IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FOR AIKEN COUNTY
Court of Common Pleas

M. Anderson Griffith, Master-in-equity for Aiken County

Case No. 2011-CP-02-00548

Three Runs Plantation Homeowners Association, Inc.,
Respondent,

v.

Jay J. Jacobs and Judith B. Jacobs,
Appellants.

v.

T.R. Sales Plantation, LLC and J. Wayne Raiford,
Respondents,

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

The Respondent agrees with the statement of the case made by Appellants.

ARGUMENT

I. DID THE TRIAL COURT ERR IN FINDING AS A FACT AND IN CONCLUDING AS A MATTER OF LAW THAT ARTICLE III, PARAGRAPH 12 OF THE PROTECTIVE COVENANTS IS ENFORCABLE AND THE JACOBS VIOLATED THAT PROVISION?

Appellants have argued that the provisions in Article III, Paragraph 12 of the Protective Covenants for the Three Run Plantation real estate development are ambiguous and therefore unenforceable. Appellants contend that the trial court erred in finding as a fact and in concluding as a manner of law the Appellants violated the covenants contained in this section. The specific language that the Appellants complain about is "clean and first class condition." The trial court held Article III Paragraph 12 was not ambiguous and that Mr. Raiford possessed the sole discretion to define "clean and first class condition." The trial court's findings should be upheld.

The appurtenant language is as follows:

> All lots, including vacant lots, must be maintained in a clean and first class condition, including mowing all grass, controlling the weeds and keeping the same free from any trash, debris or accumulation of other items on said lot. In the event an owner does not maintain said owner's lot(s) in such first class condition, the Association shall be entitled to perform the necessary work to said lot to bring it up to an acceptable condition in the Association's sole discretion and any costs so incurred by the Association shall be treated as assessments in accordance with Article VI.

The position of the Appellants was set out in the deposition testimony of Jay Jacobs, which is also found on Record page 049. Mr. Jacobs acknowledges that lots are supposed to be maintained in a first class condition, including mowing all grass, controlling weeds, and keeping the same free from trash and debris. At line 25 he states, "I disagree with the interpretation of first class." Then again on Record page 053 line 4, he says "I disagree with their determination." When questioned about the covenant which provides "The association will be the sole and final decision maker" (R. p. 053 lines 5-7), he makes his position clear in line 22 when Mr. Jacobs states, "I said I bought a piece of property and I should have the right to maintain it as I choose." Question: and you maintain that is still your position? Answer: "It is as long as I stay within the guidelines, which I feel I am doing."

Not only did the Appellants maintain that they had a right to determine the meaning of the restrictive covenants but they also made numerous other arguments, including a counter claim and third party complaint seeking damages against the Home

Owners Association as well as Three Runs Sales Plantation LLC and J. Wayne Raiford as the developer. Among other arguments, the Appellants contended that the restrictive covenants only apply to those lots shown in phase one of the development, contending that since 95% of the lots in phase one have been sold, all homeowners were entitled to the right to vote. In the examination of the many witnesses called by counsel for the Appellants, none contended that homeowners should have a right to vote. He also contended that homeowners had been damaged in that certain amenities which were advertised had not yet been installed. Appellants now have abandoned these other arguments. The purpose of these statements is to explain why Judge Griffith recaps so much of the testimony in his statement of fact beginning on page 1 (R. p. 003) of his order dated July 1, 2013 and concluding on page 14. (R. p. 16) The covenants at Three Run Plantation are similar or typical in that they provided that the developer makes decisions on behalf of the Home Owners Association until such time as substantially all of the property has been conveyed by the developer.

The language employed by Mary Guynn, the drafter of these covenants, provides "In the event an owner does not maintain said owner's lot(s) in such first class condition, the Association shall be entitled to perform the necessary work to said lot to bring it up to an acceptable condition in the association's sole discretion..." which was to give the developer the right to control the subdivision.

Appellants cite the case of Palmetto Dunes Resort v. Brown, 287 SC 1, 336 S.E.2nd 15 (1985) which involved covenants which the property owner also contended were vague and ambiguous and lacked objective standards to guide the board in approval or disapproval of the plans. Other courts confronted with similar arguments have upheld

covenants whose criteria for approval can hardly be said to be more specific than aesthetic considerations (Id. at 18) "of the highest possible quality" to protect it's "value, desirability and attractiveness" as well as conformity and harmony of external design of general quality with the existing standards of the neighborhood have been upheld and "aesthetic considerations" is not indefinite. The court held that the rule of strict construction should not be applied to defeat the plain and obvious purpose. "The covenant, by making no attempt to set forth objective 'aesthetic consideration' implicitly recognizes, as we do, that it is impossible to establish absolute standards to guide a judgment of taste." (Id. at 19) Surely "clean and first class condition" is no more vague than "aesthetic considerations." It is true, as Appellant's counsel points out, that the facts in the Palmetto Dunes v. Brown decision refer to a document titled "Policy, Procedures, and Building Guidelines" to be used by the review board. Nevertheless, the decision points out that courts have upheld covenants that provide no criteria to guide the approving authority in deciding upon the suitably of proposed construction and further provides that other courts have upheld covenants whose criteria for approval can hardly be said to be more specific than "aesthetic considerations." In doing so the courts specifically have rejected the argument that the phrase "aesthetic considerations" is ambiguous.

In a subsequent case, Sea Pines Plantation Company v. Wells, 294 SC 266, 363 SE 2nd 891 (1987), the Supreme Court of South Carolina approved covenants saying that the Sea Pines Plantation Company can refuse approval "upon any ground, including purely aesthetic conditions, which in the sole and uncontrolled discretion of the Company shall seem sufficient." (Id. at 272 footnote 1) There as here the Appellant argued the restrictive covenants were vague, unenforceable and arbitrary. There the homeowners also

argued that Sea Pines was estopped to enforce the restrictive covenants or had waived the restrictions because of existing uses permitted in the subdivision. In the Sea Pines v. Wells decision the Supreme Court affirmed the trial court in issuing a mandatory injunction. That covenant is almost identical to the covenant in this case. There the Appellant voluntarily entered into a contract making him subject to restricted covenants that appeared in his chain of title that alterations to his residence could not be made without the approval of the review board. As the Trial Court has found the covenant in this case employs language that is clear and unequivocal in that the Association has "sole discretion." Whether or not the numerous witnesses called to testify can verbally describe what clean and first class condition means is irrelevant. The Association whose sole voting member is the developer, Wayne Raiford, is authorized to make the determination. The Appellants accepted this condition. As a matter of contract law, it is not necessary to review the evidence as the interpretation of the contract is for the court to determine. Nevertheless, it may be helpful to see how far out of step the Appellants are with their neighbors.

Arthur Stremm testified the Jacob's lot was like a jungle, he called the underbrush "scrap trees" they are not like an oak tree that may grow and develop over time, they are scrap. (R. p. 127, lines 12-22) He describes the growth as "weed trees" nothing you would want, and I couldn't understand why they would want their lot to look like that. (R. p. 132, lines 2-15) Carl Juvrud testified the Jacob's property did not comport with the standard of care maintained by other homeowners in Three Runs. (R. p. 144, lines 19-24) He further stated it looked like a jungle overgrown with brush and "It really sticks out like a sore thumb in comparison to the other lots and homes in Three Runs Plantation." (R. p. 145, lines 1-6) Mrs. Leverghetta testified, the Jacobs' property was not in keeping with the

covenants and that her interpretation is that it should be maintained in the same condition it was when sold to you. (R. p. 169, lines 19-25) She said the Jacobs allowed scrub trees to grow up on the equestrian easement. (R. p. 170, line 25 and R. p. 171, lines 1-7) When questioned as to whether or not the Jacobs maintained their property consistent with their neighbors, Mr. Jacobs responded "I find that a hard question to answer. I don't know who my neighbors are that you are referring to." (R. p. 054, lines 6-9)

Laurie King testified that the Jacobs lot does not look anything like the majority of the horse property lots that are well maintained and that it was the Home Owner's Association's job to enforce these covenants. (R. p. 066, lines 14-25 and R. p. 067 lines 1-13) She testified that she was happy to have Mr. Raiford make all the decisions that controlled the development as he was doing a fabulous job. (R. p. 076, lines 20-22)

Mrs. Schneider testified that she liked having rules and that she wanted a planned equestrian community. (R. p. 083, lines 8-17) Likewise she testified that the Jacobs did not maintain their property to the same standard as the majority of the other homeowners in Three Runs Plantation. Theirs had a look with scrub brush, small trees and grass. (R. p. 084, lines 3-14) She further testified that she did not care about voting rights in the Home Owner's Association at the present time. (R. p. 091, lines 18-22)

Mrs. Viele testified that she was familiar with the Jacobs' property and it was not maintained at the same level as hers. (R. p. 097, lines 22-25) She said the difference was that the Jacobs had a lot of scrub trees, and it was not cleared as well as the others and there were smaller bushes and scrubs that would be mowed by other home owners. (R. p. 098, lines 1-19) She fully believes that the home owners are better off having one person make decisions. (R. p. 103, lines 17-22) George King stated there is a lot of undergrowth

effects the trees on the Jacobs' property and he would like to see their property maintained the same as his. (R. p. 113, lines 18-25 and R. p. 114, lines 1-11) He also testified that The Jacobs did not maintain their property in the clean first class condition. (R. p. 119, lines 8-15)

In addition to the homeowners, John and Laurie Gardner testified that they were the marketing agents for Three Run Plantation. Mr. Gardner said he had been in the business of marketing and advertising real estate developments for forty years and began work at Three Runs Plantation in 2005. As part of his duties he monitors sales of all the equestrian developments in Aiken County and that the sales of Three Run Plantation represent approximately 70% of all sales in the Equestrian Centers in Aiken County. (R. p. 001, line 2-16 of Supplemental) He further stated that the Jacobs have a mowing problem, and they have a bunch of little scrub trees growing in their lot. (R. p. 001, lines 21-25 of Supplemental) Mr. Gardner further testified that it is very common that owners do not acquire voting rights until 95% of the lots have been sold. (R. p. 002, lines 7-15 of Supplemental) His wife Laurie Gardner testified that the Jacob's property became an issue for the association in that it looked like a neglected lot in the middle of cared for lots. (R. p. 003, lines 8-17 of Supplemental) She further said there were maybe a dozen or a dozen and a half emails complaining about the Jacobs maintenance of their lot. (R. p. 004, line 17-25 and R. p. 005, lines 1-13 of Supplemental) When asked about voting rights Mrs. Gardner said if one has a problem with that structure they probably shouldn't buy in Three Runs or any other master planned community because they are all the same way. (R. p. 006, lines 12-21 of Supplemental) She further testified that the restricted covenants was just as clear as any she had ever read. (R. p. 007, lines 12-15 of Supplemental) She stated

that her experience had been that people read through the restricted covenants seeing not what can I do but "what can my neighbors not do." (R. p. 008, lines 7-15 of Supplemental) Purchasers expect the developer to enforce the restricted covenants and they are free to buy at other places if they don't like those restrictions. (R. p. 008, lines 16-25 and R. p. 009, lines 1-7 of Supplemental)

Mary Guynn, a lawyer practicing in Aiken County, was called as a witness and stated that she prepared the restricted covenants and they represent a contract between the seller and its developer and also an agreement between all of those people who buy or are a member of the same Home Owner's Association. (R. p. 010, lines 11-18 of Supplemental) She also testified that in general anyone who is bound by these restricted covenants may enforce them as well as the developer and the Home Owner's Association. (R. p. 010, lines 19-23 of Supplemental) She stated Three Runs Plantation was selling more lots than all the other Equestrian subdivisions combined and had been for a number of years. (R. p. 011, lines 1-5 of Supplemental)

The Appellants in their brief make a suggestion that the suit was filed because Jacobs refused to pay the attorney's fees incurred by the developer. It was clear from the testimony of Freeman Belser that the Appellants had apparently not cut their grass within five weeks of the agreement on page 7 of Judge Griffith's Order dated July 1, 2013. (R. p. 009) Even Judy Jacobs testified that they did not cut the grass for six months because they couldn't identify the trees that were growing from the tall foliage of other types. (R. p. 495, lines 7-14)

II. DID THE COURT ERR BY NOT ENTERING JUDGMENT AGAINST THE HOMEOWNERS ASSOCIATION FOR ITS FAILURE TO ABIDE BY AND EVENLY ENFORCE THE PROTECTIVE COVENANTS?

The only evidence of the developer's failure to enforce covenants, submitted in four days of testimony, was the testimony offered by the Appellant Jay Jacobs, appearing in the transcript of the hearing on October 31st at Record page 420-470. As pointed out earlier in this brief Mr. Jacobs thought that his interpretation of the covenants and the way they applied, was as valid as the developer, Wayne Raiford or the Homeowners Association. He offered evidence to support his claim of breach of contract in that tennis courts and a fitness center had not been added to the amenities at Three Runs Plantation. At Record page 459 he testified he had been a treasurer of a Homeowners Association. At Record page 457 he testified that he had a lot of experience and expertise with non-profit organizations in general and accounting specifically. He wants there to be meetings and to have a right to vote and in general feels disenfranchised without the right to vote. On Record page 460 lines 8-10, he states I want to participate and I think I have a lot to add. On Record page 475 lines 2-12, he responds the he ought to be allowed to do what he wants to with his own property, as long as he follows the guidelines. He is further concerned (R. p. 476, lines 4-9) that his determination doesn't count as much as Mr. Raiford's. Again at - R. p. 491 lines 9-13, he asserts he has expertise and information to contribute to the ongoing management of the property. There were references to the failure to enforce the covenants, but only a few specifics given. Mr. Jacob's complains there is a limitation on the size of signs and the number of signs which he maintains has been disregarded. (R. p. 435, lines 11-19) At one point he maintained that a political sign was put up during an election. (R. p. 436, lines 1-6) He complained that all homes should be completed within one year and that the Crumplers didn't complete their house for almost two years and that

during a portion of this time, Mrs. Crumpler lived on the property in a trailer. (R. p. 437, lines 6-18) He also complained that all fencing was supposed to be painted and that currently there are two sets of fences that have been painted on the outside but not the inside and that it was several months before either of these properties had their fences painted. (R. p. 439, lines 14-24) He complained about an owner placing a radio tower antenna in his yard and that a non-owner was allowed to use the arena and trails having riding students. But Judge Griffith found that the protective covenants allowed the developer to grant a variance and this was done with respect to the radio tower and the covenants also allowed a non-owner to use amenities under the Protective Covenants. (R. p. 23) Judge Griffith went on to find that while manure on the riding easement and trailers visible from the road could be in violation of the covenants there was not sufficient evidence to determine the extent of the violation and there were no damages based upon the evidence presented. (R. p. 23, Judge Griffith's Order dated October 1, 2013) Since damages are an essential element of a breach of contract claim, no judgment should be entered against the Homeowners Association.

III. DID THE TRIAL COURT ERR BY ALTERING ITS ORIGINAL ORDER BY DELETING CERTAIN LANGUAGE FROM ITS ORDER APPEARING AS THE LAST PARAGRAPH ON PAGE 17 (R. p. 019) OF THE ORDER DATED JULY 1, 2013 IN ITS ORDER DATED SEPTEMBER 20, 2013?

The Trial Court deleted the last full paragraph on page 17 (R. p 019) of its order dated July 1, 2013. Trial Court stated that the developer did not offer any testimony about this issue and that the only witness to raise this issue was Rhonda Laverghetta and for this reason that paragraph was deleted. Respondent respectfully points out that Rhonda Laverghetta was not the only witness to offer testimony about this issue. Lori King testified (R. p. 066, lines 14-25) that the Jacobs do not really

maintain the easement portion of their property and their property is a mess and when you "ride down on easement side, the trees—it's overgrown." Additionally Kathryn Viele testified (R. p. 098, lines 2-19) where she stated that goes to the easement. "It's not cleared as well. I often ride a pony and another horse for exercise, so I'm leading one off with another, and you can usually get down easements between properties because they are supposed to be a riding area easement and its harder to do that there because it's not cleared as well because there are small bushes and shrubs that would be mowed by other home owners." Again (R. p. 099, lines 19-25) where she states "the easement isn't as easy to pass down and ride the horses through. And, you know it says very clearly that we're expected to mow our pastures and things are not supposed to get over a certain number of inches tall. And they definitely have things that aren't trees and aren't grass that are in that range."

George King testified that the Jacob's property doesn't fit into the connotation of an equine community and that their property is difficult to get through or around on horseback. (R. p. 116, lines 1-9) Arthur Stremm states there is a trail that runs behind the Jacob's house. It's like a jungle. (R. p. 127, lines 8-11) On Record page 128, lines 18-25 he points out that each house has a ten foot easement so between two homes there is twenty feet, where a person can ride a horse between any two properties and be within the equestrian easement and again at Record page 131, lines 18-23 "scrap trees and weed trees" nothing you would want. (R. p. 132, lines 2-15)

In Judge Griffith's Order, Rhonda Laverghetta testified that the Jacobs did not maintain their equestrian easement the same as everybody else's and that they have allowed scrub trees to grow up on theirs, which makes it difficult for a rider. (R. p. 170,

line 25 and R. p. 171, lines 1-7) Five separate witnesses have made reference to trees growing in the riding easement. Article IV of the protective covenants of Three Runs Plantation provides for the establishment of equestrian/pedestrian easement for the use and enjoyment of all lot owners in the subdivision. Such easement shall be twenty feet in width the front, rear and side lot lands and the owners of lots over which the equestrian/pedestrian easements are located "shall erect no improvements and allow no obstructions within the easement area." Judge Griffith did not have available for review the transcript of proceedings, so when he altered the original July 1, 2013 order to delete the last paragraph on page 17 (Record page 19), he did so thinking only one witness had testified to this fact and that the plaintiff had not alleged a specific violation in the easement area. Subparagraph B of Rule 15 the South Carolina Rules of Civil Procedure provides that "when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in respects as if they had be raised in the pleadings."

The Appellants argue that clean and first class condition are terms that are vague and ambiguous and the Appellants have argued that the provisions of paragraph 12 of Article III controls. However, as to the riding easements the provisions of Article IV control and there can be no ambiguity as to the language which says that the owners of lots over which there are the equestrian/pedestrian easements are located "shall erect no improvements and allow no obstructions within the easement area" and shall be required to keep "all such easements open and accessible for the full width of the easements." This language is not vague or ambiguous in any respect. It is therefore respectfully requested that the Court of Appeals determine that a preponderance of the

evidence in this case clearly demonstrates that Judge Griffith should not have deleted the last paragraph on page 19 and he would not have done so had he had the transcripts of the trial testimony available.

Conclusion

After four days of testimony Judge Griffith found that the association had applied the requirement mowing grass and controlling weeds in "a reasonable and good faith manner." The Trial Court struck down all of the affirmative defenses raised by Appellants and the only reference to other violations of the restrictive covenants was horse manure on the riding easements and photographs showing trailers visible from the road. In neither case could the court determine the extent of these violations or conclude that the Appellants were entitled to any damages based on the evidence presented. The twenty three page Order of the trial judge clearly shows that the overwhelming evidence was that the Defendant Appellants have refused to maintain their property including the equestrian/pedestrian easements as the other owners in Three Runs Planation which is in violation of the provision of Article III paragraph 12 and Article IV of the Protective Covenants of Three Runs Plantation. Furthermore, the last paragraph on Record page 19 should not have been deleted on the Order dated September 20, 2013.

There was no evidence that any of the Protective Covenants had been enforced arbitrarily or discriminatively. Judge Griffith specifically found on page 17 of his order dated July 1, 2013 (R. p. 19) that there was "no evidence that any owner, after being notified or after the biannual cuttings did not comply with the decision of the Association" and based on the evidence submitted the Association had applied the

mowing requirement in a reasonable and good faith manner. In a nut shell the Appellant's position is that "I maintain that I should have a right to make my own decision." (R. p. 476, lines 10-11)

Respectfully Submitted,

July 2, 2014

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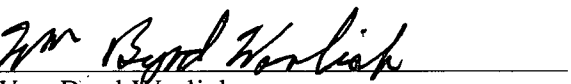
PROOF OF SERVICE

I HEREBY CERTIFY that a true copy of the Respondents' Final Brief was served on all parties by having a copy of same delivered by United States Mail, postage prepaid to: Clarke W. McCants, III, Attorney for Appellants; PO Box 2881, Aiken, South Carolina, 29802.



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