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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Circuit Court Judge

Case No. 2016-000281

Anchorage Plantation
Homeowners Association,

Respondent,

v.

John B. Walpole and
Theodora W. Walpole

Appellants.

REPLY BRIEF OF APPELLANTS

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Appellants rely upon the Statement of Issues, Standard of Review, Statement of the Case, and Facts set forth in the [Initial] Brief of Appellants.

ARGUMENT

I. Appellants properly and adequately appealed the judgment of the trial court as to the invalidity of the easements.

Respondent's Complaint alleges two causes of action: (1) seeking a declaratory judgment rendering the easements invalid, and (2) seeking injunctive relief relating to the invalidity of the easements.[1] The Respondent nevertheless contends that the "two issue" rule precludes this Court from reversing the ruling of the trial court. Respondent's hyper-technical application of this rule is misplaced, as the trial court set forth generally multiple reasons for its decision on the sole issue brought before it by Appellant, to wit, whether the easements were valid. The trial court's order states explicitly: "The primary relief sought is the invalidation of the easement, as amended." [R. p. 19].

It does not appear that this Court has addressed directly the application of the two-issue rule in any matter involving a single cause of action. The Court has declined to extend the two-issue rule, however, in *Wofford v. City of Spartanburg ex rel. S.C. Municipal Ins., Trust*, 415 S.C. 152, 158, 781 S.E.2d 146, 149 (Ct.App. 2015). Moreover, a dissenting opinion from Chief Justice Toal sets forth precisely the hazard of such an application:

> In my opinion, an over-zealous application of appellate preservation rules denigrates the primary purpose of the judiciary, which is to serve the citizens and the business community of this state by settling disputes and promoting justice.

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[1] The second cause of action and ruling, relating to the injunctive relief sought, is necessarily dependent and derived from the ruling on the declaratory judgment action; as such it serves merely as a procedural mechanism for recording the judicial ruling in the chain of title.

> To be clear, I do not discount the importance of our issue preservation rules. As an appellate court, we sit to review decisions of lower courts for error. . . . In light of my view, I believe that where the question of preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation.

Atl. Coast Builders & Contractors, LLC v. Lewis, 398 S.C. 323, 332-33, 730 S.E.2d 282, 287 (2012) (Toal, C.J., dissenting). *See also Portman v. Garbade*, 337 S.C. 186, 191, 193, 522 S.E.2d 830, 833-34 (Ct.App. 1999) (Howard, J., dissenting). ("To hold otherwise places form over substance, and renders error preservation a minefield through which only the lucky and the divine can successfully pass.").

Appellants have clearly and adequately assigned error to the ruling of the trial court: that the trial court committed error in finding that the easements at issue below were invalid. Moreover, because of the legal and equitable issues intertwined and necessarily addressed together in the matter below, Appellants have addressed each of the trial court's reasons in their appeal.

II. The ruling of the trial court created the unjust enrichment to the benefit of Respondents and to the detriment of Appellants.

Unjust enrichment is an equitable doctrine, applicable to the history of the development of Anchorage Plantation, the intent and knowledge of all of the parties, including the homeowners, the negotiation of the easement terms themselves, and the resulting enrichment to the homeowners to the detriment of the very individuals who originally owned the property and constructed the roadways and docks.

Appellants' claim of unjust enrichment was couched as an affirmative defense because the act of invalidating the easements, and Appellants' rights thereto, is the benefit conferred upon the Respondents without adequate value. Testimony from multiple witnesses clearly shows that

access to the easement property has always been available to Appellants; in fact Appellants maintained control of, in part, access to one terminus of the main roadway, Anchor Watch Drive. While Respondent has constructed a gate limiting access into the Anchorage Plantation development on one portion of Anchor Watch Drive, the remaining northern entrance was open and accessible to Appellants' property, controlled by a gate located on the Appellants' property, and secured with a lock installed and maintained by Appellants. [R. p. 273, ll. 7-14; p. 340, ll. 1-21; p. 401, ll. 9-18.]. Respondent's Board President testified at trial: "[Appellants] don't need to use the gate at --- because they have a gate which they control at the end of Anchor Watch Drive. They've always had access if they wanted to use that." [R. p. 340, ll. 1-5].

Evidence as to the importance of the roadways and docks to Appellants was uncontroverted at trial. [R. p. 387, ll. 12-17]. Prior to the development of Phases One and Two, Appellants owned the entire tract of land, comprising approximately 1,050 acres, which was used for farming purposes. [R. p. 381, ll. 2-11]. Anchor Watch Drive, the primary road in the development, was originally a farm road used daily to traverse the property. [R. p. 381, ll. 12-17]. The boat ramp was installed by Appellant John Walpole and used by the Walpole family well prior to the development of Phases One and Two. [R. p. 381, l. 18-p. 382, l. 5].

III. The holding in *Raman Chandler* by Respondent and the trial court lacks both precedential and persuasive value to this case.

Respondent, as well as the trial court, seeks to rely upon a Texas Court of Appeals case, *Raman Chandler Properties, L.C. v. Caldwell's Creek Homeowners Association, Inc.*, 178 S.W.3d 384 (Tex. App. 2005). This reliance is misplaced. As a threshold matter, *Raman Chandler* holds no precedential authority over the trial court; moreover, it construes Texas, not

South Carolina, law. Further, *Raman Chandler* may be readily distinguished from the instant case and as such provides no real persuasive value either. In *Raman Chandler*, the complaining homeowners association had been granted access to certain common areas within the development, made exclusive not only by the terms of the covenants, but also by a wooden fence and border. Exclusivity in that case was used as a selling point to the complaining homeowners. The developer then removed the obvious physical barriers and unilaterally attempted to grant access to a new development in direct contravention of the explicit and unambiguous procedures set forth in the restrictive covenants and solely for its personal gain. *Id.*, 178 S.W.3d 384, 388. This is readily distinguishable from the instant case, whereby the intent of the developer to continue the development was clear to the parties and readily visible from a physical review of Anchor Watch Plantation. [R. p. 275, ll. 14-17; p. 275, l. 23 - p. 276, l. 4; p. 278, ll. 12-20; p. 329, ll. 15-18; p. 330, l. 23-p. 134, l. 9]. Upon the developer attempting to convey the common areas to Caldwell's Creek HOA, the HOA refused to accept the deed and brought the action.

In this case, the easements at issue previously existed and continued to exist at all times prior to, during, and after the development of Phases One and Two. Moreover, the intent to continue development of Phase Three was clear from the developer's plans and from the physical layout of the roads. Not only were there pre-existing curb cuts where the roadways were intended to continue on to Phase Three (Appellants's property), there was no physical barrier surrounding Phases One and Two until Appellants installed fences for the purpose of containing livestock. In addition, Respondent accepted the deeds to the common areas which were given explicitly "[s]ubject to all matters of record . . ." and which were filed subsequent to easements at issue. [R. pp. 717-721; pp. 704-708]. Control of Respondent was transferred to the property owners in

December 2003, and yet no affirmative action was ever taken by Respondent to reject the deeds as conveyed until the filing of this case in January 2010.

IV. Respondent mischaracterizes the contractual nature of restrictive covenants.

Respondent asserts that, because the Appellants are not members of the Association, the contractual nature of the covenants, and therefore the applicable statute of limitations, does not apply. The trial court, Appellants, and Respondent all concur and have cited authority for the proposition and rule of law that restrictive covenants are contractual in nature and are to be construed like contracts. [R. p. 21; Initial Brief of Respondent at p. 30]. The trial court, furthermore, addresses the power of an association to terminate a contract entered into by the developer upon the transfer of the association's control to the homeowners. [R. p. 28]. The trial court found the transfer of the easements rights to Appellants via deed violated the contractual restrictions of the association's covenants, which finding Appellants dispute.

Assuming *arguendo* that the trial court's interpretation of the covenants is correct, a violation of such covenants would be contractual in nature. At most, however, this would render the easements at issue voidable, not void *ab initio*. The developer, even if acting as legal title holder to the property, cannot act in contravention of these restrictions without breaching the covenants. An injury arising in contract, however, must also be determined by the law of, and remedies available in, contract. That Appellants were not parties to the covenants is wholly irrelevant to the same extent a vendor to an association contract is not a party to the covenants. What is relevant, and wholly avoided by Respondents, is the applicability of the statute of limitations as to contracts, as well as the failure of the association to take any action with regard to the alleged breach by developer upon transfer of control of the association to the homeowners

in 2003. Whether or not the developer had the right to convey an interest to the parcels at issue, it was incumbent upon the association to defend

its rights or suffer a balancing of the equities and bar to its claims pursuant to the statute of limitations.

South Carolina courts have visited this issue repeatedly in the context of waiver relating to nonconforming uses and structures by homeowners. *See,* e.g., *Cedar Cove Homeowners Ass'n, Inc. v. DiPietro*, 368 S.C. 254, 260-61, 628 S.E.2d 284, 287 (Ct. App. 2006) (*citing Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987)) (noting restrictive covenants are voluntary contracts between the parties, and courts should enforce such contracts unless they are indefinite or violate public policy); *Hunnicutt v. Rickenbacker*, 268 S.C. 511, 515, 234 S.E.2d 887, 889 (1977) ("[I]t is not every case of a structure erected in violation of a restriction which will call for [a mandatory injunction]"); *Rabon v. Mali*, 289 S.C. 37, 40, 344 S.E.2d 608, 610 (1986) (holding equity will refuse her aid when a party, knowing his rights, suffers his adversary to incur expenses, enter into obligations, or otherwise change his position before asserting a claim for enforcement, "especially if an injunction is [requested]"); *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344-45, 415 S.E.2d 384, 387-88 (1992) (holding a horizontal property regime waived its right to enforce a restrictive covenant by failing to bring a claim for enforcement against a known violation until after a substantial amount was spent on improvements). Compliance with restrictive covenants is generally presumed without some affirmative action by the homeowners association to secure its rights under the covenants. The association had an obligation to act and purport the conveyance upon its knowledge of any issues. This obligation became incumbent upon the association either in

December 2003, at which time the control of the association was transferred to the homeowners (and the easements were already filed of record), or at the latest in 2004, when actual notice of the easements was evidenced by the Respondent through correspondence from counsel.

Respondent failed to timely disaffirm the easements or otherwise bring suit against developer for breach of the covenants, and repeatedly failed to protect these purported rights when given the power and the duty to do so. That Respondent failed to act timely in its prosecution of a contractual breach is dispositive of the instant case.

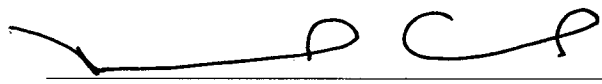
V. Conclusion

The evidence before the trial court clearly sets forth that it was the intent of the Appellants to sell their entire tract of land to a single party for purposes of development. Prior to that sale, the Appellants had constructed, maintained, and used the roads and boat ramp which are the subject of the easements at issue. In the process of a multi-part sale to the eventual developer of the first two Phases, Appellants negotiated for, and indeed retained, those rights of use and access, as is clearly set forth in the various contracts of sale. Evidence further indicated that the intent of the developer was to continue development of Phase Three, but for the failure of the developer to purchase the property for unrelated reasons. The covenants simply do not explicitly forbid the developer from having formalized and recorded in the public records easements which had previously existed.

For the reasons set forth above and in Appellants' Initial Brief, Appellants respectfully request this Court reverse the judgment of the trial court, and for such other relief previously requested or as deemed just and appropriate.

Respectfully submitted,

ALTMAN & COKER, LLC



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