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.

REPY BRIEF OF APPELLANT

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July 3, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

ARGUMENTS

I. SECTION 1.4 AND THE MEANING OF THE WORD "COMPARABLE"

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.

Respondent's position on the clearly ambiguous 1.4 is that the word "comparable" means "exact" and argues for the first time on Appeal that what she really means by 1.4 is that in erecting a fence on their own property, a property owner has the absolute freedom to purchase the exact white vinyl fencing material from any manufacturer in the world as long as it is white vinyl fencing exactly like the existing fencing at the time of purchase (Brief of Respondent p.9). Section 1.4 is ambiguous as a matter of law especially in light of the clearly stated tenant of law that "all such restrictions are to be strictly construed," against the maker of the Covenants and Restrictions "with *all doubts resolved in favor of the free use of property*." *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 863–64 (1998) (emphasis added). It follows, of course, that where the language of the restrictions is equally capable of two or more different constructions that construction will be adopted which least restricts the use of the property. *Taylor v. Lindsey*, 332 S.C. 1, 498 S.E.2d 862, (1998), *McDonald v. Welborn*, 220 S.C. 10, 66 S.E.2d 327 (1951).

One reasonable interpretation of 1.4, is the interpretation made by Appellant in this case, that as long as the fence to be erected was of comparable style to the existing fence, that is "similar" or "like thereto", not necessarily exact or with precise sameness without deviation. White wood fencing in the same size dimensions and style (two or three plank horse fencing) is virtually indistinguishable from vinyl at any appreciable distance. Of course, 1.4 says nothing of color except as to identify the existing fence, which is consistent with the fact that about fifty

(50%) per cent of the fencing in the surrounding "horse country" is dark, wood fencing. (R. p. 144, lines 3-8).

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 PHRASE "FOR ANY REASON" AS USED IN THE COVENANTS AND RESTRICTIONS ACTUALLY *IS* UNAMBIGUOUS, IT IS ALSO SO OVERBROAD SO AS TO BE UNENFORCEABLE AND CONTRAVINES PUBLIC POLICY

> **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.**

Unlike the language of 1.4, the use of the phrase "for any reason" actually *is* unambiguous and means exactly what it says in plain English. Understanding now that by reserving full power to approve or disapprove property owners' requests in her "sole opinion" "for any reason" at all (which necessarily also includes for "no" reason) she, as the sole arbiter of change to other people's property, Respondent realizes that she has gone too far in keeping such power and that by reserving everything she really has reserved nothing. Respondent engages in mighty attempts at grammatical gymnastics, heard for the first time on Appeal, to attempt to argue that "for any reason" somehow does not mean "for any reason", but somehow modifies the phrase "not suitable or desirable". The phrase "for any reason" in fact grammatically modifies the phrase "in Grantor's sole opinion" and the phrase "including pure aesthetic reasons" is a part of "any reason" and is included in that phrase. Even if "for any reason", did somehow modifies

the phrase "not suitable or desirable", the argument thereof is of no consequence because it would not change the fact that Respondent in Section 2.8 has reserved the right to make such decisions for any reason or for no reason at all, which because it can *potentially* be used for improper purposes contravenes public policy and is invalid and unenforceable.

III. UNFILED COVENANTS AND RESTRICTIONS (2.8)

Respondent seems to admit that Section 2.8 was filed only with Appellant's Deeds and at the time of trial was not filed with the Greenville County Register of Deeds, or with any of the Deeds of other purchasers of the subdivided lots. Such filing of course would be required to put subsequent purchasers on notice of the Covenants and Restrictions. Respondent's testimony that she handed out copies of 2.8 to other owners hardly makes them binding and running with the land as a matter of record and clearly does not bind subsequent purchasers. Nor is a single neighbor's testimony that 2.8 applied to her property any evidence of the applicability of 2.8 to property other than Appellant's, particularly when the witness at first denied ever seeing 2.8 and then in response to questions by Respondent's counsel suddenly remembered seeing them at her closing (R. p. 155, line 25 – p. 156, line 14 ((referring to R. pp. 232-239)); p. 157, line 7 – p. 159, line 4 ((referring to R. pp. 207-209). It is clear that legally, 2.8 applied only to and was enforceable (notwithstanding its fatal defects) only as to Appellant's property. It was error for the Court to find that 2.8 applied equally to all subject parcels. The only reasonable inference to draw from Respondent's filing strategy is that she intended, for whatever reason, to have 2.8 apply *only to Appellant.* Why else would Respondent not file 2.8 to run with all of the parcels? She knew enough to require that 2.8 be filed with Appellant's Deeds.

Respondent fails in her Brief to address her own testimony that if 2.8 did not apply equally to all parcels, then 2.8 should not apply to any parcels. She instead argues the obvious that Appellant was aware that 2.8 was filed with Appellant's Deeds, but because even respondent recognizes the inequity of the legal reality that 2.8 applied only to Appellant, this Court should reverse the lower Court and strike 2.8.

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

Even if the language of 2.8 applies to Appellant, when Respondent told Appellant by phone in the midst of taking the fence down that 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), she, as sole decision maker in her "sole opinion" "for any reason" at that time effectively approved the removal of the fence. Respondent did not recall, but did not deny making those statements the substance of which is corroborated by her subsequent November 28, 2016 email (R. p. 276), during which time the fence posts were still in the ground, where she said absolutely nothing about the fence removal, which could have been reversed at that point simply by replacing the slats, (R. p. 221-224) and instead discussed only what the new fence must be. The only reasonable inference for Appellant to draw from the phone conversation and the email is that she was being allowed, whether she had asked for permission or not, to remove the fence and that the only issue from that point forward was the make up of the new fence. As the sole decider of such things, Respondent does not have the luxury of changing her mind after allowing detrimental reliance. The trial Court should have estopped Respondent from reneging on her clear approval of the removal of the fence and it was error to Order re-installation without

weighing the equities between the parties as required by case law. *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 it violates public policy and should find Sections 1.4 and 2.8 unenforceable and should reverse the trial Court and enter Judgment in favor of Appellant. In the alternative, if the Court does not invalidate Sections 1.4 and 2.8, this Court should find that the trial Court failed to consider the equities of the matter before enforcing the covenant, that the trial Court should not have ordered replacement of the white vinyl fence and should reverse the trial Court and enter Judgment in favor of Appellant as to that part of the Order.

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CERTIFICATION OF COUNSEL

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

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