed July 8, 2024, found that the Joseys violated the Covenants and enjoined them to remove the privacy fence (Order, Jul. 8, 2025). The Master denied both Parties' requests for attorney's fees. (Order, Jul. 8, 2025). The POA moved to alter or amend the denial of attorney's fees on July 18, 2025, and the Master denied the motion by order filed January 30, 2026. (Motion to Alter or Amend; Order, Jan. 30, 2026) The Joseys timely filed this appeal on February 23, 2026. (Notice of Appeal)

ARGUMENT

- III. Does the June 13, 2022, letter of the Appellants constitute a valid request for retroactive approval of their wooden fence?**

The Joseys live in the Lakewood Links neighborhood in Sumter County, South Carolina. (Am. Complaint, p. 3). The Lakewood Links POA was established and Covenant document was recorded in the Sumter County Register of Deeds Office on December 29, 1988. (Am. Complaint; Pl. Ex. 1) This POA was empowered to enforce these Covenants. (Am. Complaint, p. 2; Pl. Ex. 1, Part Three, Art. VI, §3(e), (f) and (g), p. 32) It is these Covenants, and these Covenants alone, the POA seeks to enforce in their Complaint and Amended Complaint. (Complaint and Amended Complaint)

These restrictive covenants are contractual in nature, so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document. Hoffman v. Cohen, 262 S.C. 71, 75, 202 S.E.2d 363, 365 (1974)

The Covenants require that the POA members seek and obtain approval from the POA's Architectural Review Board (ARB) before constructing any improvements of changing the exterior appearance of the property. (Pl. Ex. 1, Part Two, Art I, §2(f), p. 14-15)

The procedures for application and approval of and by the ARB as required by Part Two; Art. 1; §1 (Pl. Ex. 1, p.11) are set by the ARB which is to set its own rules of procedure, (Pl. Ex. 1, p. 13, Part Two; Art. 1; §2(c), Sub§ (2)).

Courts tend to strictly interpret restrictive covenants and resolve any ambiguities in a covenant on the presumption of free and unrestricted land use. Edwards v. Surratt, 228 S.C. 512, 90 S.E.2d 906 (S.C. 1956). Thus, to enforce a restrictive covenant, a party must show that the restriction applies to the property either by covenant's express language or by a plain, unmistakable implication. Hamilton v. CCM, 274 S.C. 152, 263

S.E.2d 278 (1980). The rule of strict construction governing restrictive covenants does not preclude their enforcement. A restrictive covenant will be enforced if the covenant expresses the party's intent or purpose, and this rule will not be used to defeat the clear, express language of the covenant. Taylor v. Lindsey, 332 S.C.1, 498 S.E.2d 862 (S.C. 1998); Palmetto Dunes v. Brown, 287 S.C. 1, 336 S.E.2d 15 (1985)

The entire chain of title to 3020 Tidewater Drive charged the Joseys with both actual and constructive notice of the restrictions imposed by the Covenants. The deed by which the April Josey was conveyed the real property which is the subject of this lawsuit recites: "This conveyance is made subject to the restrictions, reservations, zoning ordinances or easements that may appear of record on the recorded plats or on the premises." (Pl. Ex. 2; Trial Tr. Vol. I, Pavkov, Denise, p. 12:10 to 16:9)

On January 7, 2021, Paula McCormack conveyed Lot 269 (3020 Tidewater Drive) to April Josey by her deed recorded on January 11, 2021, in the Register of Deeds Office for Sumter County in Book 1279 at Page 1210, which recited "subject to any restrictions reservations, zoning ordinances or easements that may appear of record in the recorded plats or premises." (Pl. Ex. Exhibit 2; Trial Tr. Vol.I, p. 14:6 to 16:3; p. 27:2 to 27:7)

On January 8, 2021, April Josey conveyed Lot 269 (3020 Tidewater Drive) to herself and Jason M. Josey by her deed recorded in the Register of Deeds Office for Sumter County on January 13, 2021, which recited, "subject to any restrictions, reservations, zoning ordinances or easements that may appear of record on the recorded plats or premises." (Pl. Ex. 2, Trial Tr. Vol. I, p. 14:6 to 16:3; p. 27:2 to 27:7). Then, on that same day, January 8, 2021, April Josey executed a sworn statement that provided:

"That the Buyer [Josey] acknowledges that there are Restrictive Covenants related to the property purchases and acknowledge

receipt of a copy of those Covenants recorded in the Office of the Register of Deeds for the aforementioned City/County in Book 481 page 1879; Book 696 page 1917; Book 511 page 241; Book 785 page 471; Book 849 page 833; Book 1054 page 1032; Book 1265 page 5784. Buyers acknowledge having an opportunity to review the covenants, understand that they are bound by the covenants and must comply with the terms of the covenants or face potential legal action from other property owners or property association. Closing attorney has not provided any advice as to the buyer's intended future use of the property. The buyer has no questions of closing attorney in that regard.

I have examined the contents of this affidavit and certify the contents herein to be true and correct to the best of my knowledge. By signing this affidavit, I hereby bind myself, my heirs and assigns forever, my executors(s), my estate and my personal representative to the terms and conditions hereof and do hereby release Curtis & Croft LLC from any and all liability for those for which they have not been retained as are outlined herein. (Pl. Ex. 10, Pl. Ex. 2; Trial Tr. Vol I, p. 149:15 to 151:14; p. 169:1 to 169:8.)

The property at 3020 Tidewater Drive has been subject to the restrictive Covenants recorded at Book 481 page 1879, since the 1997 deed of Plowden Holding, Inc. conveyed this Lot 269 to Robert E. and Jana VanderLeest. (Pl. Ex. 2; Trial Tr. Vol. I, Pavkov, Denise, p. 19:11 to 23:10, p. 27:2 to 27:9)

Restrictive covenants may be created by deed, declaration, or by implication from a general plan or scheme of development. Queen's Grant II, Horizontal property Regime v. Greenwood Dev. Corp., 368 S.C. 342, 362, 628 S.E.2d 902, 913 (Ct. App. 2006). The Joseys accepted their deed subject to the Covenants and are bound by the Covenants. See Erkes v. Kasparek, 399 S.E.2d 6, 303 S.C. 70 (S.C. App. 1990).

The law imputes a purchaser of real estate notice of the recitals contained in the written instruments forming his chain of title, and charges him with the duty of making such reasonable inquiry and investigation as is suggested by the recitals and references

therein contained. Generally, the means of knowledge and the duty of using them are equivalent to knowledge. If there are circumstances sufficient to put the party upon inquiry, he is held to have notice of everything which that inquiry, properly conducted, would certainly disclose. McDonald v. Welborn, 220 S.C. 10, 66 S.E.2d 327 (S.C. 1951)

The Covenants filed in the Register of Mesne Conveyances Office for Sumter County in Book 481 at Page 1879 et.seq. on December 29, 1988, provide” The covenants and restrictions of this Declaration shall run with and bind the land, and shall inure to the benefit of and be enforceable by the Association, the owner, or any Property Owner, their respective legal representatives, heirs, successors, and assigns.” (Pl. Ex. 1, §1, p. 36)

Moreover, additional lands may be subject to the covenants under the express authority granted the heirs, successors and assigns, and these additions, “.... shall be made by either deeding such additional property subject to this Declaration by specific reference in individual deeds”. (Pl. Ex. 1, Part One, Art. 2, Sec. 2(a), p.8)

Contrast the above facts with those of Anderson v. Buonforte, 365 S.C. 482, 617 S.E.2d 750 (Ct.App. 2005), the case cited by the Appellants in support of their position, in which the Court of Appeals found no evidence indicating the [homeowner] actually knew the restrictive covenants actually existed.

The Appellant, April Josey, availed herself of the benefits of the procedures of the 1988 Covenants on July 2, 2021, when she sought approval of her request to install an in-ground pool and received a prompt, favorable response of approval. (Josey, April – Trial Tr. Vol. I, p. 282:21 to 284:6; Hair, Rory – Trial Tr. Vol. II, p. 13:24 to 16:24; Pl. Ex. 11 and 12) Josey then relied upon the authority of the 1988 Covenants on June 13, 2022, when she submitted two ARB Request forms seeking construction of two-car garage and

fence alteration. (Court's Ex. 1; Def. Ex. 4; Pl. Ex. 1, 3, 13, 14, 15 and 16; Josey, April – Trial Tr. Vol I, p. 234:13 to 2:39:1; p. 244:18 to 288:2; Hair, Rory – Trial Tr. Vol II, p. 16:11 to 22:15; Pl. Ex. 11, 12, 13, 14, 16 and 16; Def. Ex. 4). On June 15, 2022, the ARB responded with signed approval of the Joseys' requests set out on the ARB Request Forms consistent with the procedures they had followed in past requests (Josey, April – Trial Tr. Vol. I, p. 185:20 to 192:11; Hair, Rory – Trial Tr. Vol. II, p. 18:24 to 19:10, p. 19:25 to 20:13, p. 22:4 to 22:15, p. 24:24 to 25:14, p. 26:11 to 27:6, p. 28:16 to 29:22; Jones, Gary – Trial Tr. Vol II, p. 81:23 to 88:3; Def. Ex. 7).

Twenty-seven days later, on July 21, 2022, April Josey submitted another ARB Request Form seeking permission to repair a dormer. (Pl. Ex. 11 and 13; Josey, April – Trial Tr. Vol. I, p. 160:4 to 161:21; p. 175:15 to 180:4; p. 238:10 to 239:4; p. 246:22 to 247:2; p. 253:16 to 254:12, p. 282:21 to 284:6)

In contrast to the [homeowners'] actions in Anderson v. Buonforte, 365 S.C. 492, the Joseys' actions, specifically, submission of requests by and with the ARB Request Forms, were consistent with the ARB procedures evidencing their knowledge and recognition of the requirements of the 1988 Covenants.

Yet, contemporaneous with their requests made consistent with the procedures of the ARB, the Joseys ignored the ARB procedures and erected a wooden fence during the months of June through September of 2021 without even seeking approval according to the procedures they knew to follow and had followed only days before. (Pl. Ex. 6A-6F, 10, 11, 12 and 13; Trial Tr. Vol. I., Josey, April, p. 153:11 to 154:4; p. 175:15 to 179:17; p. 180:24 to 181:21; p. 267:19 to 270:3) The Appellants simply connected to the fences around them which were not a part of Lakewood Links Subdivision and are governed by

the Covenants of another POA, Lakewood Estates Subdivision. (Pl. Ex. 3, Trial Tr. Vol. I, Josey, April, p. 151:16 to 160:3)

In contrast, the [homeowners] in the Anderson case submitted plans and design before they began work on the addition. Anderson v. Buonforte, 365 S.C. at 493-494.

The procedures for application and approval of and by the ARB as required by Part Two; Art. 1; Sec. 1 (Pl. Ex.1, p. 11), and these Covenants are to be interpreted as will best tend toward the consummation of the general plan for the development of the Property which is set out below:

The primary purpose of these Covenants and the foremost consideration in the origin of same has been the creation of a residential community which is aesthetically pleasing, which is functionally convenient, which is capable of maintaining itself, which provides areas reserved for recreational amenities, and provides for ultimate ownership, operation and maintenance, through the Association, of those areas. The establishment of objective standards relating to design, size and location of dwellings and other structures makes it impossible to take full advantage of the individual characteristics of each parcel of property and or technological advances and environmental values. For this reason, such standards are not established hereby but may be suggested by the Owner in discussion with and materials submitted to Property Owners. These standards and this Declaration are consistent with and serve to complement the Subdivision, Regulations of Sumter County, South Carolina. To implement these Covenants, the Owner shall, through the Architectural Review Board, establish and amend from time-to-time objective standards and guidelines which shall be in addition to and more restrictive than said governmental standards.

In accordance with its [ARB] own rules of procedure, said rules shall be filed with the Association and maintained in the records of the Association. (Pl. Ex. 1, Part Two; Art. 1; §2(c), Sub§ (2), p. 13) The submission of ARB Request Forms are and have been required as a part of the procedures established by the ARB. (Cockerill, Glenn – Trial Tr. Vol. I, p. 368:10 to 376:24; Pl. Ex. 23 and 24; Hair, Rory - Trial Tr. Vol. II, p. 31:3 to

36:7, p. 49:19 to 50:3, Jones, Gary – Trial Tr. Vol. II, p. 109:7 to 109:15; Carr, Charlie, Trial Tr. Vol. II, p. 67:11 to 68:23)

The Appellant alleges that her letter of June 13, 2022, is a request that, “the association retroactively approve our existing fence in good faith as the fencing is in compliance with the previous conditions & restrictions established in 1988.” (Def. Ex. 4) In addition to this letter, the Joseys submitted two ARB Request Forms they had used in prior requests to the ARB to request construction of a 2-car garage/workshop and a separate ARB Request Form providing, “Reason for Change or Addition: Fence Alteration.” Noticeably, the Joseys did not utilize the ARB Request Form they knew to and did use in prior successful requests, when they sought retroactive approval of the existing fence. Thus, the ARB relied upon the requests the Joseys submitted on the ARB Request Forms and promptly approved the Joseys’ requests. (Def. Ex. 4; Pl. Ex. 14; Hair, Rory - Trial Tr. Vol. II, p. 18:24 to 19:10, p. 19:25 to 20:13, p. 22:4 to 22:15, p. 24:24 to 25:14, p. 26:11 to 27:6, p. 28:16 to 29:22). The wisdom and efficacy of the ARB procedure of the requisite ARB Request Forms is validated when contrasted against an alleged retroactive request buried in a three-page letter. (Pl. Ex. 1, 6 A-F and 3; Josey, April - Trial Tr. Vol. I, p. 244:20 to 287:19; p. 313:9 to 314:25; Hair, Rory – Trial Tr. Vol. II, p. 30:22 to 32:01; Pl. Ex. 14 and 15).

April Josey argues she never received a response to her ARB request Forms included in her letter of June 13, 2022. (Josey, April – Trial Tr. Vol I, p. 274:4 to 272:15; Def. Ex. 4). However, she also testified she was not aware of or never received two other separate communications from the ARB relative to this wooden fence. First, she said while she received the September 6, 2021, e-mail of Rory Hair of the ARB board

demanding that the wooden fence be taken down, she never saw it. Second, Josey denied getting a response to her letter of June 13, 2022. (Pl. Ex. 14, 15 and 16; Court Ex. 1; Josey, April - Trial Tr. Vol. I, p. 179:23;183:24; p. 189:2 to 189:11; p. 191:14 to 193:16; p. 235:22 to 239:11). However, Rory Hair, of the ARB Board presented an e-mail dated September 6, 2022, sent to the same e-mail he had used in prior approvals for April Josey. In addition, Hair's pattern of quick response to all April Josey's requests of the ARB are contrasted against Josey's denial of seeing the September 6, 2021, e-mail, but admission of receipt, and her denial of receipt of the ARB approval of the ARB Request Forms in response to her ARB Forms that accompanied her letter of June 13, 2022. (Pl. Ex. 6A-6F, 11, 12, 14, 15 and 16; Def. Ex. 4; Josey, April – Trial Tr. Vol. I, p. 163:23 to 175:14; p. 180:5 to 185:4, p. 233:3 to 233:13; Josey, April – Trial Tr. Vol. I, p. 293:11 to 295:6; Hair, Rory – Trial Tr. Vol. II, p. 7:16 to 28:7)

Following the procedures set forth in the 1988 Covenants, the Joseys sought permission to install an inground pool on July 2, 2021, (Pl. Ex. 11 and 12; Trial Tr. Vol. I, Josey, April, p. 160:2 to 175:14), and their request was promptly granted.

On July 21, 2022, April Josey sought permission to repair a dormer with submission of the required ARB Request Form, and this request was approved. (Pl. Ex. 13; Trial Tr., Vol I, Josey, April, P. 175:15 to 180:4)

April Josey submitted two more ARB Request Forms on June 13, 2022, and these were also approved (Trial Tr. Vol. I, Josey, April, p. 231:6 to 247:23; Pl. Ex. 14 and 16)

Every request made to the ARB in conformity with the procedures of the ARB was approved – the in-ground pool, the dormer repair, the two-car garage and the fence alteration. Even so, the Joseys have, in all these approved projects, failed to commence

construction well beyond the six months of approval. (Pl. Ex. 1, Part Two, §2(f), p. 14) By contrast, the [homeowners] in Anderson v. Buonforte, 365 S.C. at 493-495, with consent of the opposing party during litigation, completed construction which was the subject of the lawsuit.

Consideration [of credibility] must be left to the trial judge who saw and heard the witnesses testify. Rogers v. Nation, 284 S.C. 330, 326 S.E.2d 182, 184-185 (Ct.App. 1985).

Generally, the balancing of equities in determining whether to issue an injunction favors enforcement of restrictions under which a property owner has freely placed him or herself because the other owners in the restricted area have relied on this restriction in purchasing their property. Midway Properties, Inc; v. Pfister, 292 S.C. 104, 106, 354 S.E.2d 926, 927 (Ct. App. 1987). Even if the Joseys suffer hardship in removal of the fence, the equities do not require that they be allowed to leave the fence in place because this hardship was caused by their own actions in knowingly failing to comply with the restriction or to seek proper means of their amendment. Arnoti v. Lukie, 350 S.C. 177, 564 S.E.2d 691 (Ct. App. 2002); Siau v. Kassel, 369 S.C. 631, 632 S.E.2d 888 (Ct. App. 2006).

In contrast to the facts of Anderson v. Buonforte, 365 S.C. at 493-494, the order to remove a small stretch of a deteriorating fence is much less onerous than requiring the removal of additions to their home.

II. Does the enforcement of the Covenants on aesthetic grounds defeat the plan and obvious purpose of the instrument?

The Covenants provide that these covenants shall be interpreted as will best tend toward consummation of the general plan of development of the property.

“The primary purpose of these covenants and the foremost consideration in the origin of same has been the creation of a residential community which is aesthetically pleasing, which is functionally convenient, which is capable of maintaining itself....” (Pl. Ex. 1, Part Two, Art. 1, Sec. 1, p. 11)

“In all cases, the provisions of this Declaration shall be given that interpretation of construction which will best tend toward the consummation of the general plan of development of the property.” (Pl. Ex. 1, p. 39)

Our courts have said, “The paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document.” Shipyard Prop. Owners' Ass'n v. Mangiaracina, 307 S.C. 299, 308, 414 S.E.2d 795, 801 (Ct. App. 1992).

The intention of the parties expressed in the 1988 Covenants was that there would be no objective standards:

The establishment of objective standards relating to design, size and location of dwellings and other structures makes it impossible to take full advantage of the individual characteristics of each parcel of property and or technological advances and environmental values. For this reason, such standards are not established hereby but may be suggested by the Owner in discussion with and materials submitted to Property Owners. These standards and this Declaration are consistent with and serve to complement the Subdivision, Regulations of Sumter County, South Carolina. To implement these Covenants, the Owner shall, through the Architectural Review Board, establish and amend from time-to-time objective standards and guidelines which shall be in addition to and more restrictive than said governmental standards.” (Pl. Ex. 1, Sec. 1, p. 11)

The Covenants provide that the approval may be based upon any ground including purely aesthetic considerations:

“Refusal of approval of plans, location or specification may be based by the Review Board upon any ground which is consistent with the objectives of these covenants, including purely aesthetic considerations, so long as such ground is not arbitrary and capricious.” (Pl. Ex. 1, Part Two, Art. 1, Sec. 2(f), p. 15)

Restrictive covenants will be enforced if they state their intent and purpose, and the general rule of strict construction will not be used to defeat the clear express language of the covenant. Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891 (S.C. 1987). As voluntary contracts, they are enforced unless they are “indefinite” or contravene public policy. Palmetto Dunes Resort, Div. of Greenwood Dev. Corp. v. Brown, 287 S.C. 1, 336 S.E.2d 15 (Ct. App. 1985) (aesthetic considerations not indefinite); Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891 (S.C. 1987) (covenants enforced on aesthetic grounds against property owner who proceeded with modifications without approval). While covenants may not be indefinite, they are not required to “expressly list every conceivable item which could be placed on a piece of property. Midway Properties, Inc v. Pfister, 292 S.C. 104, 106, 354 S.E.2d 926, 927 (Ct. App 1987). To require restrictions to expressly list every conceivable item that could be placed on a piece of property, according to individual property owner’s taste, would be an impossible burden on drafter. Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 363 S.E.2d 891 (S.C. 1987).

The “general plan of development” established by the Covenants has no objective standards and, “For this reason, such standards are not established hereby but may be suggested by the Owner in discussion with and materials submitted to Property Owners.” (Pl. Ex. 1, Part Two, Art. 1, Sec. 1, p. 11). Therefore, the ARB has considered and continues to consider the requests on a case-by-case basis after deliberation. (Cockerill, Glenn - Trial Tr. Vol .I, p. 375:21 to 376:24; Ducom, Eugene – Trial Tr. Vol. I, p. 449:19 to 451:17; Pl. Ex. 5; Kolb, Mack – Trial Tr. Vol. I, p. 51:8 to 53:2)

April Josey knew that refusal of her requests could be for purely aesthetic reasons.
(Josey, April – Trial Tr. Vol I, p. 257:14 to 258:22)

The court's ruling in the case cited by the Appellant in his brief, Palmetto Dunes Resort, Div. of Greenwood Development Corp. v. Brown, 287 S.C. 7 explains the Respondent's position well:

The covenant, by making no attempt to set forth objective "aesthetic considerations," implicitly recognizes, as do we, that it is impossible to establish absolute standards to guide a judgment of taste. But this does not compel the conclusion that the covenant is ambiguous. We agree with the trial judge that although people may reasonably differ as to whether a house is aesthetically appropriate, the covenant is unambiguous in leaving this solitary judgment to the ARB and thus [Lakewood Links]. The plain and obvious purpose of the covenant is to vest this discretion in the ARB, which is constrained only to exercise its judgment reasonably and in good faith. See Kirkley v. Seipelt, 212 Md. 127, 128 A.2d 430.

Witnesses for the Respondent testified that the typical procedure for a fence request was for the board to meet, cast votes, and approve or not approve. There had never been an automatic turn down for a wooden fence request. Considerations of the ARB typically included aesthetics, open views for an open community, fence maintenance and special circumstances. (Pl. Ex. 24; Cockerill, Glenn - Trial Tr. Vol. I, p. 375:9 to 380:6; Pl. Ex. 28; Ducom, Eugene - Trial Tr. Vol. I, p. 447:3 to 451:17)

The Respondent presented evidence of its review of the wooden fence erected by the Joseys. (Pl. Ex. 6A-6F, 12, 14, 15; Def. Ex. 4; Hair, Rory - Trial Tr. Vol. II, p. 5:19 to 9:12, 18:3 to 18:20; Carr, Charles, p. 67:11 to 69:18)

The Appellants present one photograph of another wooden fence in the Lakewood Links POA. (Def. Ex. 8) April Josey testified that Rory Hair, the current ARB Chairman, has a wooden privacy fence and keeps a camper in the driveway and supported her testimony with a photograph admitted into evidence as well as Mr. Hair's testimony. (Def.

Ex. 8) Mrs. Josey views enforcement of the covenants in the subdivision as unfair and unequal though she has testified she has no objection to Mr. Hair's fence. However, the wooden privacy fence was approved in 2000, 16 years before Mr. Hair moved to Lakewood Links and before he served on the ARB. (Pl. Ex. 5; Hair, Rory - Trial Tr. Vol. II, p. 4:11 to 5:17; Trial Tr. Vol. I, Josey, April, p. 326:21 to 327:17) In addition, Gary Jones, who has been a resident of the Lakewood Links POA since 1993, and has served and is serving in leadership capacities on the ARB and the governing board, has been required to and does adhere to the procedures for ARB requests he has made. (Jones, Gary – Trial Tr. Vol. II, p. 71:24 to 73:25)

The Respondent presented testimony to rebut the Appellant's position that fences that have been "grandfathered" in evidence disparate treatment. Testimony of prior ARB members established that some of the fences installed which were considered "grandfathered" would have to come under review when they were repaired or replaced. (Trial Tr. Vol. I, Cockerill, Glenn, p. 396:5 to 400:13, p. 410:14 to 413:4; Ducom, Eugene, p. 446:4 to 447:2, p. 461:25 to 463:4)

STANDARD OF REVIEW

An action to enforce a restrictive covenant is in equity. Buffington v. T.O.E. Enter., 383 S.C. 388, 391, 680 S.E.2d 289, 290(2009). As such, the appellate court may view the facts in accordance with its preponderance of the evidence. However, the appellate court should not disregard the findings of the special referee, who was in a better position to weigh the credibility of witnesses. Tiger, Inc. V. Fisher Agro, inc., 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989).

CONCLUSION

The entire chain of title to 3020 Tidewater Drive charged the Joseys with both actual and constructive notice of the restrictions imposed by the Covenants. The Appellants executed a sworn statement verifying that the Covenants related to the property purchased and acknowledged receipt of a copy of the Covenants recorded in the Office of the Register of Deeds for the Sumter County in Book 481 at Page 1879. Thereafter, the Appellants adhered to and followed the mandates of the procedures for ARB requests for four requests, but then, contemporaneous with their conformity with the procedures of the ARB, the Joseys ignored the procedures they had followed only days before to construct an 8-foot, wooden fence without first seeking approval. The Appellants then did not respond to the September 6, 2021, request of the ARB that the fence be removed. In response to the renewed May 22, 2022, POA demand to remove the wooden fence, the Joseys, on June 13, 2022, followed the same ARB procedures, using the same ARB Request Forms they had used before. They sent two ARB Request Forms seeking permission to construct a two-car garage / workshop and to make a fence alteration. After due consideration and deliberation, the ARB promptly responded to the two ARB Request Forms attached to their letter of June 13, 2022, with approval consistent with the procedures of the ARB and with the terms, provisions and purposes of the 1988 Covenants. The Joseys made no valid request for retroactive approval of their wooden fence. Ironically, after following the procedures to gain approval of building an in-ground pool, a two-car garage/workshop, and a fence alteration, the Joseys failed to commence construction within six months of approval, thus forfeiting the benefit of their requests.

The 1988 Covenants intentionally excluded the establishment of objective standards. Thus, the 188 Covenants imposed a duty upon the ARB to exercise judgment reasonably and in good faith on a case-by-case basis to each individual request. The Covenants are unambiguous in vesting this judgment solely in the discretion of the duly appointed members of the ARB.

s/ Richard C. Jones

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