THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Charles B. Simmons, Jr., Master in Equity

Case No. 2017-002557

Deborah L. Boies, Respondent,

v.

Jacqueline J. Lanier, Appellant.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Respondent filed Summons and Complaint to enforce certain Covenants and Restrictions (1.4 and 2.8) pertaining to a fence on Appellant's property and Motion for Temporary Restraining Order and Preliminary Injunction on November 30, 2016. On December 16, 2016 the parties entered into a Consent order in which Respondent withdrew her motions and Appellant agreed to refrain from erecting a new fence until final disposition of this action. Appellant filed an Answer to the Summons and Complaint on January 13, 2017. Appellant then filed a Motion to Dismiss on March 14, 2017 which was denied on April 20, 2017. The case was referred by consent to the Master on may 1, 2017. Appellant filed a motion for Summary Judgment on July 13, 2017 which was denied on August 22, 2017. A trial was held on October 4, 2017. The Master issued an Order on October 19, 2017. Appellant's Motion to Reconsider was filed October 30, 2017 and was denied by Order filed November 21, 2017. This appeal followed.

FACTS

Appellant, Jacqueline J. Lanier, a member of the South Carolina Bar whose practice consists primarily of handling residential real estate transactions purchased approximately twenty-two (22) acres near Landrum in Greenville County from a one hundred and twenty (120) acre tract owned by Respondent in two (2) transactions in 2015. At the time, a white vinyl fence conveyed with the property sold to Appellant. In the area of the property there are white and dark colored fences made of vinyl and wood, primarily in the horse pasture fashion design with posts in the ground and two to three (2-3) slats. About half of the fences in the surrounding area are white and about half are darker in color. At the time of the sales, a set of Covenants and Restrictions was on file for all parcels subdivided and sold from the Respondent's tract. Appellant's two (2) deeds had as exhibit attachments additional "Restrictions" and were filed with Appellant's deeds. These additional "Restrictions" were not filed with any other of the subdivided tracts sold from Respondent's tract and were not otherwise filed with the Greenville County Register of Deeds Office except as with Appellant's deeds.

In 2017, Appellant decided to replace the existing white vinyl fence on her property with another fence in the same location and with the same design differing only in material (wood) and color (dark) but otherwise being the same size, style, and location. Respondent got word from a vigilant friend that Appellant intended to erect a dark colored wood fence and the underlying action ensued.

Respondent contends that Appellant violated the two (2) following provisions of the Covenants and Restrictions:

> **1.4 Walls, Fences and Hedges. Any fence placed on any tract or parcel shall be comparable in style and constructed material to a fence presently located on the boundary of the Real Property (white vinyl fencing). Exceptions may be granted by Grantor.**

2.8. Grantor Approval of Plans. No landscaping, building, fence, wall or other structure shall be commenced, erected, maintained, and all subsequent reconstruction, modifications, additions or alterations upon any Lot, nor shall any exterior addition to or change or alteration therein be made until the plans and specifications showing the nature, kind, shape, height, materials, and location of the same shall have been submitted to and approved in writing as to harmony of external design and location in relation to surrounding structures and topography by the Grantor. The Grantor shall have the right to refuse to approve any such building plans, specifications, site plants, landscaping, or grading plans which are not suitable or desirable, in the Grantor's sole opinion, for any reason, including pure aesthetic reasons.

Section 1.4 appears in the set of filed Covenants and Restrictions which existed prior to Appellant's property purchase and Section 2.8 appears in the set of additional "Restrictions" which at the time of trial appeared only on the record attached to and pertaining to Appellant's property.

APPLICABLE LAW

"Restrictive covenants, sometimes referred to as 'real covenants,' are agreements 'to do, or refrain from doing, certain things with respect to real property.'" *Kinard v. Richardson*, 407 S.C. 247, 754 S.E.2d 888, (Ct. App. 2014). "Restrictive covenants are contractual in nature, and thus, the language used in the restrictive covenant is to be construed according to its plain and ordinary meaning." *Penny Creek Assocs., LLC v. Fenwick Tarragon Apartments, LLC*, 375 S.C. 267, 651S.E.2d 617, 620 (Ct. App. 2007). Restrictions on the use of property are historically disfavored. *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 270,363 S.E.2d 891, 893 (1987). "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." *Rhodes v. Palmetto Pathway Homes, Inc.*, 303 S.C. 308, 311, 400 S.E.2d 484, 485 (1991). "Courts shall enforce such covenants unless they are indefinite or contravene public policy." *Sea Pines Plantation Co.*, 294 S.C. at 270, 363 S.E.2d at 894.

STANDARD OF REVIEW

An action seeking an injunction to enforce restrictive covenants sounds in equity. *Santoro v. Schulthess,* 384 S.C. 250, 681 S.E.2d 897, (Ct.App.2009). *S.C. Dep't of Natural Res. v. Town of McClellanville,* 345 S.C. 617, 550 S.E.2d 299, (2001). In an equitable action, this Court may make findings according to its own view of the preponderance of the evidence.

ARGUMENTS

I. THE TRIAL COURT ERRED IN FINDING THAT THE LANGUAGE IN 1.4 WAS NOT AMBIGUOUS AS IT RELATED TO FENCING WHICH COULD BE PLACED ON THE PROPERTY

> **1.4 Walls, Fences and Hedges. Any fence placed on any tract or parcel shall be comparable in style and constructed material to a fence presently located on the boundary of the Real Property (white vinyl fencing). Exceptions may be granted by Grantor.**

The plain and ordinary meanings of the words in Section 1.4 of the Covenants and Restrictions clearly state that fences to be placed on any subject land shall be "comparable" in style and constructed material. The word "comparable" in that sentence differs from "exactly like", which thus allows for some deviation. Respondent agrees but states that despite the word "comparable", her interpretation is that the fencing must always be exactly white vinyl fencing which renders the word "comparable" meaningless. (R. p. 120, lines 19-23). The plain English reading of 1.4 show that the word "comparable" relates to the words "a fence presently located on the boundary..." later in the sentence. The words "white vinyl fencing" in parentheses clearly identifies the "a fence" by its then current description (why else would it be in parentheses?).

Respondent's argument that this sentence in its entirety can only be read to require white vinyl fencing to be on the property is manifestly without merit, when if that was the desire, Respondent could have simply written that "any fence placed on any tract shall be white vinyl fencing exactly like the one which is on the property" or could have simply required that the existing fencing had to remain as it existed, which she agrees she could have done (R p. 117, line 15 - p. 118, line 8). Since Respondent did not choose to so restrict new fences, she obviously intended for some deviations from "white vinyl fencing" to be permissible.

The clear and plain language of the sentence establishes that new fences must be similar in style and material to the existing fence, but that they can be different as long as they are

comparable (so as to preclude such fences and privacy, picket, cyclone, chicken wire, etc.); and moreover by its existence the language suggests that the existing fence may be replaced with one comparable in style and material to the existing fence (which arguably leaves only color as the acceptable variable).

Appellant upon reading 1.4 had a reasonable expectation that she could have a fence on her property which while it had to have a design similar to the white vinyl fence which existed on the property, could differ in appearance as long as it was comparable or similar in style (posts and slats) and material (wood and vinyl are indistinguishable from a distance). Respondent's strained interpretation of 1.4 that "comparable in style and constructed material" to a white vinyl fence actually means "it has to be a white vinyl fence" is unreasonable and confuses the buyer with multiple potential meanings.

"[A] restriction on the use of the 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 the free use of property." *Hardy v. Aiken*, 369 S.C. 160, 631 S.E.2d 539 (2006). (alteration in original). "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." *Id.* A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation." *DNR v. Town of McClellanville*, 345 S.C. 617, 550 S.E.2d 299 (S.C., 2001). When such an ambiguity exists, all doubts are to be "resolved in favor of free use of the property." *Hardy v. Aiken*, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006). Thus, "a restriction on the use of the property must be created in express terms or by plain and *unmistakable* implication." Id. (emphasis added) (quoting *Hamilton v. CCM, Inc.*, 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980)).

Particularly in light of strict construction with all doubts resolved in favor of the free use of the property, at the very least more than one reasonable inference regarding fence requirements can be drawn from 1.4 which renders it ambiguous as a matter of law. "Restrictions on the use of property will 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." *Hardy v. Aiken*, 369 S.C. 160, 631 S.E.2d 539 (2006).

The Trial Court erred in failing to find that the language of 1.4 is ambiguous and as to what color and material fence may be erected on Appellant's property this Court should reverse.

II. THE TRIAL COURT ERRED IN FAILING TO FIND THAT 2.8 WAS UNENFORCEABLE BECAUSE IT IS TOO BROAD, FAILS TO SPECIFY COLOR OF STRUCTURES, AND VIOLATES PUBLIC POLICY BY RESERVING IN A SINGLE GRANTOR THE ABILITY TO APPROVE OR DISAPPROVE OF ANY PROPOSED CHANGES FOR "ANY REASON"

> **2.8. Grantor Approval of Plans. No landscaping, building, fence, wall or other structure shall be commenced, erected, maintained, and all subsequent reconstruction, modifications, additions or alterations upon any Lot, nor shall any exterior addition to or change or alteration therein be made until the plans and specifications showing the nature, kind, shape, height, materials, and location of the same shall have been submitted to and approved in writing as to harmony of external design and location in relation to surrounding structures and topography by the Grantor. The Grantor shall have the right to refuse to approve any such building plans, specifications, site plants, landscaping, or grading plans which are not suitable or desirable, in the Grantor's sole opinion, for any reason, including pure aesthetic reasons.**

Interestingly, of all of the features and descriptors of proposed improvements required to be submitted for approval, "color" is not one of them. A reasonable reading of 2.8 and the curious absence of the word "color" as a descriptor leads the potential fence builder to

reasonably conclude that the color of the fence is of no concern to the Grantor because literally every other descriptor of potential construction is listed except color. This is consistent with the language of 1.4 which likewise does not address color except as to identify the existing fence.

Moreover, Respondent's reservation of the right to deny any application for improvements on the affected land "for any reason" is grossly indefinite and overbroad, and contravenes public policy because it vests in a single person, a former owner of the land, the sole and absolute right to decide how other owners may use their own property with no available means of review other than the courts of State of South Carolina. Our Supreme Court has held that to be valid and enforceable a restrictive covenant must, among other things, "not be too indefinite." *Vickery v. Powell*, 267 S.C. 23, 28, 225 S.E.2d 856, 858 (1976). To be able to make a decision for "any reason" is the very essence of being "too indefinite" as there is no definiteness at all and absolutely no predictability in what may or may not be approved or denied. Courts shall enforce such covenants unless they are indefinite or contravene public policy." *Sea Pines Plantation Co.*, 294 S.C. at 270, 363 S.E.2d at 894.

The plain English definition of "any reason" necessarily includes "no reason" since "no" would be included in the all-inclusive word "any" (if one can do something for any reason, one can also do that thing for "no" reason). To be able to deny reasonable requests for additions of and changes to structures for any reason or no reason at all includes the ability to deny such requests for improper reasons such as would violate the law or public policy. The fact that the subject Covenants and Restrictions simply give Respondent that ability, whether she uses it or not, to act arbitrarily and perhaps improperly, is what renders the 2.8 of the Covenants and Restrictions unenforceable, not necessarily what she does with that power. The examination is on

the language of the Covenants and Restrictions, not the manner in which Plaintiff contends that she uses it.

III. THE TRIAL COURT ERRED IN FINDING THAT SUPPLEMENTAL COVENANTS AND RESTRICTIONS FILED ONLY IN APPELLANT'S TITLE CHAIN AND NOT IN THE TITLE CHAINS OF OTHER GRANTEES OF THE RESPONDENT WERE BINDING ON THE OTHER GRANTEES

Respondent testified that the supplemental Covenants and Restrictions which contain "2.8 Grantor Approval of Plans" were on file with the Register of Deeds as to all of Respondent's grantees (six owners), (R. p. 105, line 6 – p. 109 line 19) but she was unable to produce a filed set and in fact Appellant testified that she had searched the title for each of the Respondent's grantees and that Appellant was the only parcel to which the 2.8 language applied (R. p. 173, line 10 – p. 174, line 11). In fact, while the set of Covenants and Restrictions that included 1.4 appear in the deed chains of all Respondent's grantees (R. p. 232 - p. 239), the supplemental set which included 2.8 appeared only in Appellant's deed chain such that future grantees of the Respondent's grantees (other than Appellant) would not be bound by 2.8. Recognizing that it would be inherently unfair and inequitable, Respondent agreed that if 2.8 did not apply to all of her grantees, then it should not apply to any of them:

Q. Ma'am, you would agree, wouldn't you, that in a situation where you have numerous homeowners governed by covenants and restrictions that in fairness and equity that the restrictions should apply to all property owners or to none of them, wouldn't you agree with that?

A. I would agree.

(R. p. 112, line 22 – p. 113, line 2)

The uncontroverted testimony at trial, and in fact the public record, show that the 2.8 set of Covenants and Restrictions had not been filed and as such would not have been binding on the other grantees and their future grantees but were binding on Appellant's property only.

Even Respondent agrees that such a disparity is unfair and the Trial Court should have refused to apply 2.8 to Appellant's property.

IV. THE TRIAL COURT ERRED IN ORDERING APPELLANT TO REPLACE THE REMOVED FENCE IN LIGHT OF RESPONDENT'S TESTIMONY AND EMAIL TO APPELLANT

Even with a finding that the Covenants and Restrictions would prevent Appellant from erecting a dark wood fence on her own property, it was error for the Trial Court to order Appellant to replace the fence which had been taken down. Respondent should be estopped from requiring replacement of the fence because of specific statements made by Respondent to Appellant which Appellant reasonably relied on.

Appellant testified that during her first contact with Respondent relative to the subject fence, a telephone call, Appellant testified that Respondent specifically told her "I don't know why you are taking that fence down. I guess you can since it's your property, but I don't understand why you're doing it" (R. p. 176, lines 3-11). At that point, the fence was still in the process of being taken down. Respondent testified that she did not recall the content of the phone call, but importantly, she did not deny that she told Appellant that Appellant "could take down the fence". Appellant's testimony, uncontroverted, is corroborated by an email sent by Respondent to Appellant on November 28, 2016, with the posts still in the ground (R. p. 276) which makes no mention at all of any prohibition of taking down the fence:

"Hey, Jacqui, it's been brought to my attention that you are removing the white vinyl fencing on the property that you purchased from me. According to the covenants you are only permitted to reinstall like fencing which means white vinyl. At this point I have no idea why you are removing it, but felt it important to let you know that any replacement must be the same. If you have any questions, feel free to call me."

(R. p. 276)

So here, in the midst of the fence being taken down, Respondent, the sole person on the planet who had the ability to tell Appellant to stop taking down the fence or that taking down the fence violated the Covenants and Restrictions, Respondent, with the perfect opportunity to do so if she wished, did absolutely nothing of the kind and rather than engage Appellant on that issue expressed only puzzlement as to why the fence was being taken down and was not in the least upset about the fence being taken down and not in the least interested in trying to stop it or admonish Appellant for taking it down. Instead, Respondent was solely concerned that Appellant understood that if she decided to put a fence back up, that it had to be white vinyl. Whether the Covenants and Restrictions prohibited taking the fence down or not, Respondent, as the sole arbiter of allowing or disallowing the fence being taken down and with the opportunity to express denial of the right to remove the fence, tacitly allowed it or at least acquiesced in the removal. Respondent can not later change her mind after detrimental reliance by the Appellant and should be estopped from requiring replacement of the fence now.

Here, the Trial Court erred in failing to consider the equities of requiring the replacement of the fence even after a finding that removal may have violated the Covenants and Restrictions. Neither Order reflects and such independent consideration as required. "[U]pon a finding that a restrictive covenant has been violated, a court may not enforce the restrictive covenant as a matter of law. Rather, the court must consider equitable doctrines asserted by a party when deciding whether to enforce the covenant." *Buffington v. T.O.E. Enters.,* 383 S.C. 388, 680 S.E.2d 289, (2009).

This Court, if it does not reverse the prohibition against erecting a dark wood fence, should at least in fairness reverse the requirement to rebuild the white vinyl fence.

V. CONCLUSION

The pertinent Covenants and Restrictions in this matter ambiguous as a matter of law and are so vague, overbroad, and indefinite that they violate public policy and are not enforceable. This Court should find that Section 1.4 of the Covenants and Restrictions is void as being ambiguous, should declare Section 2.8 of the Covenants and Restrictions void as being so vague, overbroad, and indefinite that they violate public policy, and should reverse the trial Court and enter Judgment in favor of Appellant.

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CERTIFICATION OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211 (b) SCACR.

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