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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM PICKENS COUNTY  
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Case No. 2013-CP-39-1414

Carol P. Marsh, Harold S. Buie  
and Agnes K. Buie.

Respondents,

v.

Robert Pierson, ABC Care, Inc., and  
Lake Wood Lane Properties, Inc.,

Appellants.

INITIAL BRIEF OF RESPONDENTS

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## STATEMENT OF ISSUES ON APPEAL

- I. The trial court did not err in determining that Plaintiffs did not have unclean hands with regard to their enforcement of the deed restrictions
- II. The trial court applied the proper standard in finding that a grant of permanent injunction was appropriate in this case
- III. The trial court applied properly balanced the equities in finding that a grant of permanent injunction was appropriate in this case
- IV. The trial judge did not abuse his discretion in granting a permanent injunction in this case

## ARGUMENT

### I. **The trial court did not err in determining that Plaintiffs did not have unclean hands with regard to their enforcement of the deed restrictions**

In equity actions an appellate court can “review the record and make findings based on its review of the preponderance of the evidence.” Townes Assoc. v. City of Greenville, 266 S.C. 81, 87, 221 S.E.2d 773, 776 (1976). However, in doing so, this Court “is not required to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility.” Tiger, Inc. v. Fisher Agro., Inc., 301 S.C. 229, 238, 391 S.E.2d 538, 544 (1989). Here, the record of the matter below and the findings made by the trial judge demonstrate that the preponderance of the evidence supported trial judge's decision to grant a permanent injunction enforcing the restrictive covenant against Defendants-Appellants from constructing more than one residence on the property originally designated as Lot 3 on the Meehan Plat and which includes the Lots 3A, 3B, and 3C on the Pierson Plat.

The substance of Defendants-Appellants’ argument appears to be that the trial judge erred in finding that the doctrine of unclean hands will not prevent Plaintiffs-Respondents from obtaining a permanent injunction to enforce the restrictive covenant preventing more than one residence from being constructed on a single lot in the original plat. This issue was evaluated in detail below. Where applicable, the doctrine of unclean hands prevents a party seeking relief in equity from obtaining said relief where “he acted unfairly in a matter that is the subject of the litigation *to the prejudice of the defendant.*” First Union Nat’l. Bank of South Carolina v. Soden, 333 S.C. 554, 567, 511 S.E.2d 372, 379 (1998) (citations omitted) (emphasis added). As noted above, the “subject of this

litigation” is the applicability of a restrictive covenant located in the deed of conveyance. Ord. p. 4, ¶ 7. By the litigation below, Plaintiffs-Respondents sought to obtain a permanent injunction enforcing one of several restrictions contained in the deeds of conveyance for the subject properties. *Id.* Specifically, Plaintiffs-Respondents sought to enforce the second deed restriction - "There shall not exist on said lot at any time more than on residence." *Id.* In response, Defendants-Appellants claimed that Plaintiffs-Respondents could not obtain a permanent injunction enforcing this restriction because they had violated another deed restriction – No. 5, which states that "No trailer, tent, shack, barn, temporary building, outbuilding, shanty, or mobile home of any description shall be placed or erected on said lot of land." Ord. p. 5, ¶ 11.

The “unclean hands” argument advanced by Appellants-Defendants in support of this appeal rests on a false equivalence between the detrimental effect of the violation of the restrictive covenant limiting the number of residences permitted on each parcel of property and the restrictive covenant limiting outbuildings. App. Brief pp. 4-5. The trial court, in reaching its decision, weighed the relative equities of Plaintiffs’ claims and Defendants’ estoppel defense. Ord. p. 5, ¶11. In doing so, the Court evaluated "the general plan of the original developer as evidenced by the restrictions and plats" to determine whether, after balancing the equities, the violations of the deed restrictions with regard to outbuildings were "major or minor" compared to the Defendants' proposed violation of the restrictive covenant barring placing more than one residence on the same lot. Ord. p.5, ¶11-12.

The trial judge determined, upon weighing of the evidence presented, that "[t]he original developer's plan was to create a small residential community on the lake

comprised of four residences." *Id.* pp. 5-6, ¶11. While the Court acknowledged that construction of "sheds, garages, boathouses, and other minor structures" would violate the deed restriction prohibiting these types of buildings, the court, after weighing the relative equities found that this violation did not rise to the level of the proposed violation of the deed restrictions preventing more than one residence on the same parcel of land. The Court found that the nature of the restrictions against outbuildings different significantly from the restrictions against permanent residences in that "[t]he nature of the restriction against outbuildings is contained in a list that covers more temporary structures which could be used as temporary living quarters or unsightly structures which would take away from the general appearance and nature of the neighborhood." Ord. p. 6. The Court held that, even "[i]f these structures fall within the deed restrictions against 'outbuilding'...these violations are minor compared with the major violation of Defendants-Appellants' proposed construction" and that "these outbuildings do not contravene the nature of the character of the development nor the plan of the original developer." *Id.* With regard to weighing of the respective equities, specifically, the Court found that:

Defendant did not provide any evidence that the removal of these structures on the property owned by the Plaintiffs and Third-Party Defendants would confer any benefit to the Defendants, but that such removal of these structures would result in a substantial injury to the other parties in the cost of removal and potential depreciation in value of their property. Most of the structures on each property appear to be similar in construction and exterior to the residence on the same lot and are in character with the general nature of the neighborhood in a lakeside residential community. Further, these structures have been located on the property for many years, with the most recent construction in 1996, without any complaint by the other landowners within the subdivision or the Defendants' predecessors in title. Some

of the structures include boathouses which appear to be on the lake and are not even covered by the restrictions.

Ord., pp. 6-8.

Accordingly, the mere fact that the restrictive covenant was violated by the Plaintiffs-Respondents is insufficient to demonstrate "unclean hands." Soden, 333 S.C. at 567, 511 S.E.2d at 379 (1998). Rather, Defendants-Appellants must also establish that the violation prejudiced them. Defendants-Appellants have failed to present evidence below of any prejudice to them, nor have they cited any such evidence on appeal. Accordingly, the preponderance of the evidence supports the lower court's findings in this matter and the decision of the trial court should therefore be upheld and this appeal should be denied.

**II. The trial court applied the proper standard in finding that a grant of permanent injunction was appropriate in this case**

Defendants-Appellants misstate the standard for determining whether or not the grant of a permanent injunction is appropriate. "Irreparable harm" is not required for the grant of a permanent injunction for enforcement of a restrictive covenant. As the Court stated and Appellants state in their appeal brief, "[t]he issuance of an injunction depends upon the equities between the parties and if great injury will be done to the parties sought to be enjoined with little benefit to the other property owners, it is proper for a trial court to deny equitable relief." Gibbs v. Kimbrell, 311 S.C. 261, 270, 428 S.E.2d 725, 731 (Ct. App. 1993) (citing Hunnicut v. Rickenbacker, 268 S.C. 511, 515-16, 234 S.E.2d 887, 889 (1977)). However, the Court in this matter found that, on the contrary, that the building of more than one residence on each of the subject lots would "destroy the intent of the developer in including the restrictions" altering the nature of the subject property. Ord. p. 4, ¶ 7. Preservation of the character of the residential community is certainly of great "benefit" to the Plaintiffs seeking to enforce the per-lot residence restriction. Accordingly, the Court took note of the harm implicit in permitting Defendants-Appellants to construct more than one residence on each of the at-issue Lots.

Conversely, Defendants-Appellants cannot plausibly advance "great injury" with regard to enforcement of the restrictive covenants contained in the deed restrictions. The fact that the Defendants-Appellants were aware of the deed restrictions at the time they purchased the property supports the appropriateness of enforcement of the restrictive covenants in this case. Buffington v. T.O.E. Enterprises, 383 SC 388, 393, 680 SE2d 289, 292 (2009); App. Brief at 8 (Defendant admits to being "aware of the restrictions within

the chain of title” at the time the property was conveyed). Further, failure by the trial court to issue a permanent injunction in this matter would effectively result in a holding invalidating the restrictive covenant. The Court will only invalidate a restrictive covenant where the party seeking to prevent its enforcement demonstrates that "there is such a change in character of the neighborhood as to render enforcement of the covenant valueless to the covenantee and oppressive and unreasonable to the covenantor." SPUR at Williams Brice Owners Ass'n., Inc. v. Lalla, 415 SC 72, 90, 781 SE2d 115, 125 (2015) (citing Menne v. Keowee Key Property Owners' Ass'n, 368 S.C. 557, 564, 629 SE2d 690, 694 (2006)). Further, any change in the character of the property is insufficient; rather the change in conditions must represent "so radical a change that the original purpose of the restrictive covenant can no longer be realized." *Id.* Here, the Defendants-Appellants utterly failed to demonstrate that the conditions of the neighborhood had so radically changed from the developer's original plan that rejection of the restrictive covenant is appropriate.

**III. The trial court properly balanced the equities in finding that a grant of permanent injunction was appropriate in this case**

The trial transcript demonstrates that that the trial judge heard testimony on matters concerning the balancing of the equities, both with regard to the impact of restrictive covenant No. 2 and restrictive covenant No. 5, at issue in this case. *See, e.g.*, Tr. pp. 12-14; 22-23; 52. Further, the Court's decision reflects a weighing of the equities with regard to these issues. For example, with regard to restrictive covenant No. 2, the Court notes to fail to enforce this covenant would "destroy the clear intent of the developer" in including the restrictive language in the deeds in order to create "a small residential community on the lake comprised of four residences." Ord. p. 5, ¶¶8, 12. The Court determined that Appellants-Defendants' proposed construction constituted a "major" violation of the intention of the developer and the deed restrictions, but that the violations of restriction No. 5, with regard to outbuildings were "minor" by comparison. Ord. p. 6, ¶ 12. By its nature, this requires a relative assessment of the impact of the enforcement of the restrictions on the relevant parties.

Accordingly, Appellants-Defendants' contention on appeal that the trial court "erred in making no finding or determination balancing the equities" is unsupported by the plain language of the Court's decision in this case, as well as the trial transcript.

**IV. The trial judge did not abuse his discretion in granting a permanent injunction in this case**

Defendants-Appellants' argument that the trial judge's decision in this case constitutes an abuse of discretion is without merit. Defendants-Appellants appear to claim that the trial judge improperly expanded the terms of the restrictive covenant the Plaintiffs-Respondents sought to enforce in the action below. Specifically, Appellants-Defendants claim that the court erred by in holding that "the restrictive covenant prohibiting more than one home on a lot...also prohibit[ed] that a lot could not be subdivided." App. Br. at p. 10. However, contrary to Defendants-Appellants' assertions, the trial court did *not* find that that the restrictive covenant preventing them from constructing more than one residence on each lot also prohibited them from subdividing the lots. Rather, the trial court affirmed that the lots could be subdivided:

Said restrictions prohibit more than one residence on the original Lot 3 which encompasses Lots 3A, 3B, and 3C on the Pierson Plat. The Defendants argue that since there is no restriction against an owner subdividing the lot, this restriction would not prohibit a separate residence on each of the on each of the new lots 3A, 3B, and 3C. Even though Defendants may not be restricted from subdividing their original Lot 3, the Defendants would still not be allowed to put more than one residence on the property designated as Lot 3 on the Meehan Plat.

Ord., p. 4, ¶ 8.

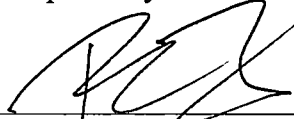
As noted by Defendants-Appellants, in South Carolina, "a restriction on the use of a property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed..." Buffington, 383 S.C. at 392, 680 S.E.2d at 291. As noted above, the restrictive covenant contained in the deeds of conveyance for all four lots in the Meehan Plat in this case was very clear: "[t]here shall

not exist on any said lot at any time more than one residence.” Ord. p. 2, ¶1. Accordingly, by Defendants-Appellants own admission, this restrictive covenant should be strictly construed, as it was in this case. Because the Court did not engage in the expansion of the restrictive covenant alleged by the Defendants-Appellants, this argument is without merit and cannot be reasonably addressed by this Court.

## CONCLUSION

Appellants' bases for appeal of the trial court's decision in this matter are entirely without merit. The trial court found that any violation of other applicable restrictive covenants by Respondents *did not* rise to the level of "unclean hands" sufficient to deny them equitable relief via enforcement of the deed restrictions which is the focus of Appellants' appeal. The trial court judge properly balanced the equities with regard to the parties respective requests for enforcement of restrictive covenants pertaining to the at issue lots. The trial court's decision in this matter is well-supported by the evidence in this case and the law of the State. For the reasons set forth herein, Respondents respectfully request that this Court uphold the decision of the trial court and deny Appellants' appeal in its entirety.

Respectfully submitted,



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Appellant.

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PROOF OF SERVICE

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I certify that I have served on Appellants the Initial Brief of Respondents and Designation of Matter to be Included in Record on Appeal by depositing a copy of the same in the United States Mail, postage prepaid, on December 7, 2016, addressed to their attorney of record, Randall S. Hiller, 850 Wade Hampton Blvd., Greenville, SC 29609.

December 7, 2016



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Wednesday, December 07, 2016

S.C. Court of Appeals  
Attn: Hon. Jenny Abbott Kitchings  
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Re: Carol P. Marsh, Harold S. Buie, and and Agnes K. Buie v. Robert Pierson,  
ABC Care, Inc., and Lake Wood Lane Properties, Inc.  
Appellate Case No. 2016-001005

Dear Madam Clerk:

Enclosed herewith please find one original of the Initial Brief of Respondents and the Designation of Matter to be Included in the Record on Appeal, along with Proof of Service for the same upon Randall S. Hiller, attorney for Appellants.

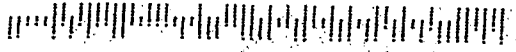
Sincerely,

BRIAN K. JAMES, L.L.C.



Brian K. James

BKJ/ktf  
Encl. as noted  
Cc: Randall S. Hiller, Esq.



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