

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Allison R. Lee, Circuit Court Judge

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S.C. Supreme Court

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.

BRIEF OF RESPONDENTS

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QUESTION PRESENTED

Was the Court of Appeals correct in refusing to enforce a building's restrictive covenant when the evidence shows that the building's governing body has a prolonged history of ignoring the covenant and when the current owners purchased their properties after the non-conforming uses began?

COUNTER-STATEMENT OF FACTS

This lawsuit is the story of a building that has never been used how the building's developers originally intended.

The "Place on the Greene" is a condominium building located on Greene Street in Columbia. It is close to the University of South Carolina's main campus, and it is also near the Five Points district.

The building contains eight commercial units and sixty-three residential units. The building's homeowners association is the petitioner. The respondents are two individuals and two corporations. They separately own all but one of the building's commercial spaces.

This building was supposed to be something of a "high end" mixed-use development, but that plan never came to fruition. For example, the developers thought that they would sell the residential units to "professionals" who were living and working downtown, but the units drew immediate interest from college students and the evidence suggests that college students and other rental tenants are the majority of this building's residents today. (R.p.92, lines 17-18; p.98, lines 1-3; p.140, lines 2-15).

The commercial units followed a similar deviation from the initial design. These units were intended to be "general office space," but the trial testimony was that most of the commercial 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 eight 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 other two units sold, but they did not become general office space. Their first use was as a hair salon. See (R.p.142, line 18 - p.143, line 15).

This litigation arises out of the homeowners association's recent effort to enforce a restrictive covenant in the building's master deed.

The master deed prohibits a number of commercial activities including restaurants, bars, and retail shops that draw a volume of walk-in patrons. See (R.p.264, §3). This was yet another part of the building's plan that never found its footing.

There have been walk-in businesses in the building since at least 1988. See (R.p.204, line 5 - p.205, line 7). There has been a restaurant in the building since at least 1993. (R.p.342). The homeowners association even conducted its 1995 meeting inside one of the restaurants. (R.p.344). In short, this covenant was never enforced until this case began.

In June of 2007, the homeowners association sent cease and desist letters to the respondents. (R.pp.328-335). Lawsuits followed roughly six months later. (R.pp.16-35).

The four respondents admitted violating the covenant but alleged that the claims were barred by laches, waiver, and estoppel. (R.pp.36-54) (the answers). The four cases were consolidated. Trial occurred in April of 2009. See (R.pp.55-261) (the trial transcript).

The circuit court did not issue a decision until June of 2011. (R.p.1). This was over two years after the one-day trial.

Although the trial court's decision is relatively lengthy, see (R.pp.1-15), the reasoning that the court employed is not particularly detailed.

The trial court's decision repeatedly observed that the respondents had "constructive notice" of the covenant because the covenant was included in the respondents' deeds. See (R.p.6, ¶5; p.8, ¶11; p.10, ¶17; p.11, ¶22). The court also opined that the respondents' financial harm was not sufficient evidence of prejudice. (R.p.11, ¶22).

The trial court further found that the respondents had not been "lulled into a false sense of security" by the fact that nobody made any previous effort to enforce the deed's restriction. The court continually emphasized that the respondents were on notice of the covenant and that they had chosen to violate it at their peril. See generally (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); also at (App.pp.1-2).

ARGUMENT

In simple terms, this case asks whether equity should allow this homeowners association to change its decades-long course of dealing and start enforcing this building's restrictive covenant when doing so will harm the respondents.

The trial court said that this switch from friend to adversary was permissible, but its reasoning does not withstand scrutiny. The concept of "constructive notice" has nothing to do with whether this covenant is enforceable, and if an owner is going to be financially affected by a covenant's enforcement, it is difficult to imagine a clearer case of harm.

The Court of Appeals correctly reversed and held that the homeowners association could not change course in this way. There are three principal reasons why this Court should enter a disposition affirming that decision.

First, this case *does* involve unreasonable delay. The claim that the homeowners association was “bullied” into inaction cannot be reconciled with the evidence. This covenant was ignored because it proved unworkable from the beginning. The greater weight of the evidence supports this view, and the trial court did not find to the contrary.

Second, the non-waiver provision of the master deed does not apply. It *cannot* apply. The non-waiver provision says that the failure to enforce the building’s covenant will not waive the right to enforce that covenant in the future, but if this language is effective, then it bars *all* defenses, regardless of the circumstances. This cannot be a suit “in equity” if the person who violates the building’s restrictive covenant will always lose. In the end, the petitioner is seeking to override South Carolina’s long-standing rule that restrictive covenants are disfavored and will only be enforced if the equities favor enforcement.

Finally, the hypothetical “innocent purchaser” that the petitioner describes does not exist. Everyone who has bought a residential unit in this building since 1993 has known that they would be living over restaurants and retail stores. For some people, this may have been the very thing that made this building attractive as a residence. The openness of these non-conforming uses is significant because the person who knowingly buys a condo above a restaurant and then tries to close the restaurant down is not seeking equity. He is seeking a windfall. This Court should affirm the Court of Appeals.

- A. This case *does* involve unreasonable delay, the respondents *will* be prejudiced by the covenant’s enforcement, and the claim that the homeowners association was “bullied” is incredulous.**

This Court has defined “laches” as “neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law

should have been done.” *Strickland v. Strickland*, 375 S.C. 76, 83, 650 S.E.2d 465, 469 (2007). To establish laches, the defendant must show that the plaintiff delayed in asserting his or her rights, that this delay occurred over an unreasonable amount of time, and that this delay resulted in prejudice. *Id.* at 83, 650 S.E.2d at 469.

- i. This building’s history of non-conforming uses began under previous owners.

A map of this building’s first floor appears on page 266 of the record. The commercial units are on the far left of the page and are labeled alphabetically. These are ground-level units that abut Greene Street. They open onto the sidewalk next to the road.

The current owner of unit A purchased this unit in 1990. See (R.p.268-69). From 1988 to 1999, this unit housed a laundromat. (R.p.203, line 21 - p.204, line 7). This unit is currently leased to a restaurant named the “Pita Pit.” The Pita Pit has operated in this location since the year 2000. (R.p.206, lines 6-7).

The current owner bought unit B in 2005. See (R.p.275-77). Unit B is part of the “Tavern on the Greene” restaurant and bar, which opened in 1999. (R.p.214, lines 15-18).

The petitioner says that this business has recently closed, but that fact does not appear in the record or the appendix. See Rule 210(h), SCACR (review is limited to the record).

The current owner bought units C and D in 2006. (R.p.286-87). These units house other parts of the Tavern on the Greene and have done so since 1999. (R.p.230, lines 6-8).

The current owner of units F, G, and H bought these units in 2002. (R.p.308-312). A tobacco shop currently operates in unit F, (R.p.246, lines 10-13), but when the current owner bought unit F, it contained the “Sub Pub” restaurant. (R.p.247, lines 15-18).

Units G and H are leased to a restaurant named “The Blue Cactus.” As the previous paragraph described, the current owner of these units purchased them in 2002. The Blue Cactus has been open since May of 1994. (R.p.193, lines 16-17; p.246, lines 8-9).

The reason this history is relevant is that all of these owners — every one of them — bought their respective units after non-conforming businesses were already operating there. Indeed, with the exception of units A and F, these units still house the exact same businesses that operated under each unit’s previous owner, for multiple years.

- ii. People presume that existing activities which are generally lawful will be allowed to continue.

The respondents could not help but presume that the activities which had previously been allowed would be permitted to continue. Nobody thinks that they will have to change the way a piece of property is already being used as long as the activity is normally lawful.

This principle was at work in this Court’s decision in *Rabon v. Mali*. The property in *Rabon* consisted of several lots with a covenant that restricted the lots to “residential purposes.” The owner ignored this restriction and used the property for various businesses, as well as for his residence, for a prolonged period of time. His neighbors never objected. See 289 S.C. 37, 38-40, 344 S.E.2d 608, 609-610 (1986).

This owner eventually sold the property, but after the new owners began to operate a daycare, some of the neighbors filed suit. This Court found that the covenant could not be enforced against the daycare. The reasoning applies to the present case with equal force.

Rabon observes that the plaintiffs knew the property had been used for commercial purposes and had never objected. *Id.* at 40, 344 S.E.2d at 610. The same is true here. These

units have a long history of unrestricted commercial activity, and these activities were not secret. Everyone who has passed by the building has seen that these businesses are there.

Rabon also observes that the purchasers had relied on the idea that commercial uses would be allowed. Again, the same is true here. One of the individual respondents testified at trial, and the other respondents sent representatives to testify. Some bought these units in order to continue (or allow) existing uses that were already in place, and others relied on the fact that the units could be put to general commercial use. See (R.p.212, line 23 - p.213, line 13) (unit A); (R.p.229, lines 3-5) (unit B); (R.p.235, lines 16-24) (units C and D); (R.p.247, line 15 - p.248, line 17) (units F, G, and H). The point is that the respondents' decisions to buy these properties were affected by the building's history.

This fact should not be remarkable. Nobody thinks that they will have to change the way a piece of property is already being used when the current activity is generally lawful.

- iii. The delay *was* unreasonable, and the claim that the homeowners board was "bullied" is incredulous.

Waiver, estoppel, and laches are different defenses, and this Court has described that in restrictive covenant cases, "[t]he essential difference" in these defenses is found in analyzing "whether the affirmative defense is based on passivity (laches) or an affirmative act (waiver or estoppel)." *Circle Square Co. v. Atlantis Dev. Co.*, 267 S.C. 618, 628, 230 S.E.2d 704, 708 (1976).

One of the things that makes *this* delay *unreasonable* is that there was more than just a history of inaction. This building's homeowners association actively accommodated some of these commercial activities and helped the non-conforming uses continue.

For example, in 1993, the building's governing board acceded to the "Duck-In" restaurant's request to build a deck in front of two units that were occupied by retail businesses. (R.p.342). On another occasion, the board affirmatively 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 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.*

Affirmative conduct is generally the subject of estoppel, not laches. But laches requires unreasonable delay, and the respondents submit that these acts of acquiescence should say *something* on the point of reasonableness. This building's board knew the way that these units were being used and it established a practice of obliging requests that helped those uses continue. If the homeowners association wanted to enforce the covenant, the reasonable thing to do would have been to deny those requests, not grant them.

The trial court did not find to the contrary. The homeowners association claimed that its delay should be forgiven because of several factors including budget restraints, other litigation, and confusion as to its rights. (R.p.9, ¶16 and p.11, ¶21). The trial court's analysis on unreasonable delay does not mention any of these things. Instead, the court repeated its consistent mantra that the respondents had constructive notice of the covenant. It also observed that the respondents had not "improved" their property. (R.p.11, ¶22).

Respectfully, this analysis was misguided. Everyone agrees that the covenant exists, and the respondents never said that they had improved their units. The respondents said they bought their units after these activities had already been allowed. Renovations or enhancements were not the issue. The question was detrimental reliance on history.

The principal thrust of the petitioner's brief is to hang the homeowners association's conduct around the necks of Beau Powell and Craig Stoneburner, who were two of this building's developers. The petitioner claims that these individuals ignored the covenant, "dominated" the building's board, and were able to intimidate the board into inactivity.

That argument does not withstand legitimate scrutiny. Consider the record of the 1993 discussion regarding the Duck-In's request 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 Beau Powell nor Craig Stoneburner was present. (R.p.342).

Consider also the minutes of the board's 1995 annual meeting. 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 Beau Powell nor Craig Stoneburner are listed as being present or as being members of the building's board. *Id.* It is hard to see how these individuals were dominating the board and bending its will to theirs when they were not even at the meeting.

This narrative about "bullying" derives from the testimony of a single witness, Laura Nichols. Ms. Nichols is a past president of the board, her husband was the building's architect, and she currently works for the building's property management company.

With the utmost respect for Ms. Nichols, her story was not a consistent story. Parts of her own testimony undercut the very same narrative that the petitioner is advancing.

For example, Ms. Nichols said that she believed the building's board was ignorant of the covenant, see (R.p.177, lines 13-16), but Ms. Nichols was present at a 1991 board meeting when Beau Powell addressed the fact that many of the commercial units were vacant

and that restaurants were prohibited. (R.p.340). The petitioner seeks to characterize Ms. Nichols as the “voice in the wilderness” who opposed violating the covenant, but there is no record of her advocating that the covenant should be enforced and there is no record of her ever voting against the board’s decisions to accommodate any of the non-conforming uses.

Consider the “new rules and regulations” that the homeowners association board passed in 2004. See (R.p.99, lines 18-22) (describing the rules); (R.p.347-350) (the rules themselves). These rules regulate how the businesses in the commercial units can advertise, they control how the businesses can serve patrons after certain hours, and they provide directions for the commercial units to dispose of their trash. (R.pp.347-48).

Nothing suggests that Beau Powell or Craig Stoneburner had anything to do with these rules. Indeed, it does not appear that either of these men owned any part of this building after Craig Stoneburner sold unit B in February of 2004. See (R.pp.278-281).

The truth is that the story of this covenant is the story of a rule that was unworkable from the beginning. Everyone knew this rule existed. The interested parties acknowledged it, and there were several requests to change it. The record suggests that those changes failed not because they lost an up-or-down vote or because they were opposed. Instead, they failed because only a few people in the building cared enough to attend meetings. See (Brief of Appellant, p.14) (recounting these attempts and citing to the record).

This is not a story of bullying. The more plausible explanation, as Ms. Nichols explained elsewhere in her testimony, is that the homeowners association board “tried to make it work” until a new board decided to be hostile. (R.p.190, line 18 - p.191, line 8). The Court of Appeals was right to reverse. Equity should not permit a bait-and-switch.

B. The non-waiver provision in the building's master deed does not apply. This case sounds in equity, and applying this clause would violate the rules that restrictive covenants are read strictly and will only be enforced if the equities favor enforcement.

The building's master deed contains a clause that says failing to enforce the building's restrictive covenant will not count as a waiver of the right to enforce the covenant in the future. (R.p.265, §4). There is no South Carolina case examining this sort of clause. This appears to be a novel issue.

The petitioner's argument is rooted in case law from the State of Arizona. When the parties argued this case to the Court of Appeals, the petitioner contended that these clauses were "uniformly" applied, but the authorities it cited were cases from Arizona and Illinois, see (Brief of Respondents, pp.12-14), and the lead Indiana case, *Johnson v. Dawson*, expressly relies on Arizona authority. See 856 N.E.2d 769, 775 (Ind. Ct. App. 2006) (relying on *Burke v. Voicestream Wireless Corp. II*, 87 P.3d 81 (Ariz. Ct. App. 2004)).

Arizona law is different from South Carolina law. This Court has instructed that restrictive covenants will be strictly construed and that all doubts will be resolved in favor of the free use of property. *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 864 (1998). Arizona does not construe restrictive covenants in favor of the free use of property. Arizona focuses on the intent of the parties. *College Book Centers, Inc. v. Carefree Foothills Homeowners' Ass'n*, 241 P.3d 897, 904 (Ariz. Ct. App. 2010).

South Carolina law provides that although a court *will* enforce a restrictive covenant when the covenant's language is plain, restrictive covenants have always been subject to equitable defenses or offensive attack. See *Buffington v. T.O.E. Enterprises*, 383 S.C. 388,

393, 680 S.E.2d 289, 291 (2009). Under the petitioner's view, this approach is no longer valid. If there is a non-waiver clause, the non-conforming user will always lose.

This would be a sea change in South Carolina law. South Carolina follows "the widely held view that society's best interests are advanced by encouraging the free and unrestricted use of land." *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 270, 363 S.E.2d 891, 893 (1987). Under the petitioner's view, this does not matter. History does not matter, prejudice does not matter, and whether the plaintiff has unclean hands does not matter. The only thing that matters is the non-waiver provision in the deed.

South Carolina's jurisprudence has a rich history of the court examining a covenant's purpose and of the court basing its decision to enforce the covenant on whether the purpose of the covenant can be realized. See, e.g., *Circle Square Co.*, 267 S.C. at 628-631, 230 S.E.2d at 708-09; *Flinkingshelt v. Johnson*, 258 S.C. 77, 187 S.E.2d 233 (1972); *Dunlap v. Beaty*, 239 S.C. 196, 122 S.E.2d 9 (1961). Apparently this goes out the window as well because the petitioner says that all violations require an injunction.

The proper way to treat the clause is to read it narrowly. Waiver is a legal defense, not an equitable defense. The defendant should not lose if the case sounds in equity and if the defendant shows prejudice. The petitioner is reading "waiver" broadly, not strictly.

C. The hypothetical "innocent purchaser" does not exist. The person who knowingly buys a condo above a restaurant and then tries to shut the restaurant down is not seeking to do equity. He is seeking a windfall.

The petitioner claims that laches cannot apply to this lawsuit because laches would not bar a *different* lawsuit brought by a new owner who has not been around for very long.

The argument goes that if this new owner promptly files a lawsuit to enforce the covenant, there is no tenable contention that there has been unreasonable delay.

Laches might not apply, but an action to enforce a restrictive covenant will still be an action in equity. *Buffington*, 383 S.C. at 391, 680 S.E.2d at 290. The truth of the matter is that this “innocent purchaser” does not exist because no one can look at this building without seeing the businesses that are on the first floor. There is an equitable maxim that “He who seeks equity must do equity.” *Ingram v. Kasey’s Assocs.*, 340 S.C. 98, 107, 531 S.E.2d 287, 291 (2000). This has been the law of this state for a very long time. See *State v. Penman*, 2 S.C. Equ. (2 Des.) 1 (1800) (“It is a maxim in this Court, that he who would have equity must do equity.”). The fair-minded plaintiff who does not want to live near these businesses would not buy a condo in this building. He would buy a condo somewhere else; probably not in the Five Points neighborhood.

This refusal to acknowledge reality is typical of the approach the petitioner has taken throughout this litigation. For example, the petitioner attempts to use this argument as a vehicle to assume the mantle of an innocent purchaser, but the president of the homeowners association, who explained during trial that she was the person who brought this issue to the board’s attention, is anything but that. She does not live in this building. She bought her unit in 2002 because she had college-age children, she heard that then-Senator Fritz Hollings was going to “get a big old chunk of money to redo Five Points,” and the price of the unit she bought seemed “awesome.” (R.p.67, lines 3-21). She testified that “nobody in their right mind” would live above or behind these commercial activities, see (R.p.72, lines 9-12), but if she truly felt that way, she would have bought a condo somewhere else.

The petitioner's arguments focus on the non-waiver provision and the question whether the record contains evidence of laches, but this was not the theory of the case that the petitioner offered at trial. 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, those past allowances do not affect the officer's ability to issue a speeding ticket in the future. See (R.p.62, line 23 - p.63, line 7).

Traffic court is not a court of equity, and the bulk of the petitioner's argument, whether it falls under the "non-waiver" label or is based on section 27-31-170 of the Horizontal Property Act, is really just an argument that equitable principles should not apply and that the defendant in a restrictive covenant case should never win.

The petitioner cites this Court's decision in *Buffington* as standing for the proposition that the respondents' purchase price is not evidence of prejudice, but the reason this was true in *Buffington* is because the property in *Buffington* had never been used as commercial property until the after the violating parties purchased it. 383 S.C. at 393, 680 S.E.2d at 291. The scenario in the present case is precisely the opposite.

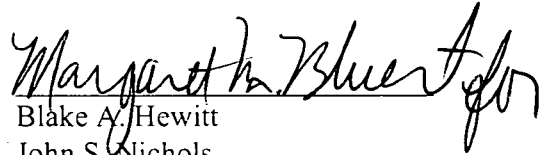
This case is much more like *Rabon v. Mali*, where the non-conforming uses began before the current owner bought the servient property. That fact is significant. When there is a history of non-conforming uses, a critical element in the analysis of that history is whether the use began before the present owner's purchase or whether it began later. *Buffington* suggests this, *Rabon* suggests this, and these cases are not outliers. See, e.g., *Circle Square Co.*, 267 S.C. at 628, 230 S.E.2d at 708 (noting the absence of proof that non-conforming uses began under previous ownership).

The correct view is the view that the Court of Appeals adopted. Nobody thinks that they will have to change the way a piece of property is already being used as long as the activity is generally lawful. This Court should affirm the Court of Appeals.

CONCLUSION

The Court of Appeals correctly reversed and held that the homeowners association could not change course and prohibit activities which it has allowed for many years without any restrictions. This Court should enter a disposition affirming that decision.

Respectfully submitted,



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Allison R. Lee, Circuit Court Judge

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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 *Brief of Respondents* by mailing copies of the
same by United States Mail with first class postage prepaid to the following addresses:

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March 6, 2015
Columbia, South Carolina



BLUESTEIN · NICHOLS · THOMPSON · DELGADO LLC
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March 6, 2015

VIA HAND DELIVERY

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MAR - 6 2015

S.C. Supreme Court

RE: Place on the Greene v. Eva Berry
Case Tracking No. 2013-001980

Dear Mr. Shearouse:

Please find enclosed for filing the original and fifteen (15) copies of the Brief of Respondents in reference to the above case. I have also enclosed a Proof of Service of this document on counsel for the petitioner. Please return the additional filed copy to me via our courier.

Thank you for your attention to this matter. If you have any questions or need any additional information, please do not hesitate to contact me.

Sincerely,

Erin Bridges

Paralegal to Blake A. Hewitt
BLUESTEIN, NICHOLS, THOMPSON &
DELGADO, LLC

/emb

Enclosures

cc: Brian Boger, Esquire
Jamie M. Best, III, Esquire
William M. Spillane, Esquire
James B. Richardson, Jr., Esquire