

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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SC SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Appellate Case No. 2015-001555
Trial Court Case No. 2009-CP-23-07707

R.C. Frederick Hanold, III and Rose F. Hanold, and Carol R. Mitchell and George P. Mitchell, Jr., Respondents,

v.

Watson's Orchard Property Owners Association, Inc., a South Carolina Corporation, and Pelham Farm, LLC, a South Carolina Corporation, Legacy One, LLC, a South Carolina Corporation, SESP LLC, a South Carolina Corporation, an unknown Trustee of the Revocable Trust Agreement Dated March 19, 1996 established by James B. Stephens as amended, and unknown Jay Stephens and Mike Stephens as Co-Personal Representative of the Estate of James B. Stephens, Defendants,

Of whom Pelham Farm, LLC, a South Carolina Corporation, Legacy One, LLC, a South Carolina Corporation, an unknown Trustee of the Revocable Trust Agreement Dated March 19, 1996 established by James B. Stephens as amended, and unknown Jay Stephens and Mike Stephens as co-Personal Representative of the Estate of James B. Stephens, are the Petitioners,

v.

Property Owners in Watson's Orchard Subdivision: N. Carter Poe, III; McNally Reeves, as Trustee of the Residual Trust under item Five of the Last Will and Testament of Hattie L. Reeves dated February 9, 1998; Janet B. Yusi; Lucy S. Tiller; James G. Stephens; Rachel P. McKaughan; Ramon J. Ashy and Jana Ashy; Christopher D. Scalzo and Heather V. Scalzo; Erma R. Rash, as Trustee of the Erma R. Rash Revocable Trust dated February 12, 2010; James Edwin Conrad, as Trustee of the James Edwin Conrad Living Trust dated September 7, 2010; Sue Lane Conrad; Horst H. H. Eschenberg and Floride C. Eschenberg; Caryl L. Clover, as Trustee of the Caryl L. Clover Revocable Living Trust Agreement dated May 12, 1999; Mary F. Newell; Timothy M. Conroy and Elizabeth W. Conroy; Nathan Scolari; Joel Wells Norwood and Lynn Norwood; J. Lynn Shook; Juan Hernandez and Janice M. Pelletier; Scott P. Payne and Kathleen H. Payne;

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ARGUMENTS

I. This Action is in Equity

Respondents assert this is an action to “construe a contract” and is therefore an action at law subject to an “any evidence” standard of review. (Resp. Br. p. 8). The Court should reject this contention.

The Court of Appeals found the action was in equity. The court stated, “An action to enforce restrictive covenants by means of injunctive relief, however, is an action in equity. *Cedar Cove Homeowners Ass’n v. DiPietro*, 368 S.C. 254, 258, 628 S.E.2d 284, 286 (Ct. App. 2006).” *Hanold v. Watson’s Orchard Prop. Own. Assoc.*, 412 S.C. 387, 395, 772 S.E.2d 528, 533 (Ct. App. 2015). In both their initial complaint (R. p. 25) and the amended complaint (R. p. 31), Respondents requested that the circuit court “enjoin and restrain” Petitioners “from using the property for any uses which are more intensive than the current uses with the Watson’s Orchard Subdivision....” *See, e.g., Verenes v. Alvanos*, 387 S.C. 11, 690 S.E.2d 771 (2010) (“The nature of the issues raised by the pleadings and character of relief sought under them determines the character of an action as legal or equitable.”, citing *Bell v. Mackey*, 191 S.C. 105, 119-20, 3 S.E.2d 816, 822 (1939)).

Even though the circuit court did not expressly grant the injunctive relief the Respondents sought in their complaint, the court effectively enjoined Petitioners from proceeding under the 1981 R&Cs by declaring them void and of no effect. While Respondents did seek a declaration of rights, their pleadings and the character of the relief they sought (injunction and restraining order) were in equity. The Court of Appeals applied the correct scope of appellate review.

II. Petitioners Did Not Misrepresent the Court of Appeals' Opinion

Respondents accuse Petitioners of “misrepresent[ing] the opinion of the Court of Appeals” in arguing the Court required the lots to be “developed lots.” (Resp. Br. p. 8). Petitioners have not “misrepresented” anything, as this Court may readily determine by reading the Court of Appeals’ decision and Petitioners’ discussion of that decision in their brief. (Pet. Br. p. 1).

The upshot of the Court of Appeals’ decision is that the language of the 1981 R&Cs requires development of the property beyond discrete lots. The Court looked for more than what the express language of the covenants required which is not what the law permits.

Respondents assert in conclusory fashion that Petitioners had to develop the property beyond just the subdivision reflected in the plat and the tax map. (Resp. Br. p. 10). Nothing in the covenant requires such. The 1981 document provides expressly for amendment “by vote of a majority *of the then owners of the lots into which the property described above shall have been developed* and in Watson’s Orchard Subdivision.” (R. p. 322)(emphasis added). So to have a vote, there must be (1) an owner (2) of a lot (3) into which the property shall have been developed. Petitioners are owners, they own property, and that property has been developed into lots. There is nothing that requires the lots to be developed into residential lots, as Respondents argue (Resp. Br. p. 10), or into “an area suitable for residential or business uses” as Respondents contend. (Resp. Br. p. 8). Had the property owners wished for the covenants to require these additional steps, they could have easily said so – they did not.

What the Respondents advocate, and what the Court of Appeals did, was read these covenants expansively rather than narrowly and in a manner that favors the free use of property. *Buffington v. T.O.E. Enterprises*, 383 S.C. 388, 392, 680 S.E.2d 289, 291 (2009), citing *Hardy v. Aiken*, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006). Such a construction is contrary to this Court's precedent.

This Court should reject Respondents' arguments and should reverse the courts below.

III. Petitioners Explained How Their Construction was "Equally Logical"

Respondents contend that Petitioners "fail[] to set forth what [their] interpretation is or that it is less restrictive." (Resp. Br. p. 10). Petitioners did, however, set forth their interpretation in Part I of the Brief (p. 7), Part III of the brief (pp. 9-12), Part V of the brief (pp. 13-15), and Part VI of the brief (pp. 15-23). The upshot of those arguments is that Petitioners had developed the property into lots sufficient to vote separately on amending the R&Cs.

Respondents then move forward to contend that the only logical interpretation of the covenants is that the owners must "subdivide the property into individual residential lots, sell them, and distribute the money between its shareholders." (Resp. Br. p. 11). Again, none of this language appears in the express language of the covenants. There is also nothing in the covenants requiring the property to remain a "residential buffer between the existing owners and the commercial development while also providing a wind fall to those owners upon the sale of those residential lots." (Resp. Br. pp. 10-11).

Like the Court of Appeals and the circuit court, Respondents are reading language into the covenants so as to expand what is required to vote on amendments to the restrictions and to further restrict Petitioners' use.

This Court should not be persuaded by Respondents arguments but should instead address this argument and hold that this rule of construction requires reversal of the courts below.

IV. The Court of Appeals Should Not Have Disregarded the Evidence

Respondents assert that Petitioners' contention that "[t]he only evidence at trial was that the Property had, in fact, been 'developed' into 'lots'" is "patently false." (Resp. Br. p. 11). Petitioners deny this characterization, and this Court should reject it.

Respondents assert contrary evidence was submitted (Resp. Br. p. 11), but they fail to cite to a single page of testimony in support of that purported evidence.

Respondents do cite to an excerpt from the testimony of John Owings, a Greenville County Planning Department employee, earlier in their brief for the proposition that a local ordinance required an application to subdivide property and no such application had been filed. (Resp. Br. pp. 9-10). But Mr. Owings also testified that even today if a transfer came in that did not comply with Section 1.4 he would simply call the person and tell them to correct it. (R. p. 222, ll. 20-26). The recording requirement, Mr. Owings testified, was simply "an administrative act," and the whole process "an administrative process." (R. p. 223, l. 11; p. 224, l. 20 - p. 225, l. 3).

Respondents also contend that both the circuit court and the Court of Appeals

declined to consider the testimony under *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003) (expert testimony on issues of law is inadmissible). (Resp. Br. p. 12). Neither court referenced *Dawkins* or excluded the evidence under the rule of that case. Instead, both courts found the language of the covenant to be unambiguous so that extrinsic evidence was inadmissible. In fact, the Court of Appeals stated, “[b]ecause we hold the Property does not satisfy the plain and ordinary meaning of ‘lots which shall have been developed,’ we affirm the circuit court and find it properly declined to consider this evidence.” *Hanold v. Watson’s Orchard Prop. Own. Assoc.*, 412 S.C. 387, 396, 772 S.E.2d 528, 533 (Ct. App. 2015). There was no ruling that the testimony would violate *Dawkins*. And the testimony, going to the intent of the document, was not about an “issue of law” but an issue of fact, so *Dawkins* would not have required its exclusion.

Respondents also contend the courts below “rightfully refused to consider the testimony of Patrick Grayson” for the same reasons Respondents argued the other evidence was property excluded. (Resp. Br. pp. 12-13). The crux of Respondents’ argument here is that because Mr. Grayson was not a party to the R&Cs, he could not opine as to its meaning. (See also Resp. Br. pp. 13-14). Respondents cite no case or rule in support of Respondents’ contention that the only evidence of intent can come from the parties themselves, nor could they because that is not the law. *E.g., Harris v. Ideal Solutions, Inc.*, 385 S.C. 74, 682 S.E.2d 523 (Ct. App. 2009) (finding master properly admitted testimony of defendant’s accountant as extrinsic evidence where agreement ambiguous; accountant was not a party to the agreement); *Perry v. Morgan*, 32 S.C.L. (81 Strob.) 8 (Ct. App. 1846) (O’Neill, J) (noting extrinsic evidence to explain ambiguous

term in will “is not confined to the grant or deed, but necessarily embraces every thing, which may inform the Court and jury”).

The evidence below establishes that Petitioners developed the property into five discrete lots, and in doing so each lot was eligible to vote on the amendments to the R&Cs. Even Mr. Owings’ testimony does not contradict that fact. This Court should reject Respondents’ characterization of the record and should reverse the failure of both courts below to consider Petitioners’ evidence.

V. The Case Does Not Involve an “Illegal Contract”

Respondents cite to case law holding the courts will not lend assistance towards carrying out an illegal contract. (Resp. Br. pp. 15-16). The Court should not be persuaded by this argument.

There is nothing about what the Petitioners did in this case that would give rise to this principle. The only evidence Respondents presented was the testimony of Mr. Owings, but his testimony does not support a finding that the Petitioners’ subdivision of their property was illegal and unenforceable.

The Court should reject Respondents’ contention that this case involves an “illegal contract” that the law will not assist. Instead, the Court should find that the Petitioners sufficiently developed their property into lots and those lots were eligible to vote on the amendments to the R&Cs.

CONCLUSION

For the reasons stated in Petitioners' principal brief and this brief in reply, this Court should reverse the Court of Appeals and the circuit court. The Court should hold that the Petitioners sufficiently developed their property into lots such that those lots were entitled to vote to amend the covenants and restrictions in this case.

Respectfully submitted,



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PROOF OF SERVICE

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

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