THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison R. Lee, Circuit Court Judge

Case Nos. 2007-CP-40-8107 through -8110

Place on the Greene Homeowners
Association, Inc., ... Respondent,

v.

W.G.R.Q., LLC, Easy Coin Laundry, Inc.,
Eva Nell Berry, and Jeffrey O. Kenney, ... Appellants.

REPLY BRIEF

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ARGUMENT

I. An Action to Enforce a Restrictive Covenant Sounds in Equity, and the Standard of Review Is De Novo, Not Abuse of Discretion.

The homeowners association argues that the circuit court's decision is reviewed under the abuse of discretion standard. That is not correct.

An action to enforce a restrictive covenant sounds in equity. *Buffington v. T.O.E. Enterprises*, 383 S.C. 388, 391, 680 S.E.2d 289, 290 (2009). In an equitable action, the standard of appellate review is *de novo*. This was the holding in *Lewis v. Lewis*, a family court appeal in which the Supreme Court explains that although some of its prior decisions use the term "abuse of discretion" to describe its review of certain family court decisions, that term does not correctly describe the standard of review authorized by the South Carolina Constitution. 392 S.C. 381, 386, 709 S.E.2d 650, 652 (2011). The *Lewis* opinion notes that an appellate court will generally defer to the lower court's findings of fact because of the lower court's superior ability to assess the demeanor and credibility of witnesses, but the *Lewis* opinion also notes that "[the] standard of review does not *require* any deference." *Id.* at 388-89, 709 S.E.2d at 653-54 (emphasis added).

As the homeowners association observes, several appellate court decisions recite that the abuse of discretion standard governs appellate review of a decision whether a defendant has established the defense of laches. That language in those appellate court decisions cannot have survived the *Lewis* opinion. Two of the six cases cited to support the application of the abuse of discretion standard are family court cases and as such, are controlled by *Lewis*. See *Emery v. Smith*, 361 S.C. 207, 603 S.E.2d 598 (Ct. App. 2004) and *Grossman*

v. Grossman, 242 S.C. 298, 130 S.E.2d 850 (1963) (both cited on page 8 of the Brief of Respondent). Two more of the cases cited by the homeowners association are not family court cases, but those decisions cite to family court cases as authority for why the abuse of discretion standard applies. See *Brown v. Butler*, 347 S.C. 259, 265, 554 S.E.2d 431, 434 (Ct. App. 2001) and *Gibbs v. Kimbrell*, 311 S.C. 261, 269, 428 S.E.2d 725, 730 (Ct. App. 1993) (cited on page 8 of the Brief of Respondent). One of the two remaining cases — *Premium Investment Corp. v. Green* — does not list any authority for the abuse of discretion standard. See 283 S.C. 464, 473, 324 S.E.2d 72, 78 (Ct. App.1984). The final case — *King v. James* — cites *Premium Investment Corp.* and *Brown v. Butler*. See *King*, 388 S.C. 16, 28, 694 S.E.2d 35, 41 (Ct. App. 2010). *Brown* relies on a family court case for the application of the abuse of discretion standard. 347 S.C. at 265, 554 S.E.2d at 434.

The Supreme Court's decision in *Lewis* controls on this point, and that case establishes the standard of review in equity cases as *de novo*. It is appropriate for this Court to take stock of the fact that the trial judge is generally in a superior decision for making credibility determinations, and it is also appropriate to impose a burden on the appellant to satisfy this Court that the preponderance of the evidence is against the trial court's findings, but these principles are merely parts of *de novo* review. See *Lewis*, 392 S.C. at 391, 709 S.E.2d at 655.

II. The Homeowners Association Asserts Several Items as "Facts" When No Such Facts Were Found by the Trial Court.

The homeowners association alleges that two of the original owners of the commercial units — Beau Powell and Craig Stonebruner — dominated and intimidated the

association's board, falsely represented that it was acceptable to violate the building's restrictive covenants, and unilaterally decided to ignore the restrictions. The homeowners association presents these allegations as facts.

The trial court never found that anyone "dominated" or "intimidated" the homeowners association board. The trial court also did not make any finding that these owners falsely represented to the members of the board that the covenants allowed for restaurants or bars to operate in the commercial units. The trial court's order mentions this alleged conduct only once, and that reference occurs when the trial court is describing the justifications that the homeowners association offered to explain its history of inaction. At trial, the homeowners association alleged its delay in asserting its rights was caused by several things including confusion as to what those rights were, confusion because of property management company changeovers, naivete on the part of the board members, a high board member turnover rate, and "pressure from and misguidance by commercial unit owning member(s) of the board." See (R.p.9, ¶16). But the court never actually found any misguidance or pressure occurred, and the court also never made a finding that this alleged action influenced the board's failure to ever take *any* action to enforce this covenant.

The trial court's order describes what actually drove its decision. It found that all of the commercial unit owners had constructive notice of the restrictions in their deeds, that none of the owners made any significant improvements to their properties, that there was no evidence of prejudice to the commercial unit owners "other than that they would be financially affected," and that the "no waiver" clause was enforceable. See (R.pp.9-12). The *de novo* standard of review certainly allows a party to ask an appellate court to find new

facts, but this Court should distinguish any of its own fact-finding from the analysis and reasoning that the trial court actually used.

III. The Fact That a Property Owner Had Prior Notice of a Restrictive Covenant Does Not Bar the Application of Estoppel or Laches; Those Defenses Rely on the Plaintiff's Silence and Delay.

As the appellants' principal brief attempted to describe, the trial court's reasoning was not faithful to the law that governs enforcing restrictive covenants, and it also was not faithful to the evidence presented at trial. For example, the trial court placed a great deal of emphasis on the fact that the owners of the commercial units had constructive notice of the covenant. This was the court's refrain for two of the equitable defenses. The court recited that the commercial unit owners could not claim estoppel because they "had notice of the restrictive covenants when they were deeded the property . . . and operated their businesses at their own peril." (R.p.10, ¶18). The commercial unit owners also could not claim laches because "[t]hey had constructive notice of the restrictions in their deed . . . [and] were on notice to inquire about the restrictions." (R.pp.11-12, ¶22).

If constructive notice was the touchstone, no party with a restrictive covenant in his or her deed could ever successfully claim laches or estoppel. Past appellate court decisions illustrate that this is not how these principles operate. In *Gibbs v. Kimbrell*, this Court described estoppel as arising when the plaintiff observes another person dealing with property in a manner inconsistent with the plaintiff's rights and makes no objection while the other party changes his position in reliance on the party's silence. 311 S.C. at 268, 428 S.E.2d at 729. This Court explained "the [plaintiff's] silence" is the critical factor that

prevents him from later seeking relief. 311 S.C. at 268, 428 S.E.2d at 729. In *Rabon v. Mali*, the Supreme Court held that laches barred part — not all — of an action to enforce a restrictive covenant because neighboring property owners knew of the improper use of the property and never expressed concern or objected. 289 S.C. 37, 40-41, 344 S.E.2d 608, 610 (1986). Laches and estoppel amplify the principle that "equity aids the vigilant and diligent," and not those who sleep on their rights. See *Ex parte Johnson*, 371 S.C. 614, 618, 640 S.E.2d 887, 890 (Ct. App. 2006). In continually repeating that the Place on the Greene's commercial unit owners were charged with notice of the restrictive covenant, the trial court was reciting something that does not control whether estoppel or laches applies.

IV. This Case Has More than Silence and Delay. The Homeowners Association Actively Encouraged Ongoing Violations.

The law on restrictive covenants is that they are enforceable but disfavored and that because an action to enforce a restrictive covenant sounds in equity, the court's decision on whether to issue an injunction is governed by principles of equity including fairness doctrines like estoppel and laches. See *Buffington*, 383 S.C. at 391-93, 680 S.E.2d at 290-91 (stating all of these principles). A large part of what makes the present case unusual, and what makes enforcing this covenant unfair, is that these commercial units have continuously violated the covenant from the time this building opened, those violations have been open and apparent for all of the other property owners to see, there has never been a hint of enforcing the covenant until this lawsuit, and the homeowners association board gave its permission for some of these activities to occur. These were not secret infractions that only recently came to light; this is more than silence and delay by the plaintiff. This is a bait and switch.

This description is not puffing, this is the reality of the case. The building opened in 1985 and a coin laundry that was open 24 hours a day, 7 days a week, began operating in one of the units in 1988. (R.p.204, lines 5-7). There has been a restaurant in the building since at least 1993. (R.p.341). The homeowners association board gave permission for the Blue Cactus restaurant to cut a hole in the exterior of the building in order to allow a vent for the restaurant's grill. (R.p.169, line 20 - p.171, line 6). The board also voted in favor of the commercial units being able to sell beer and wine, and the board opined that the deck the Duck-In Restaurant wanted to build would be an "asset to the building." (R.p.168, line 17 - p.169, line 10; p.342). In 2004, the board published rules regulating how the commercial units could serve patrons and how the units could advertise. See (R.p.347-350). Through this conduct, the board was sending the message that restaurants and bars were acceptable if they operated within certain constraints.

The homeowners association would hang this conduct around the necks of Beau Powell and Craig Stonebruner, but the record tells a different story. The minutes from the board's 1993 annual meeting do not list either Powell or Stonebruner as attending the meeting, and this was the meeting where the board expressed that the Duck-In Restaurant's deck "could be an asset to the building." See (R.p.342). The 1995 meeting minutes discuss that the building's doors had been relocated to allow restroom access for patrons of the commercial units, and this was the meeting that was actually held *inside* one of the restaurants in the building. (R.p.344). Neither Powell's name nor Stonebruner's name appears anywhere in these minutes. Laura Nichols, the president of the board and the supposed "lone voice" opposing Powell and Stonebruner, called both meetings to order, and

the minutes do not contain anything suggesting that the board's action with respect to the commercial units was not unanimous. (R.pp.342-45). Ms. Nichols testified that she believed the board did not know the master deed was being violated, (R.p.177, lines 13-16), but she also was present at the 1991 board meeting where Beau Powell advocated that the building should allow restaurants, "which are prohibited." (R.p.340). These statements are not consistent. The other board members may have looked up to Beau Powell and he may have been a forceful advocate for his views, but if Powell and Stonebruner were acknowledging that these activities were prohibited and advocating for a change in the master deed, the board could not have been ignorant of the restrictive covenant.

V. A "No Waiver" Clause Should Not Protect a Party That Has Actively Encouraged Violations of a Restrictive Covenant.

Although they have some similarities, waiver, laches, and estoppel are different defenses. Waiver is a legal defense and has been described as the "voluntary and intentional relinquishment or abandonment of a known right." *Strickland v. Strickland*, 375 S.C. 76, 86, 650 S.E.2d 465, 470-71 (2007). As applied in actions to enforce restrictive covenants, the court generally determines the existence or non-existence of waiver by examining the number and character of previous infractions. See, e.g., *Kneale v. Bonds*, 317 S.C. 262, 268, 452 S.E.2d 840, 843 (Ct. App. 1994) (concluding that although the property owners had acquiesced to minor violations, they did not intend to waive their right to enforce a covenant in all circumstances). This shares some of the characteristics of the equitable defenses of laches, which is a delay in asserting a right for an unreasonable period of time, and estoppel by silence, which is silence that amounts to a representation, but laches and estoppel differ

from waiver in a material respect — prejudice. To satisfy either defense, the defendant must show a prejudicial change in his position. See *Queen's Grant II Horiz. Property Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 358-60, 628 S.E.2d 902, 912 (Ct. App. 2006).

The non-waiver clause in the master deed provides only that the failure to enforce the restrictive covenants does not amount to a waiver of the right to enforce those covenants. It says nothing about the board or another homeowner being forever empowered to enforce those covenants against activities that the board has expressly approved, and it says nothing about the body of South Carolina law which provides that finding a violation of a restrictive covenant does not end the question; the court still considers the equities in determining whether to issue an injunction. See, e.g., *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 274-75, 363 S.E.2d 891, 896 (1987) (stating this principle). For this type of suit to truly sound "in equity," the law has to account for the fact that a defendant might have justifiably changed his or her position based on another party's conduct. It also has to consider that the circumstances may be such that enforcing the restrictive covenant will cause unfair harm.

The state of Arizona has reached a different conclusion. The homeowners association cites *Burke v. Voicestream Wireless Corp. II*, 87 P.3d 81 (Ariz. Ct. App. 2004) to support its argument, but the more appropriate comparison to the argument being made in this appeal is the case *College Book Centers, Inc. v. Carefree Foothills Homeowners' Association*, 241 P.3d 897 (Ariz. Ct. App. 2010). In *College Book Centers*, the party attempting to escape the no waiver clause argued that such a clause was meant only to excuse the consequences of inaction. The argument went that the clause could not apply when a homeowners association affirmatively approved of a party violating a covenant. The court of appeals of Arizona

rejected that argument. The homeowners association also cites an Indiana case, *Johnson v. Dawson*, but the principal authority in that case is the Arizona court's decision in *Burke*. See *Johnson*, 856 N.E.2d 769, 775 (Ind. Ct. App. 2006).

The reasoning of the Arizona courts should not be persuasive; South Carolina law is materially different from Arizona law. The *College Book Centers* opinion notes that in Arizona, ambiguities in restrictive covenants are *not* construed in favor of free use of property. 241 P.3d at 904. This is directly contrary to the law in South Carolina. See *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 864 (1998) ("It is still the settled rule in this jurisdiction that restrictions as to the use of real estate should be strictly construed and all doubts resolved in favor of free use of the property[.]"). South Carolina law has traditionally observed that although it will enforce a restrictive covenant when the covenant's language is plain, even the most straightforward covenants have historically been subject to equitable defenses or offensive attack. See *Buffington*, 383 S.C. at 393, 680 S.E.2d at 291 ("[T]his Court has consistently held that courts should consider equitable doctrines when determining whether to enforce a restrictive covenant."). Treating the no waiver clause as a total bar to any relief from a covenant would change this law and eliminate the principle that even after the court finds that a restrictive covenant has been violated, it is not mandatory that the court issue an injunction. E.g., *Sea Pines Plantation Co.*, 294 S.C. at 274-75, 363 S.E.2d at 896.

VI. The Greater Weight of the Evidence Suggests That the Financial Harm to the Appellants from an Injunction Will Be Substantial, and the Equities Favor Refusing the Request for an Injunction.

This case tells the story of a building that in all respects, has never been used as it was envisioned during development. The target market for residents was professionals that were

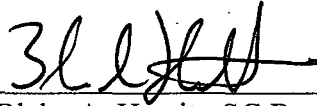
living and working downtown, but almost immediately, several of the units were occupied by college students. (R.p.140, lines 2-15). This continues to be the case today. (R.p.92, lines 17-18) (great majority of units are leased); (R.p.98, lines 1-3) ("a lot" of college students live there). As for the commercial units, they were intended to be "general office" space, perhaps occupied by a CPA or a lawyer, but they sat vacant because those units were only allotted one parking space a piece. (R.p.141, lines 3-10; p.162, line 17 - p.163, line 9). Powell and Stonebruner did not take their units until after those units had failed to sell during development. See (R.p.153, lines 24-25). Repeated requests to change the restrictive covenants failed not because the requests lost an up-or-down vote, but because of a lack of homeowner attendance at the owner meetings.

The trial court found that the owners of the commercial units would be financially affected by an injunction, and the greater weight of the evidence in the record is that those effects will be severe. The units sat vacant until non-conforming uses began, and the only uses to which these units have ever been put have been non-conforming uses. What is more, the present owners of the units bought with the understanding that the activities being conducted in those units could continue. On the other hand, the residential owners or tenants who move in this building know exactly what they are getting by moving in to the Five Points neighborhood and this specific building; they are moving in to an area where restaurants and bars are prominent, see (R.p.128, line 10 - p.129, line 15), and they cannot walk in to the front of their building without seeing that they will be living over some of the same. In these circumstances, equity favors allowing the status quo to continue.

CONCLUSION

This Court should reverse because the trial court's conclusion does not faithfully apply the law regarding restrictive covenants and because issuing an injunction in these circumstances would be *un*fair.

Respectfully submitted,



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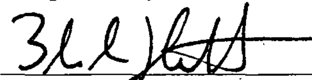
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Appellant* and the *Reply Brief* comply with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

/Signature page attached

October 3, 2012

Respectfully submitted,



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