THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY

Court of Common Pleas

Charles B. Simmons, Master in Equity

Appellate Case No. 2017-002557

Deborah L. Boies, ... Respondent,

v.

Jacqueline J. Lanier, ... Appellant.

FINAL BRIEF OF RESPONDENT

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Table of Contents

Table of Authorities

Cases

STATEMENT OF THE CASE

This is a civil action to enforce real estate covenants. The Circuit Court held a nonjury trial on October 4, 2017. At the beginning of the trial, the parties agreed with the Judge's summary of the issues in the case: whether Sections 1.4 and 2.8 of the Covenants "are enforceable or whether they are ambiguous or whether they are so outside public policy as to not be enforceable" (R. p. 74, lines 10-20).

The Circuit Court ruled for the Plaintiff, Respondent Deborah line Boies (R. pp. 10-16). Defendant, Appellant Jacqueline J. Lanier moved to alter or amend, and the Court denied the motion (R. pp. 17-21).

STATEMENT OF FACTS

On two occasions, Boies sold Lanier real estate in what is commonly known as "horse country" near Landrum in Greenville County: first in February, 2015, and then again in 2016. On each occasion, the deed conveying title to the real estate contained an attachment, Exhibit A, which was a part of the deed, and constituted the Covenants applicable to the real estate. The Covenants require, among other things, the following:

> 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.
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> * * *
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> 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 **purely aesthetic reasons**.

(R. pp. 31-33) (emphasis added). Boies is the Grantor listed in the Covenants.

Boies owned 122 acres in horse country near Landrum South Carolina. All around the 122 acres, she and her husband had installed two miles of white vinyl fencing, which was premium quality and very expensive (R. p. 85, 16, lines 1-7; R. p. 137, line 23 – R. p. 138, line 11). The white vinyl fencing also encompassed paddocks and pastures inside the property (R. p. 75, line 17 – R. p. 76, line 13; R. p. 38, lines 22-24). Boies decided to subdivide the property and create Covenants that would apply to the whole 122 acres (R. p. 144, lines 14-25). Boies issued two sets of Covenants, first in the early 2000's, and the second set more recently (R. p. 77, lines 1-8). Both sets of Covenants applied to the whole 122 acres (R. p. 78, lines 2-14). The first set of Covenants was on file in the Register of Deeds Office (R. p. 232).

Boies sold Lanier one parcel in 2015 and the other in 2016. The property was surrounded by the white vinyl fencing (R. p. 79, lines 3-11). Prior to each purchase, Boies informed Lanier of the existence and contents of the updated Covenants. Lanier bought the property anyway (R. p. 133, lines 7-17; R. p. 169, lines 18-21). The second set of Covenants were attached to both deeds when Boies sold the property to Lanier (R. p. 74, lines 2-9; R. p. 80, lines 2-14; R. p. 81, lines 20 – R. p. 82, line 4; R. pp. 205-209; R. pp. 248-253).

Lanier is a real estate lawyer, and she drafted the deed for the first transfer of property to Lanier (R. p. 80, line 12 – R. p. 81, line 1; R. p. 168, lines 10-22; R. p. 170, lines 16-22).

Lanier testified that she read the Covenants before she bought the property (R. p. 188, lines 17-24). Lanier admitted that the Covenants were a part of her deed on her first purchase, and when she purchased again (R. p. 189, lines 8-22).

Lanier admitted that pursuant to Section 2.8 of the Covenants, she had submitted plans to Boies for a house and for a garage, and the plans were approved (R. p. 191, line 4 – R. p. 192, line 16).

Boies testified that in applying the Covenants to a request for a structural change or alteration, she considers the appearance related to the request.

> We want to keep our area looking compatible and aesthetically pleasing. We've kind of upgraded the area and we want to keep it that way. It's not overly confining or overly restrictive. We just want to maintain a certain look and appearance. . . . The house plans can be different. But if they're very pleasing and they fit well with the property, then there's no question, they usually – they're approved.

(R. p. 83, lines 10- 17).

Lanier admitted that the Covenants give Boies, as the Grantor "a right to make purely aesthetic judgments about plans that are submitted to her for approval" (R. p. 195, lines 4-7). Lanier also admitted that the Covenants give Boies the right "to make decisions about whether site plans and landscaping are suitable or desirable" (R. p. 195, lines 12-15).

After buying the property, in late November or early December 2016, Lanier tore down white vinyl fencing on her property, without making a prior request to tear the fencing down and without receiving permission to tear the fencing down (R. p. 84, lines 2-10; R. p. 90, lines 6-12). Lanier admitted that she did not request Boies's consent before tearing down the fence (R. p. 192, line 17 – R. p. 193, line 5). Lanier admitted that tearing out the fence is a modification or alteration under Section 2.8 of the Covenants. (R. p. 193, lines 12-20).

Lanier admitted that prior to her tearing out the fence, a white vinyl fence stood on the left side of the driveway and on the right side of the driveway. She also admitted that having the white vinyl fencing on both sides of the stone entrance created a balance, which was not there after she removed the fencing (R. p. 193, line 21 – R. p. 194, line 18). Lanier testified that she intended to replace the white vinyl fencing with dark wooden fencing (R. p. 175, lines 3-19).

Boies testified that the Covenants require white vinyl fencing, and that dark wooden fencing would not be in keeping with the Covenants (R. p. 84, lines 11-16). Boies testified:

> There's a large difference between white vinyl fencing and dark wooden fencing. The composite material is different. The look is obviously different. The maintenance is much more difficult with wood fencing than it is with vinyl fencing. And vinyl fencing is much more expensive than wood fencing. And it needs to be kept the way that it was originally designed. And that's with the entire perimeter surrounded in white vinyl fencing.

(R. p. 84, lines 18-25).

On the day Lanier was removing the fencing, Boies had a conversation with Lanier about the removal of the fence. Lanier told Boies that she disagreed with Boies's interpretation of the Covenants regarding the requirement of white vinyl fencing. (R. 90, line 19 – R. p. 91, line 5). Lanier told Boies that she intended to install dark wood fencing, because she did not like the white vinyl (R. p. 91, lines 9-14). Lanier did not request permission to install dark wood fencing or to tear out the white vinyl fencing (R. p. 91, lines 15-20).

Boies testified that the white vinyl fencing added value to the whole 122 acres, including that owned by Boies, by Lanier, and by the other property owners within the 122 acres (R. p. 91, line 25 – R. p. 92, line 9). Boies testified that she did not find that Lanier's tearing out of the white vinyl fencing to be suitable or desirable. She testified further, "It

was changing the character of the entire landscape. And also, I considered it to be in violation of the Covenants and the agreed upon deed" (R. p. 132, lines 9-16). Boies testified that the replacement fencing could be white vinyl fencing from a different manufacturer, as long as it was of a similar style, if not the exact style (R. p. 92, line 18 – R. p. 93, line 6).

Boies brought this action to enforce the Covenants and for injunctive relief to prevent the erection of a dark wooden fence, and to require the re-erection of the white vinyl fencing that Lanier tore down (R. p. 92, lines 10-17).

The Court ruled, "[I]t is clear that the identical covenants apply to all landowners" (R. p. 11, par. 3). The Court further ruled,

> Prior to the purchases of real estate, the Defendant had seen and was aware of the approximately 2 miles of white vinyl fencing around and through the 122 acres of real estate subject to the covenants. The white vinyl fencing had been installed by Plaintiff around and between the six (6) tracts as part of the establishment of the 122 acre tract. Plaintiff testified this was done to ensure an aesthetically pleasing and consistent fencing around and between the tracts within the larger 122 acre tract.

(R. p. 11, par. 4).

The Court also ruled,

> After carefully reviewing the record and the covenants, the Court finds that removing the white vinyl fencing is a "modification" or "alteration" under paragraph 2.8 of the Covenants, and that the Covenants required the Defendant to submit the plans and specifications to the Grantor and obtain written permission of the Grantor prior to making this "modification" or "alteration." Defendant failed to do either.

(R. p. 12, par. 7).

The Court further found that dark wooden fencing is not "comparable in style and constructed material to a fence presently located on the boundary of the Real Property (white vinyl fencing)" (R. p. 12, par. 8).

The Court ruled that "the Covenants give the Grantor [Boies] 'the right to refuse . . . plans which are not suitable or desirable, . . . for any reason, including purely aesthetic reasons.' Under the rationale of *Palmetto Dunes* [*Resort v. Brown*, 287 S.C. 1, 336 S.E.2d 15 (Ct. App. 1985)], this standard is valid and enforceable" (R. p. 14, par. 14).

Finally, the Court ordered Lanier to reinstall white vinyl fencing where she had torn it out, and denied Lanier's Motion to Alter or Amend the Judgment. Lanier appeals.

ARGUMENT

South Carolina courts have explained the legal principles that govern Covenants.

> "Restrictive covenants are contractual in nature." *Hardy v. Aiken,* 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006). An action to enforce restrictive covenants by means of injunctive relief, however, is an action in equity. *Cedar Cove Homeowners Ass'n. v. DiPietro,* 368 S.C. 254, 258, 628 S.E.2d 284, 286 (Ct.App.2006). In an equitable action, we may find the facts in accordance with our own view of the evidence. *Id.* "While this standard permits a broad scope of review, **an appellate court will not disregard the findings of the [circuit] court, which saw and heard the witnesses and was in a better position to evaluate their credibility**." *Buffington v. T.O.E. Enters.,* 383 S.C. 388, 391, 680 S.E.2d 289, 290 (2009).
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> "[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,* 369 S.C. at 166, 631 S.E.2d at 542 (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.* "[T]he paramount rule of construction is to ascertain and **give effect to the intent of the parties as determined from the whole document**." *Taylor v. Lindsey,* 332 S.C. 1, 4, 498 S.E.2d 862, 863–64 (1998) (internal quotation marks and citation omitted). "When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract's force and effect...." *Moser v. Gosnell,* 334 S.C. 425, 430, 513 S.E.2d 123, 125 (Ct.App.1999) (citation omitted). To that end, when the language creating restrictions on the use of property is unambiguous, **the restrictions will be enforced according to their plain and obvious meaning**. *Shipyard Prop. Owners' Ass'n. v. Mangiaracina,* 307 S.C. 299, 308, 414 S.E.2d 795, 801 (Ct.App.1992).

Hanold v. Watson's Orchard Property Owners Ass'n., Inc., 412 S.C. 387, 395-97, 772 S.E.2d 528, 533 (Ct. App. 2015) (emphasis added), *aff'd.* 419 S.C. 162, 797 S.E.2d 47 (2017).

The Supreme Court has also ruled:

> **The rule of strict construction governing restrictive covenants does not preclude their enforcement**. A restrictive covenant will be enforced if the covenant expresses the party's intent or purpose, and this rule will not be used to defeat the clear express language of the covenant. *Palmetto Dunes*

> *v. Brown,* 287 S.C. 1, 336 S.E.2d 15 (1985); *Hamilton v. CCM, Inc., supra. See generally, Vickery v. Powell,* 267 S.C. 23, 225 S.E.2d 856 (1976); *Hoffman v. Cohen,* 262 S.C. 71, 202 S.E.2d 363 (1974). This restrictive covenant is a **voluntary contract** between the parties. **Courts shall enforce such covenants unless they are indefinite or contravene public policy**. *Vickery v. Powell, supra.*

Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987) (emphasis added).

I. SECTION 1.4 IS NOT UNLAWFULLY AMBIGUOUS.

Section 1.4 is not unlawfully ambiguous, and especially as it applies to the facts of this case. Lanier admits that Exhibit A to the Complaint contains the deed by which she purchased the property and the Covenants, which are applicable to the deed (R. p. 44, par. 3). Section 1.4 of the Covenants, attached to the Complaint, states the following:

> 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.

(R. p. 31) (Emphasis added).

In the Complaint, Boies alleged, "[Lanier] has torn down white vinyl fencing, without permission from the Grantor, and, upon information and belief, intends to replace it with dark wooden fencing" (R. p. 27, par. 7). Lanier Answered, and admitted that "she has had the fence removed in its entirety and plans to replace the fence with the fence comparable in style and constructed material to the previous fence but which is more aesthetically compatible with the design and appearance of the defendant's home on the property" (R. p. 44, par. 5).

Lanier contends Section 1.4 is unlawfully ambiguous. Boies respectfully submits it is not unlawfully ambiguous. It requires that any fence on the property be "comparable

in style and constructed material" to the fence already there (white vinyl fencing). There is nothing vague or ambiguous about that standard. Furthermore, photographs attached to the Complaint and those admitted in to evidence demonstrate white vinyl fencing surrounds all of the property subject to these Covenants. Lanier does not dispute the validity of the photographs. She also admits that the white vinyl fencing has been there since before she purchased the property.

On the existing fence, the "constructed material" is white vinyl. It is not wood. Any permitted fencing must be comparable in "constructed material." Wood is not a comparable construction material to vinyl. If there were any question, the Covenants clarified by stating explicitly "white vinyl fencing." Section 1.4 is not ambiguous. The replacement need not be purchased from the same manufacturer, or designed in exactly the same style, but must be *comparable* in style and construction material, but not dark, wooden fencing.

Lanier argued that although Section 1.4 states that any fence must be "comparable" to the fence which is already there, Boies testified that the standard was that the fence must be a white vinyl fence. Lanier, in effect, argued that Boies had verbally changed the standard from "comparable" to the existing fence, to exactly like the existing fence. The Court rejected this argument and found that the standard under the Covenants is that the fence be "comparable in style and constructed material to a fence presently located on the boundary of the Real Property (white vinyl fencing)" (R. p. 31, Section 1.4). The trial court found that Boies's testimony was consistent with the written standard of the Covenants and that Section 1.4 was not unlawfully ambiguous. Accordingly, this Court should affirm the judgment of the Circuit Court.

II. SECTION 2.8 IS NOT UNLAWFULLY AMBIGUOUS OR UNENFORCABLE.

Second, Lanier argues that Section 2.8 is unlawfully ambiguous or unenforcable. Lanier focuses on one prepositional phrase in the two long paragraphs that make up Section 2.8: "for any reason, including purely aesthetic reasons." From that language, Lanier extrapolates that Boies could reject the plans for "**no** reason." Lanier's extrapolation from this prepositional phrase is not a fair reading of Section 2.8, nor is it a permissible construction. Boies respectfully submits that the Court must examine all of Section 2.8, and not just an isolated phrase. Section 2.8 reads as follows:

> 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.
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> 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**. Grantee shall deliver a written request for action to the Grantor by certified mail with return receipt requested or by hand delivery with signed receipt together with the necessary building plans and specifications. Building plans and specifications submitted to the Grantor shall consist of not less than the following: foundation plan, section details, floor plans of all floors, elevation drawings of all exterior walls, roof plans, material specifications and site plan showing exterior walls, roof plans, material specifications and site plan showing the location and orientation of building on the Lot, with all setbacks indicated. Such plans and specifications shall show the driveway service court or area, parking and any other buildings, improvements or facilities to be constructed. In the event the Grantor fails to approve or disapprove such plans and specifications or **to request additional information reasonably required for proper determination** within sixty (60) days after submission, the plans and specifications shall be deemed approved. In all circumstances, compliance with zoning regulations of Greenville County, South Carolina shall be required.

(R. p. 33) (emphasis added).

A fair reading of the entire Section 2.8 demonstrates that the Grantor's decision must relate to "harmony of external design and location in relation to surrounding structures and topography." The determination must reflect whether the plans are "suitable or desirable, . . . for any reason, including purely aesthetic reasons." The prepositional phrase, "for any reason" modifies "suitable or desirable." This is a determination of judgment, suitability, and aesthetics, which is determinable and understandable. It does not authorize a purely arbitrary reason unrelated to whether the plans are "suitable and desirable." Furthermore, the judgment must reflect whether the plans are in "**harmony of external design and location in relation to surrounding structures and topography**." Accordingly, the judgment is not an unlimited or arbitrary judgment, and it cannot be based on "no reason," as Lanier contends. This is an aesthetic standard, based on judgment and taste.

An aesthetic decision based upon judgment and taste is entirely enforceable and defensible. *Palmetto Dunes Resort v. Brown*, 287 S.C. 1, 336 S.E.2d 15 (Ct. App. 1985). In *Palmetto Dunes*, a residential and resort subdivision on Hilton Head Island filed suit to enforce its Covenants to prevent Brown, a landowner, from building a house that the Architectural Review Board had rejected for "aesthetic" reasons.

> Like Lanier here, Brown argued that the Palmetto Dunes covenant:
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> > lacks objective standards to guide the Board in its approval or disapproval of plans. Specifically, he argues that the provision allowing disapproval for "purely aesthetic considerations" is vague and ambiguous, thereby enabling Palmetto Dunes to be arbitrary in its decisions.

Id. 287 S.C. 1, 4-5, 336 S.E.2d 15, 17-18.

The Court of Appeals rejected Brown's argument, and explained its reasoning at some length:

> Rejecting similar arguments, **courts have upheld covenants that provide *no* criteria** to guide the approving authority in deciding upon the suitability of proposed construction. *See Rhue v. Cheyenne Homes, Inc.,* 168 Colo. 6, 449 P.2d 361 (1969); *Hannula v. Hacienda Homes, Inc.,* 34 Cal.2d 442, 211 P.2d 302, 19 A.L.R.2d 1268 (1949); *Kirkley v. Seipelt,* 212 Md. 127, 128 A.2d 430 (1957). **Other courts** confronted with similar arguments have **upheld covenants** whose criteria for approval can hardly be said to be more specific than the "**aesthetic considerations**" criterion involved here. *See Snowmass American Corp. v. Schoenheit,* 524 P.2d 645 (Colo.App.1974) (stated purpose of all covenants was to establish and maintain mountain residential area "of the **highest possible quality**" and protect its "**value, desirability and attractiveness**"); *Winslette v. Keeler,* 220 Ga. 100, 137 S.E.2d 288 (1964) (covenant required building to be in "**conformity and harmony of external design and general quality** with the existing standards of the neighborhood"); *Normandy Square Association, Inc. v. Ells,* 213 Neb. 60, 327 N.W.2d 101 (1982) (covenant required plans to be approved "**as to the harmony of external design and location in relation to the surrounding structures and topography**"); *Syrian Antiochian Orthodox Archdiocese v. Palisades Associates,* 110 N.J.Super. 34, 264 A.2d 257 (1970) (covenant allowed disapproval of plans "which are **not suitable or desirable** in [grantor's] opinion").
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> 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). "Restrictive covenants are contractual in nature," so that the paramount rule of construction is to ascertain and give effect to the intent of the parties **as determined from the whole document.** *Hoffman v. Cohen,* 262 S.C. 71, 75, 202 S.E.2d 363, 365 (1974); *Easterby v. Heilbron,* 26 S.C.L. (1 McMul.) 462 (1840).
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> Applying these principles, we find **the "aesthetic considerations" clause is not indefinite**. Its settled intent, viewed in relation to the entire document, is to vest in Palmetto Dunes the authority to disapprove plans based upon its judgment of their **aesthetic suitability** within Palmetto Dunes Resort. Brown displayed his understanding of this by proposing to make cosmetic changes to the house following the initial rejection. **The parties voluntarily bound themselves to this arrangement**, which they had the right to do. *See Winslette v. Keeler,* 220 Ga. 100, 137 S.E.2d 288; *Kirkley v. Seipelt,* 212 Md. 127, 128 A.2d 430.
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> **Brown urges that the phrase "aesthetic considerations" is ambiguous**

> so that we must apply the rule of construction that requires ambiguities in a restrictive covenant to be strictly construed against the party seeking to enforce it. *See Donald E. Baltz, Inc. v. R.V. Chandler and Co.,* 248 S.C. 484, 151 S.E.2d 441 (1966). **We conclude, however, that this rule is not applicable here**. "[T]his rule of strict construction should not be applied so as to defeat the plain and obvious purpose of the instrument." *Davey v. Artistic Builders, Inc.,* 263 S.C. 431, 436, 211 S.E.2d 235, 237 (1975).
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> The covenant, by making no attempt to set forth objective "aesthetic considerations," implicitly recognizes, as do we, that **it is impossible to establish absolute standards to guide a judgment of taste. But this does not compel the conclusion that the covenant is ambiguous**. We agree with the trial judge that although people may reasonably differ as to whether a house is aesthetically appropriate, **the covenant is unambiguous in leaving this solitary judgment to Palmetto Dunes**. The plain and obvious purpose of the covenant is to **vest this discretion in Palmetto Dunes**, which **is constrained only to exercise its judgment reasonably and in good faith**. *See Kirkley v. Seipelt,* 212 Md. 127, 128 A.2d 430.

Palmetto Dunes Resort v. Brown, 287 S.C. 1, 5-7, 336 S.E.2d 15, 18-19 (footnotes omitted, emphasis added).

The Circuit Court found the holding and analysis of *Palmetto Dunes* was on point and controlling.

Furthermore, the Covenants give the Grantor (Boies) "the right to refuse . . . plans which are **not suitable or desirable**, . . . **for any reason**, including purely **aesthetic** reasons" (emphasis added). Under the rationale of *Palmetto Dunes*, this standard is valid and enforceable.

As in *Palmetto Dunes*, Boies's decision as Grantor was required to be based on aesthetics, the surrounding topography, and considerations of suitability and harmony, that it was not an arbitrary standard, and that such consent could not be withheld for "any reason," as Lanier contends.

The South Carolina Supreme Court approved very similar language in a Covenant in *Sea Pines Plantation Co. v. Wells*: "Refusal of approval of plans, location or

specifications may be based by the company **upon any ground, including purely aesthetic conditions**, which in the sole and uncontrolled discretion of the Company shall seem sufficient." *Id.,* 294 S.C. 266, 272, n.1, 363 S.E.2d 891, 895 (1987) (emphasis added). The trial court properly ruled that Section 2.8 was enforceable. This Court should affirm the judgment of the Circuit Court.

III. BOTH SETS OF COVENANTS WERE BINDING ON ALL 122 ACRES.

Lanier next argues that the second set of Covenants applied only to Lanier's deeds. Boies issued two sets of Covenants, first in the early 2000's, and the second set more recently (R. p. 77, lines 1-8). The first set of Covenants was on file in the Register of Deeds office (R. pp. 232-239). The second set of Covenants were attached to the deeds when Boies sold the property to Lanier (R. p. 80, lines 2-14; R. p. 29-33; R. pp. 249-253). Lanier argues that because the second set of Covenants was not on file at the Register of Deeds Office, that they did not apply to any property except Lanier's, and if that were the case, it would be unfair to apply them solely to Lanier's property and no others.

Lanier was on actual notice of the second set of Covenants because they were attached to her deeds. Boies testified that she had delivered copies of the same second set of Covenants to all the other persons whose property was affected by the first set of Covenants. A neighbor to both Boies and Lanier testified that both sets of the Covenants were applicable to her property as well as all of the properties covered by the first set of Covenants (R. p. 146, line 19 – R. p. 147, line 12; R. p. 148, line 25 – R. p. 149, line 14).

The Court found that Lanier was on actual notice of the second set of Covenants, and that they governed her property (R. p. 17-18, par. 1). The Court also found that Lanier

lacked standing to assert the alleged lack of notice to any other landowners (R. p. 17-18, par. 1). This Court should affirm the judgment of the Circuit Court.

IV. THE TRIAL COURT PROPERLY ORDERED THE REPLACEMENT OF THE WHITE VINYL FENCING AS A REMEDY FOR THE BREACH OF THE COVENANTS.

Finally Lanier argues that after she had torn out the rails of the fence, but the posts were still standing, Boies remarked that Lanier could do what she wanted, based on Lanier's ownership of the land. Lanier argued that such a remark should "estop" Boies from insisting that the fence be rebuilt.

Boies contends that the alleged remark, if it happened at all, happened during the first telephone call, while Boies was out of town, and when Boies had just been given notice that Lanier had torn the rails out of the fence, without prior written permission, as required by the Covenants. Thereafter, Boies reviewed the Covenants and concluded that Lanier had no right to remove the fence without prior written consent of the Grantor. Boies immediately filed suit, served Lanier, and sought an injunction preventing Lanier from tearing out the fence posts. While Boies was attempting to get a hearing on her motion for temporary injunctive relief, Lanier finished tearing out the fence posts. She had been served, but the Court had not heard the motion.

During cross-examination, Lanier admitted that removing the fence was a "modification" or an "alteration" of a structure on the property (which includes fences) (R. p. 193, lines 12-20). Under the Section 2.8 of the Covenants, "modifications" required prior written consent, which Lanier did not seek or obtain. The trial court ordered Lanier to replace the white vinyl fencing (R. p. 15). This Order was proper and necessary.

In *Sea Pines Plantation Co. v. Wells*, the South Carolina Supreme Court approved a mandatory injunction which required the offending landowner to tear out a third story loft that he had installed without prior consent of the Architectural Review Board. He was also required to remove a flagpole, a Jacuzzi, a satellite dish, a wrought iron fence, a gate, a beach walkway, a shower, a no trespassing sign, and all trees, bushes, walls, fences, and other structures he had placed or cause to be placed in the view of the easements. Finally, the Court ordered him to re-landscape the property. *Id.*, 294 S.C. 266, 269-70, 363 S.E.2d 891, 893 (1987). The landowner argued that the remedy was inequitable and would be more costly to him than the damages suffered by the neighborhood covered by the Covenants. He also argued that the cost he would expend would not create a commensurate benefit to the neighborhood. The Supreme Court rejected both arguments.

> A court does not automatically issue a mandatory injunction once it finds a restrictive covenant has been violated. The court must balance the equities between the parties; and if the harm to the defendant outweighs the plaintiff's benefit, no relief will be granted. *Hunnicutt v. Rickenbaker,* 268 S.C. 511, 234 S.E.2d 887 (1977). Although the issuance of a mandatory injunction depends upon the equities between the parties, **the decision of whether to issue such relief rests in the court's discretion.** *Id.,* 234 S.E.2d at 889. *See also, Metts v. Wenberg,* 158 S.C. 411, 155 S.E. 734 (1930). Respondent argued that **the balancing of equities test is inapplicable** in this case **where appellant's actions or inaction is the direct cause of the mandatory injunction's issuance**. Even though the injunctive remedy may cause some economic hardship to appellant, **injunctions have routinely been granted in such instances**. *See, Palmetto Dunes v. Brown, supra; Sprouse v. Winston,* 212 S.C. 176, 46 S.E.2d 874 (1948). *See generally, Tubbs v. Brandon,* 374 So.2d 1358 (Ala.1979). We are of the opinion that **the only effective relief is injunctive relief** and, accordingly, conclude that **the trial judge did not abuse his discretion** in issuing the mandatory injunction. *Renney v. Dobbs House, Inc.,* 275 S.C. 562, 274 S.E.2d 290 (1981).

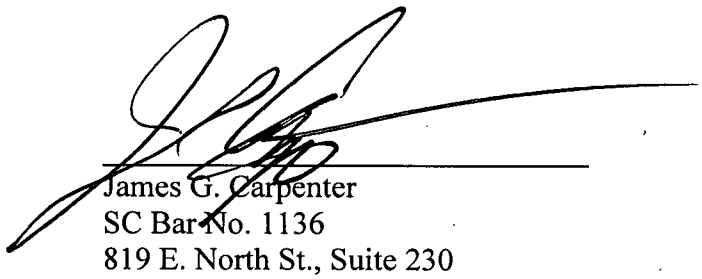
Id., 294 S.C. 266, 274-75, 363 S.E.2d 891, 896 (1987) (emphasis added). Similarly, in this action, the Circuit Court did not abuse its discretion when it ordered Lanier to reinstall white vinyl fencing where she had torn it out. Her actions were "the direct cause of the

mandatory injunction's issuance." *Id.* The decision of whether to issue such relief rests in the court's discretion. *Hunnicutt v. Rickenbaker,* 268 S.C. 511, 234 S.E.2d 887, 889 (1977). The trial court properly exercised its discretion to require Lanier to replace the white vinyl fencing.

CONCLUSION

Boies is entitled to exercise aesthetic judgment and enforce the requirement of white vinyl fencing. The Court should affirm the grant of Judgment to Boies, and affirm the Order that Lanier replace the fencing that she tore down with fencing that is "comparable in style and constructed material to a fence presently located on the boundary of the Real Property (white vinyl fencing)" (R. p. 15).

Respectfully submitted
THE CARPENTER LAW FIRM, PC



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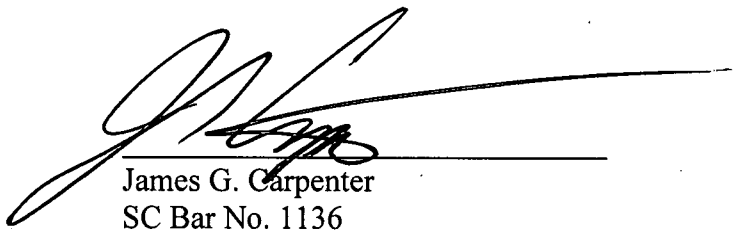
CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that the Final Brief of the Respondent complies with SCACR 211(b).



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