THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

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SC Court of Appeals

R. Lawton McIntosh, Circuit Court Judge

C/A No. 2017-CP-04-2632
Appellate Case No. 2018-002028

EUGENE L. GRIFFIN, JR. and BETH KING GRIFFIN..................Appellants,

v.

ARDEN CHASE HOMEOWNERS' ASSOCIATION, INC................Respondent.

BRIEF OF APPELLANTS

Daniel L. Draisen
S.C. Bar No. 13536
Krause, Moorhead & Draisen, P.A.
207 E. Calhoun Street
Anderson, South Carolina 29621
(864) 225-4000
Attorneys for Appellants

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STATEMENT OF THE ISSUES

I. **Did the Court err in granting Summary Judgment to Respondent where Appellants primary assertion in their Complaint is that the ACC wrongfully denied approval of Appellants' *revised* garage plans that comply with both Judge Sprouse's Order and the Covenants?**

II. **Did the Court err in finding that the Appellants did not make a written request for the ACC to reconsider its decision rejecting the Appellants' revised garage plans?**

III. **Did the Court err in ordering, prior to the complete adjudication of Appellants' claims, that Respondent is entitled to require the demolition of the garage and may exercise the Right of Abatement if Appellants do not tear down the garage?**

IV. **Did the Court err in including language in the Order Denying Appellants' Motion for Reconsideration that modified and expanded the ruling on the Covenants issued by Judge Sprouse?**

STATEMENT OF THE CASE

The Appellants are the owners of Lot 32 in Arden Chase (100 Arden Chase), a residential subdivision located in Anderson County, South Carolina. All lots in Arden Chase subdivision are subject to the Declaration of Covenants, Conditions and Restrictions for Arden Chase, a Residential Community (the "Covenants"), dated February 1, 1990 and recorded in the Office of the Register of Deeds for Anderson County, South Carolina on May 29, 1990 in Book 1010 at Page 88. (R. pp. 300-331)

The Covenants provide at Section 6.21 Recreational Vehicles and Trailers:

> *(a) No Commercial or disabled vehicles, boats, boat trailers, **motor homes**, campers, or like equipment or mobile or stationary trailers of any kind shall be permitted on any home site of the subdivision **unless kept in a completely enclosed garage so that same shall not be visible from any street or public way.**"* (emphasis added)

Pursuant to the Covenants, the first week of June 2016 the Appellants submitted drawings and plans for the construction of a detached garage to be built for the purpose of housing their motor home to the Architectural Control Committee (the "ACC") by delivering same to G. Stephen Crain, member of the ACC. In June 2016, the Appellants received a signed copy of the plans that were submitted marked "Approved" and signed by Crain and the President of the Arden Chase HOA, Larry Rowland. (R. p. 332) In reliance thereon, the Appellants then had the footings dug and installed and had the slab poured for the construction of the proposed garage.

Shortly after beginning construction, the Appellants were served with a lawsuit in the matter of *R. Dean Price, et. al vs. Eugene L. Griffin, et al.,* C/A No. 2016-CP-04-2028,

wherein several owners objected to the construction of the Appellants' garage structure on the basis of, among other things, that a) same would be in violation of the Covenants, and b) because there are no other garage structures that have been built of a size necessary to completely enclose a motor home, that any such structure would not be in conformity or harmony with the other structures built in the neighborhood.

The matter regarding the construction of a detached garage on the Appellants' property was then litigated in the matter of R. Dean Price, et. al vs. Eugene L. Griffin, Jr., et al., C/A No. 2016-CP-04-2028, in which the named owners sought to enjoin such construction. The HOA (Respondent herein) was named as a Third-Party Defendant in the previous matter and the Court's Order is therefore binding on the Respondent.

In its Order dated March 28, 2017, the Trial Court granted the owners' requested injunction solely on the basis that the garage door on the originally proposed detached garage opened to the roadway in front of the house. However, the Court also specifically held as follows:

> 25. **The Defendants can bring their proposed garage into compliance by changing its direction so that a straight line from each corner of the wall containing the garage door intersects Concord Road instead of Arden Chase road.**

The Trial Court found that 1) Detached garages are not prohibited; 2) The Restrictive Covenants do not restrict the size of any garage except for the mandatory minimum square footage nor do they specify any particular size of garage door; and 3) The housing of recreational vehicles is not prohibited by the Restrictive Covenants. The Owners, Appellants, nor the Respondent appealed the Order of the Trial Court and therefore the

Court's ruling as to whether the Appellants' garage structure would be allowed if the wall containing the garage door faces Concord Road is *res judicata.* (R. pp. 3-18)

On May 24, 2017, the ACC sent a letter to the Appellants advising that if they intended to go forward with the construction of a detached garage it would be necessary for them to first submit a revised site plan, and that this would need to be done before any construction begins. (R. p. 335) Thereafter, on May 31, 2017 the Appellants, by and through their attorney, submitted a copy of the original floor plan with a hand-drawn revision showing the approximate angle change of the front wall that would be made so that a straight line from each corner of the wall containing the garage door intersects Concord Road and no part of Arden Chase road. The Appellants believed that by changing the angle of the wall containing the garage door they would bring the garage into compliance with the Court's prior Order. (R. pp. 336-337)

On June 5, 2017, The Respondent and its ACC, by and through its attorneys, asserted that the information provided on May 31st was not sufficient to determine whether the proposal complies with the Covenants or the Court's Order, that the existing concrete pad must be completed re-configured, and that because the angle of the front wall and its corresponding roofline was being changed it was necessary for the Appellants to submit revised plans to the ACC for approval (said ACC now being comprised of owners that were all adverse in the prior litigation to the approval of Appellants' garage.) (R. pp. 338-339)

By way of email on June 5, 2017, the Appellants' attorney responded denying that the Appellants were required to go through the ACC approval process again, asserted that

the Trial Court included Paragraph 25 of its Order specifically to prevent the Appellants from having to go through the ACC approval process again, and stated that going through the ACC approval process would be futile as the new members of the ACC were all adverse to the garage in the prior litigation. (R. pp. 340-341)

In response to the Appellants' refusal to submit revised plans to the ACC, the HOA filed a second lawsuit again seeking an injunction in the matter captioned, _Arden Chase Homeowners Association, Inc. vs. Eugene L. Griffin, Jr., et al.,_ C/A No. 2017-CP-04-1244. The Appellants filed a Motion to Dismiss, Answer and Counterclaim, and then filed a Motion for Summary Judgment attaching the Affidavit of John "Jack" Jones in which Mr. Jones attested that:

> In order to meet the requirements as set forth by Judge Sprouse, the front left garage wall needs to be extended and turned a number of feet. By doing so, when the wall containing the garage door is connected to the original length of the rear right wall the angle of garage door wall will be shifted such that will intersect only Concord Road and no part of Arden Chase Street (Arden Drive).
>
> The attached elevation and floor plan drawings by Tim Strickland Drafting, dated August 30, 2017, fairly and accurately depict the necessary extension and turning of the front left garage wall and the resulting angle change of the wall containing the garage door.
>
> A garage constructed in accordance with the attached plans will be in full compliance with Judge Sprouse's Order, that the direction of the wall containing the garage door, when a straight line is drawn from each corner of that wall, will not intersect any portion of Arden Drive, and that such wall will intersect Concord Road only.
>
> Other than the minor changes deemed necessary to bring the garage into compliance in accordance with the March 28, 2017 Order, the plans and specifications, as well as the materials to be used, are the same as those submitted previously to Judge Sprouse in the litigation surrounding the construction of the subject garage. (R. pp. 342-347)

On September 8, 2017, the Honorable R. Lawton McIntosh granted the Appellants' Motion for Summary Judgment, denied Respondent's request for an injunction, and dismissed the Respondent HOA's Complaint. However, in its Form 4 Order, the Court issued the following condition:

> "This order is without prejudice to either party to have the issue of compliance with Judge Sprouse's Order determined by Judge Sprouse."

The Respondent nor the Appellants appealed the Order granting the Appellants Summary Judgment and denying the Respondent's request for an injunction and same is therefore *res judicata.* (R. pp. 19-21)

Respondent then filed a Motion to Clarify and to Compel Compliance with the Court's Order and did so in the matter captioned *Arden Chase Homeowners Association, Inc. vs. Eugene L. Griffin, Jr., et al.,* C/A No. 2017-CP-04-1244. The motion sought to have Judge Sprouse clarify his ruling in the matter of *R. Dean Price, et. al vs. Eugene L. Griffin, Jr., et al.,* C/A No. 2016-CP-04-2028, with regard to whether the Appellants were required to re-submit the garage plans for approval to the ACC because the angle of the front wall and its corresponding roofline was being changed, and because doing so added additional square footage. (R. pp. 228-229)

Appellants responded to Respondent's Motion and asked that same be denied on the basis that the Motion was procedurally filed in the wrong case and that Judge Sprouse lacked jurisdiction to hear the matter. On October 13, 2017 the Honorable R. Scott Sprouse issued an Order denying Respondent's Motion for Temporary Injunction and

Clarifying the Court's Original Order. However, in its ***obiter dictum*** the Court stated:

B. The Intent of the Original Order

> The parties seek guidance from the Court as to how "proposed garage" is defined. In the Original Order, the Court permitted the Respondent s to "bring their proposed garage into compliance by changing its direction so that a straight line from each corner of the wall containing the garage door intersects Concord Road instead of Arden Chase Street." The Court's intent in the previous order was that the structure as indicated on the submitted plans, was allowed on the condition that the entire structure was turned to comply with the restrictive covenants. The Respondent s' modified plan, which slightly increases the square footage of the building and changes the configuration of the front of the building so that only one wall is turned, would constitute a new plan which would require submission to the board. Modification, however slight, of the building as configured on the plan submitted to the Court in the trial, would be a different plan.
>
> The Court recognizes the effect of this ruling, which is made in an effort to enforce the governing restrictive covenants. Counsel for the Respondent s has set forth practical reasons why this new plan would actually be less visible from the roadway of the subdivision than the original building if it were turned. The Court also is mindful of the emotions existing in the subdivision.
>
> The Respondent s are fearful that the current Architectural Control Committee will summarily reject any proposed plans, even if they comply in all aspects with the restrictive covenants. As pointed out at the hearing, an unreasonable rejection of a reasonable plan is actionable. The Court would encourage the parties to resolve this issue prior to any further litigation.

(R. pp. 22-24)

While Appellants believed any effort to obtain approval of the ACC for the garage would be futile, on the same day the Order was issued (October 13, 2017) Appellants, by and through their attorney, submitted a "revised" garage plan to the ACC for approval with the amended floor plan and elevation drawings showing the changes. (R. pp. 348-355)

On October 16, 2017, the ACC sent a letter to the Appellants denying the approval of the plans on the basis, of among other things, that the submission did not contain a detailed plan for landscaping and grading and because the plans do not do not call for the "entire structure [to be] repositioned so that it is in compliance with the Arden Chase Covenants and the orders of Judge Sprouse." (R. pp. 356-359)

On October 26, 2017, after a second hearing with Judge Sprouse seeking clarification, the Appellants, by and through their attorney, re-submitted the "new" garage plans to the ACC for approval and this time included a google earth aerial site map and copy of the landscaping plan that was submitted with the original garage plans drawing in the front wall angle change (as the Appellants did not intend to make any changes to the proposed landscaping plan). (R. pp. 360-368)

With Summary Judgment granted on September 8, 2017 and the thirty (30) day appeal time expired, Appellants began construction of the garage in accordance with the "revised" drawings submitted to the ACC on October 16 and again on October 26th.

On October 30, 2017 the ACC again denied the request for approval this time citing that the google earth site plan was insufficient (despite the fact that the garage structure was framed at this time and the ACC was invited to come to the site and review same), that the landscaping plan was insufficient because it did not show the hardscape and grading changes (as a result of the turning of the front wall), and because the entire structure was not "turned in accordance with Judge Sprouse's order." (R. pp. 369-371)

On December 1, 2017, the ACC notified the HOA in writing that the Appellants had constructed a detached garage on their lot that was not approved by the ACC, that the garage was constructed in violation of the covenants, and that did not comply with Judge Sprouse's Order. Thereafter the HOA, on December 5, 2017, delivered a letter to the Appellants citing the findings of the ACC, and demanding that the entire slab and building be reoriented, or that the structure be removed in its entirety from the premises within thirty (30) days, or the HOA would have the Right of Abatement. (R. pp. 372-373, and R. pp. 374-377)

On December 12, 2017, the Appellants again submitted a revised submittal to the ACC with the intent of curing any alleged deficiencies in the prior <u>submittals</u>, this time including the following:

1. The revised floor/foundation plan prepared by Tim Strickland Drafting (the foundation is shown on the floor plan);
2. The revised elevation drawings prepared by Tim Strickland Drafting (the materials to be used are specified on the elevation drawings);
3. A detailed landscaping plan by Stepping Stone Landscaping overlaid on the site plan; and
4. A complete site plan prepared by Professional Land Surveying Solutions, LLC.

(R. pp. 378-385, and R. pp. 386-391)

Despite the Appellants being requested to submit more formal documentation than has ever been required in Arden Chase, on December 22, 2017 the HOA and the ACC again denied the Appellants' request for approval stating that the ACC nor the HOA will approve a "six-sided building" that is not in compliance with the Covenants and Judge Sprouse's Order. (R. pp. 392-393)

As the result of the ACC's refusal to approve the Appellants' revised garage plans, the instant (third lawsuit between the parties) ensued[1]. This matter came on for hearing before the Hon. R. Lawton McIntosh on May 11, 2018 pursuant to cross-motions for Summary Judgment filed by the parties. At the conclusion of the hearing, the matter was taken under advisement by the Court. On May 17, 2018 the Trial Court issued its Form 4 Order (R. pp. 25-28) and on August 9, 2018 the Trial Court issued its Order granting Respondent's Motion for Summary Judgment and the Order was electronically filed with the Clerk of Court that same date. The Order was received electronically by counsel for the Appellants on August 9, 2018. The Trial Court did not rule on or address Appellants' Motion for Summary Judgment in the Order. (R. pp. 29-34) Appellants promptly filed their Motion for Reconsideration within ten (10) days from the date of electronic receipt of the Trial Court's Order. The notice of entry of the Form 4 Order Denying Appellants' Motion for Reconsideration was received by counsel for the Appellants on November 6, 2018, and the formal Order was filed and received on November 13, 2018. (R. pp. 35-37, and R. pp. 38-43)

STANDARD OF REVIEW

Summary judgment. When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). That standard is that "summary judgment may be rendered only when the pleadings, depositions, answers to

[1] It should be noted that the three (3) lawyers that have represented the Respondent in these matters, James W. Logan, Jr., J. Franklin McClain, and Ernest C. Trammell, all live in Arden Chase subdivision.

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Additionally, it must be shown that further inquiry into the facts of the case is not desirable to clarify the application of the law." Folkens v. Hunt, 290 S.C. 194, 196, 348 S.E.2d 839, 841 (Ct. App. 1986).

"All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." Nelson v. Charleston County Parks & Recreation Comm., 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004). If "the parties vehemently dispute the inferences and conclusions to be drawn from the undisputed facts, . . . that simply establishes that summary judgment is not appropriate[.]" Montgomery v. CSX Transp. Inc., 656 S.E.2d 20, 29 (S.C. 2008).

"When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual issues." Englert. Inc. v. LeafGuard USA. Inc., 377 S.C. 129, 133-34, 659 S.E.2d 496, 498 (2008).

In 2009, the South Carolina Supreme Court clarified earlier confusion about whether a scintilla of evidence is sufficient to defeat summary judgment. Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 802-03 (2009). In Hancock, the Court held that "in cases applying the preponderance of the evidence burden of proof, the

non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Id. What is required to defeat a summary judgment motion in cases requiring heightened burdens of proof or applying federal law is simply more than a scintilla of evidence. Id.

ARGUMENT

I. Did the Court err in granting Summary Judgment to Respondent where Appellants primary assertion in their Complaint is that the ACC wrongfully denied approval of Appellants' *revised* garage plans that comply with both Judge Sprouse's Order and the Covenants?

In Judge Sprouse's original Order in this matter dated March 28, 2017, Judge Sprouse answered the following questions and held as follows:

1. **Detached garages are allowed in Arden Chase;**

a. Do the Arden Chase Subdivision restrictive covenants prohibit the construction of a detached garage, and if so, is the detached garage subject to the same rules as an attached garage?

A detached garage is not prohibited, per se, by the Restrictive Covenants and would be subject to the same restrictions as the mandatory, attached garage.

2. **The express wording of the Covenants requires that if an owner wants to house a motor home at his residence, it must be kept in a fully enclosed garage;**

The Plaintiff made references to Paragraph 6.03 as well, which reads, "Restrictions of Use. Home sites may be used for single-family residences only and for no other purpose…." I find that this paragraph is not applicable to this situation since there is no evidence that the Defendants are planning to use this proposed garage for anything other than storage of an RV for their personal use. The restrictive covenants clearly contemplate lot owners having additional vehicles and boats for personal use. I find that the housing of RVs of this type are not prohibited per se, by the restrictive covenants.

3. **<u>The size of the proposed Griffin garage is allowed in Arden Chase;</u>**

b. Do the Arden Chase Subdivision restrictive covenants prohibit a certain size of garage, garage doors or the housing of recreational vehicles (RVs)?

The restrictive Covenants do not restrict the size of any garage except for the mandatory minimum square footage nor do they specify any particular size of garage door. The housing of recreational vehicles (RVs) is not prohibited by the Restrictive Covenants.

4. **<u>The height of the proposed garage door on the Griffin garage is allowed in Arden Chase;</u>**

17. One does not have to delve deeply into the intent of the developer when ascertaining the meaning of the pertinent provisions in the restrictive covenants regarding this issue. The restrictive covenants themselves clearly provide for the housing of RVs in the subdivision. As shown above, Section 6.21 is entitled "*Recreational Vehicles* and Trailers." It also uses the term "motor homes" in the body of the paragraph. No interpretation of this paragraph is necessary beyond reading it in light of its plain, ordinary language.

5. **<u>The materials proposed to be used on the Griffin garage are in conformity with the quality and character of the materials used on other structures in Arden Chase; and</u>**

Jones testified that the modified plans were in compliance with the restrictive covenants. The Court notes that the challenge to this proposed structure comes not from its anticipated exterior appearance but from its size, purpose, detachment and direction it faces.

6. **<u>The garage door may not face any part of Arden Chase road.</u>**

c. How is "open to the roadway in front of the residence" defined?

"Open to the roadway" shall be defined as meaning that a straight line drawn from at least one of the two front corners of the proposed structure intersects Arden Chase Street prior to intersecting a neighboring lot line, Concord Road or the outer boundary of the subdivision.

The **only** element of the garage structure that was not approved by Judge Spouse in his Order was the direction of the proposed garage door. (R. pp. 3-18)

Judge Sprouse's Order allowed the Appellants **two (2) options**:

1. **Turn the entire building structure so that the garage door does not face any part of Arden Chase road;**

   25. The Defendants can bring their proposed garage into compliance by changing its direction so that a straight line from each corner of the wall containing the garage door intersects Concord Road instead of Arden Chase Street.

or

2. **Modify the building plan so that the garage door does not face any part of Arden Chase road. By subsequent "clarification" Judge Sprouse indicated that this option would require re-submission of the plans to the ARB for approval.**

   26. There are no challenges to any other existing structures in the subdivision and it appears that all other existing structures are in compliance as to Paragraph 6.06, in addition to the other provisions in the Restrictive Covenants. In order to aid the parties with an answer to the declaratory judgment portion of this case, future construction in the subdivision can be compliant regarding this provision if a straight line drawn from the front corners of a proposed structure intersect a neighboring lot line, Concord Road, or the outer boundary of the subdivision prior to intersecting Arden Chase Street.

   This ruling is for the express purpose of providing interpretation of the restrictions in dispute so as to guide future board members of the ACC when they evaluate future projects submitted to them for approval. Nothing in this Order shall be construed to exempt any future project from any other restriction or standard set forth in the Restrictive Covenants. The Restrictive Covenants shall remain in full force and effect, subject to the provisions of this Order.

(R. p. 15)

However, based upon the ***obiter dictum*** in Judge Sprouse's later "clarification" ruling, (R. p. 23) the Appellants and their contractor, Jack Jones, determined that the garage door could be made not to face any part of Arden Chase road if the wall containing the garage door was angled slightly so that "<u>if a straight line is drawn from the front corners of a proposed structure intersect a neighboring lot line, Concord Road, or the boundary of the subdivision prior to intersecting Arden Chase street."</u> (language as in the original Order dated March 28, 2017).

The Appellants assert that the detached garage structure on their property, which was completed in late November 2017, complies with the Covenants for Arden Chase. There are no restrictions in the Covenants that disallow or prohibit the angling of a portion of a structure to aid functionality and to add architectural detail. Further, the structure complies with Judge Sprouse's prior Order that <u>*any*</u> detached garage in Arden Chase will be in compliance when a straight line from each corner of the wall containing the garage door does not intersect any part of Arden Chase street. (R. pp. 3-18)

In doing so, Judge Sprouse gave the Appellants the opportunity to either a) turn the entire building and use the original plans, or b) to re-design the building and then re-submit plans to the ACC for approval. The Appellants chose the latter.

The Appellants herein assert that their detached garage is in full compliance with the Covenants and Court's directive, and that there can be no factual dispute that when a straight line is drawn from each corner of the wall containing the garage door of the garage as built the line intersects Concord Road instead of Arden Chase. In support of such

assertions, the Appellants submitted the Affidavit of John "Jack" Jones, contractor, and the signed and sealed Survey of Arden Chase Subdivision, Lot 23, prepared by PLS Solutions, LLC, T. Lloyd Silva, PLS No. 28142, showing that when a straight line is drawn from the front corners of the garage structure (as built) the line intersects Concord Road or the outer boundary of the subdivision and no part of Arden Chase street. The Respondent presented no evidence to the contrary from any opposing experts.

In addition, there are simply no restrictions contained in the Covenants that disallow or prohibit the angling of a portion of a structure to aid functionality and to add architectural detail to the structure. "The historical disfavor of restrictive covenants by the law emanates from the widely held view that society's best interests are advanced by encouraging the free and unrestricted use of land. Hamilton v. CCM, Inc., 274 S.C. 152, 263 S.E.2d 378 (1980). "Restrictive covenants are contractual in nature." Hardy v. Aiken, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006). "The language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it *at the time of execution*." Taylor v. Lindsey, 332 S.C.1, 4, 498 S.E.2d at 864 (1998). "The paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document." *Id.* at 4. "A restriction on the use of property must be created in express terms or by plain and unmistakable implication and all such restrictions are to be strictly construed, *with all doubts resolved in favor of free use of the property*, although the rule of strict construction should not be used to defeat the plain and obvious purpose of the restrictive covenants." Hamilton at 152, 263 S.E.2d 378 (1980).

"The court may not limit a restriction, nor will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms, even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written." Taylor at p.4, S.E.2d 862, 863 (1998). "Restrictive covenants will be enforced unless they are indefinite or contravene public policy." Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987). "An action to enforce restrictive covenants by injunction is in equity." Seabrook Is. Property Owners Ass'n v. Marshland Trust, Inc., 358 S.C. 655, 661, 596 S.E.2d 380, 383 (Ct. App. 2004).

In *Palmetto Dunes*, the South Carolina Court of Appeals held that "a refusal to approve plans for aesthetic reasons will be upheld where the *covenant or appropriate authority* has provided guidelines for enforcement and expressed the purpose of the restrictive covenant." Palmetto Dunes v. Brown, 287 S.C. 1, 336 S.E.2d 15 (1985). "Although… not expressly named and prohibited, a particular use or structure may be forbidden by the covenant's general language without an express designation or label." *See, eg.* Nance v. Waldrop, 259 S.C. 69, 187 S.E.2d 26 (1972).

Appellants assert that the primary allegation in their Complaint is that the ACC wrongfully denied approval of Appellants' revised garage plans that comply with both Judge Sprouse's Order and the Covenants, factual issues exist as to whether the Respondent' decision to deny/reject Appellants' revised garage plans was, and as such the Trial Court's granting of Summary Judgment to the Respondent is in error.

II. Did the Court err in finding that the Appellants did not make a written request for the ACC to reconsider its decision rejecting the Appellants' revised garage plans?

The ACC's denial of the Appellants' **revised plan submissions** is based on the incorrect assertion that the Appellants did not make written request for the ACC to reconsider its decision rejecting the revised garage plans.

Appellants initially submitted revised garage plans to the ACC on May 31, 2017, supplemented their submissions on October 13, 2017, supplemented their submissions on October 26, 2017, and on December 12, 2017 again submitted a revised submittal to the ACC with the intent of curing any alleged deficiencies in the submittals, this time including the following:

1. The revised floor/foundation plan prepared by Tim Strickland Drafting (the foundation is shown on the floor plan);
2. The revised elevation drawings prepared by Tim Strickland Drafting (the materials to be used are specified on the elevation drawings);
3. A detailed landscaping plan by Stepping Stone Landscaping overlaid on the site plan; and
4. A complete site plan prepared by Professional Land Surveying Solutions, LLC.

(R. pp. 336-337, R. pp. 348-355, R. pp. 360-368, and R. pp. 378-385)

The following is a list of all communications that occurred between the Appellants and the ACC regarding the revised garage plans. Each of these were filed as an exhibit with the Trial Court in support of Appellants' Motion for Summary Judgment and in opposition to Respondent's Motion for Summary Judgment:

1. Letter of May 24, 2017 to Appellants from ACC asking the Appellants intentions with regard to building the proposed garage; (R. p. 335)

2. Letter of May 31, 2017 from attorney to ACC indicating it is the intention of the Appellants to build the garage on the existing pad with the front wall angled slightly to make sure the door does not face any part of Arden Chase road including a sample drawing; (R. pp. 336-337)

3. Email from attorneys of June 5, 2017 with attached letter stating position of the HOA and ACC regarding the construction of the Griffin garage and that the concrete pad would have to be completely reconfigured to support any garage in compliance with Judge Sprouse's Order; (R. pp. 338-339)

4. Email of June 5, 2017 from attorney to ACC attorneys in response to the position letter of same date from ACC attorneys advising that the ACC's position is viewed as continued interference with the Appellants' ability to build a garage that is not prohibited by the Covenants, and indicating Appellants' position that the garage can, in fact, be built without completely reconfiguring the concrete pad by making a simple angle adjustment to the walls; (R. p. 340)

5. Email Correspondence of September 8, 2017 asking ACC and HOA to decide whether they prefer the original design and placement of the garage, or the most recent revised design with the slight wall extension (offering to build the garage either way the ACC preferred); (R. p. 394)

6. Email Correspondence of September 13, 2017 again asking for an answer from the ACC and HOA about the preferred design and placement; (R. p. 395)

7. Email Correspondence of September 13, 2017 from attorney stating that the altered plan does not comply with the Judge's Order and the original plan does not comply with the covenants; (R. p. 396)

8. Email Correspondence of September 13, 2017 advising that Appellants will likely begin construction of garage that meet Judge Sprouse's requirements; (R. p. 397)

9. Email Correspondence of September 14, 2017 regarding the two proposed options and the benefits to the homeowners of one plan versus the other; (R. p. 398)

10. Email from attorney attaching copy of Plaintiff's Motion for Clarification of Court Order; (R. pp. 399-401)

11. Email Correspondence of September 26, 2017 advising that Respondent 's Motion for Clarification appears to have been filed in the wrong case; (R. p. 402)

12. Email with attached letter to Judge Sprouse sent on behalf of Appellants October 9, 2017; (R. pp. 403-404)

13. Letter in response from attorney to Judge Sprouse dated October 10, 2017; (R. p. 405)

14. Email to attorneys for ACC of October 13, 2017 submitting a letter and **FIRST** "revised" plans for consideration to ACC pursuant to Judge Sprouse's Order issued same date; (R. pp. 348-355)

15. Order of October 13, 2017 denying Plaintiff's Motion for Temporary Injunction and Clarifying Court's Original Order; (R. pp. 22-24)

16. Email from attorneys of October 16, 2017 containing the decision of the ACC denying Appellants' revised garage plans on basis that a) no landscaping plan was provided as required by 5.05, and b) the assertion that the "small modification/angulation of side walls does not materially change the appearance and/or orientation of the garage, and, as a result the garage door has not moved and its opening still faces Arden Chase street; (R. pp. 356-359)

17. Email of October 17, 2017 to Judge Sprouse advising the Court that, as anticipated, the ACC denied the revised plans submitted, and advising the Court that a second Motion to Reconsider, Alter or Amend had been filed by the Appellants seeking additional clarification; (R. p. 406)

18. Email to Chairman of ACC of October 26, 2017 submitting a letter and a **SECOND** revised plan submission for the Griffin garage for consideration correcting the deficiency in the first submission by adding and areal site plan and a landscape plan; (R. pp. 360-368)

19. Email from attorneys dated October 31, 2017 with letter dated October 30, 2017 from Chairman of the ACC denying Appellants' SECOND revised garage plans on the basis that a) the garage door opening faces Arden Chase street in violation of the Covenants and Judge Sprouse's Order, b) that the landscape plan needs updating to clearly show all existing and proposed hardscaping as well as any shrubbery or trees, and c) the committee needs a complete, accurate and detailed site plan including all criterial listed in 5.05a; (R. pp. 369-371)

20. Email to Dr. Bryant, Chairman of ACC, of November 1, 2017 responding to the October 30, 2017 denial, advising that attorney cannot speak directly to the Chairman as

the ACC is represented by counsel, and that advising that the Appellants would submit the requested updated landscaping plan and site plan, but that the issue of whether the door as shown on the revised plans faces Arden Chase street needs to be resolved first; (R. p. 407)

21. Letter from ACC to HOA dated December 1, 2017 informing the HOA Board that the Appellants have constructed a garage without the approval of the ACC; (R. p. 408)

22. Email from attorneys dated December 6, 2017 with copy of letter from HOA Board to Appellants about constructing a non-approved garage and HOA's right of abatement; (R. pp. 409-412)

23. Email to Chairman of ACC of December 12, 2017 submitting a letter and a **THIRD** revised plan submission for the Griffin garage seeking approval of the constructed garage and resolving all prior alleged deficiencies by including a) the revised floor/foundation plan by Tim Strickland, b) the revised elevation drawings prepared by Tim Strickland, c) a detailed landscaping plan by Stepping Stone Landscaping overlaid on the site plan, and a complete site plan prepared by Professional Land Surveying Solutions, LLC; (R. pp. 378-385)

24. Affidavit of Benjamin Beck, Land Surveyor, certifying that "when a straight line is drawn from each corner of the wall containing the garage door on the Griffin garage as constructed on Lot 23, the lines do not intersect any portion of Aden Chase road, and such lines intersect Concord Road only"; (R. pp. 409-412)

25. Affidavit of John "Jack" Jones, Residential Builder No. 3276, stating his intent regarding the Restrictions he placed on Arden Chase subdivision as the developer, his opinion that the Griffin garage as constructed does not violate any of the Covenants, that the garage was constructed in compliance with Judge Sprouse's Order, that when straight lines are drawn from each corner of the wall containing the garage door no portion of those lines intersects any portion of Arden Chase road, and that other than the minor change made to the angle of the front wall which added approximately 50 square feet the garage was substantially the same as the garage plan that was submitted to Judge Sprouse; (R. pp. 413-416)

26. Affidavit of George Stephen Crain, former ACC member, stating that in his experience and during his tenure on the ACC for Arden Chase, the ACC has never required any other owner to provide such detailed drawings, site plans, landscape plans, or the like, as the Appellants were required to provide, and that it was obvious that the newly elected ACC, made up of all owners that opposed the construction of the garage, would reject the plans no matter what was submitted; (R. pp. 417-419)

27. Section of the Original Garage plans that were submitted to the Arden Chase ACC in June 2016 that were signed off as "Approved" by 2 of the 3 then acting members of the ACC (these Approved plans were then challenged by the first lawsuit filed in this matter Dean and Price v. Griffin, et al., C/A No. 2016-CP-04-2028 resulting in Judge Sprouse's Order of 3-28-17); (R. p. 332)

28. Griffin Garage plans as revised by Jack Jones and submitted to Judge Sprouse in the original lawsuit; (R. pp. 333-334)

29. Nine (9) Color Photographs of the completed Griffin garage as constructed on Lot 23; (R. pp. 423-431); and

30. The physical site, 100 Arden Chase, Lot 23, where the garage is located. (retained in the trial court)

At every instance of re-submission (and the express purpose of such additional submissions) the Appellants asked (whether explicitly or impliedly) that the ACC reconsider its denial of the Appellants' revised garage plans. Each time, the ACC and/or the HOA replied that the only garage the Appellants can build that would be approved must be rectangular and must be constructed with the wall containing the garage door facing Concord Road.

Appellants assert that factual issues exist as to whether the Appellants made (repeated) written requests to the ACC regarding reconsideration of its decision to deny/reject Appellants' revised garage plans, and as such the Trial Court's granting of Summary Judgment to the Respondent is in error.

III. Did the Court err in ordering, prior to the complete adjudication of Appellants' claims, that the Respondent is entitled to require the demolition of the garage and may exercise the Right of Abatement if Appellants do not tear down the garage?

The Trial Court's granting of Respondent's Motion for Summary Judgment solely on the basis that there is no disagreement that the Appellants did not obtain approval from the ACC before building their detached garage without consideration of the allegations contained in Appellants' Complaint that Respondent wrongfully, arbitrarily, speciously, maliciously and in bad faith denied approval of the plan submissions is improper.

Despite Attorney McClain's representations to the Court wherein he asserted that the Appellants said, "we are going to build it anyway," and that the Appellants did not seek approval of the garage or ask for reconsideration of the denial, the Appellants did, in fact, submit **<u>THREE</u>** separate requests for approval of the modified garage. (R. p. 289. l. 17- p. 297, l. 7) According to a former ACC member, no other owner has ever been required to submit the detailed plans and drawings that were required of the Appellants. (R. pp. 417-419)

While there is no disagreement that the Appellants did not get approval from the ACC to build the detached garage, there is ample evidence to support the Appellants' claims (when viewed in a light most favorable to the Appellants) that the denial and refusal to approve the plans by the ACC was arbitrary, specious, malicious, and in bad faith.

Finally, in its Order the Court did not specifically rule on Plaintiffs' Motion for Summary Judgment. Assuming, arguendo, that the Court intended to deny Plaintiffs' Motion, such denial would serve to indicate that the Court believes there are questions of

fact and that the issues asserted in Plaintiffs' Complaint must be tried. The denial of a Motion for Summary Judgment is not a complete adjudication of the case.

If, after a trial of the case on the merits, it is ultimately determined that the Plaintiffs' revised garage plans, as submitted to the ACC (with all subsequent additional submissions), should have been approved by the ACC, and that the revised garage plans otherwise comply with Judge Sprouse's Order and the Covenants, but the Respondent is allowed to demolish the Appellants' garage prior to such final adjudication, Appellants would be irreparably harmed in that the Respondent Home Owners' Association does not possess assets sufficient to pay to rebuild Appellants' garage (R. p. 277, l. 10 – p. 279, l. 21).

Based on the foregoing, the Appellants assert that the Trial Court's granting of Summary Judgment in Respondent's favor, and more particularly the Trial Court's ruling in the portion of its Order that authorizes Respondent to exercise the Right of Abatement prior to complete adjudication of the Appellants' claims in this matter is in error.

IV. Did the Court err in including language in the Order Denying Appellants' Motion for Reconsideration that modified and expanded the ruling on the Covenants issued by Judge Sprouse?

In its Order[2] denying Appellants' Motion for Reconsideration, the Trial Court included the following language:

> The Plaintiffs have relied heavily on the language in Judge Spouse's original order which stated: "In order to aid the parties with an answer to the declaratory judgment portion of the case, future construction in the subdivision can be compliant regarding this provision if a straight line drawn from the front comers of a proposed structure intersects a

[2] This Order was drafted and prepared by Respondent's attorney, J. Franklin McClain.

> neighboring lot line, Concord Road, or the outer boundary of the subdivision prior to intersecting Arden Chase Street."
>
> However, the final site plan submitted to the ACC on December 12, 2017 and introduced as an exhibit shows that the straight line from one of the sides containing the garage door *intersects Arden Chase Road Right-of-Way* prior to intersecting a <u>neighboring lot line, Concord Road, of the outer boundary of the subdivision.</u>
>
> Therefore, the revised plan clearly does not comply with Judge Sprouse's Order and does not comply with the covenants.

Nowhere heretofore had the lower courts held or made any finding regarding the intersection of a straight line from the sides containing the garage door with the *road right-of-way* as opposed to the paved road itself. The Covenants make no mention of the road-right-of way, and the language contained in the Court's March 28, 2017 Order was intended to define the term "open to the roadway."

The use of and inclusion of wording in an Order denying Appellants' Motion to Reconsider to expand and further restrict the interpretation of the Covenants detrimentally to Appellants is merely one example of the gross misuse of the legal system that has been perpetrated on the Appellants in this case. The lower court could simply have said that the Appellants' Motion was denied.

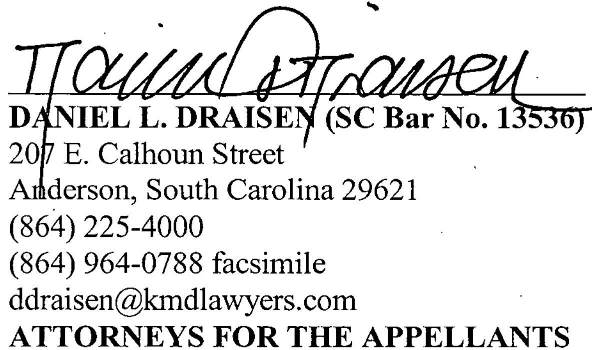
Instead, what started out as a fairly straight-forward legal issue concerning the interpretation of subdivision Covenants has now become a prime example for why the average citizen distrusts the legal system. There was absolutely zero basis for the lower court to expand the definition of "open to the roadway" to include the road right-of-way and such language should be stricken from the Order.

CONCLUSION

The lower court's ruling in this matter is based upon only a partial analysis of the facts and issues presented to the court (in three separate lawsuits). Appellants assert that triable issues of fact exist, and that when considering the evidence and all reasonable inferences for summary judgment purposes the lower court was required to view same in the light most favorable to the non-moving party (Appellants). The granting of summary judgment would improperly deprive the Appellants of a trial on disputed factual issues. Based upon the foregoing, and for the reasons stated herein above, this Court should reverse the lower court and remand this case for a trial on the merits.

Respectfully submitted,

KRAUSE, MOORHEAD AND DRAISEN, P.A.



DANIEL L. DRAISEN (SC Bar No. 13536)
207 E. Calhoun Street
Anderson, South Carolina 29621
(864) 225-4000
(864) 964-0788 facsimile
ddraisen@kmdlawyers.com
ATTORNEYS FOR THE APPELLANTS

May 21, 2019
Anderson, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

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SC Court of Appeals

C/A No. 2017-CP-04-2632
Appellate Case No. 2018-002028

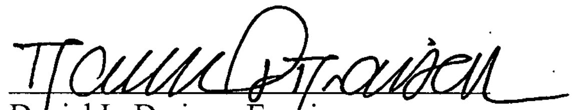
EUGENE L. GRIFFIN, JR. and BETH KING GRIFFIN..................Appellants,

v.

ARDEN CHASE HOMEOWNERS' ASSOCIATION, INC...............Respondent.

CERTIFICATE OF COUNSEL

I hereby certify, pursuant to SCACR Rule 211(b), that the Final Brief of Appellant is identical to the brief previously served under SCACR Rule 208 except for revisions to indicate where materials appear in the Record on Appeal and the correction of typographical errors and misspellings.



Daniel L. Draisen, Esquire
SC Bar No. 13536
Krause, Moorhead & Draisen, P.A.
207 E. Calhoun Street
Anderson, South Carolina 29621
(864) 225-4000
Attorneys for Appellants