IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MARSHALL E. BELAGER-PRICE
AND BRENDA C. BELAGER-PRICE;
BRIAN E. PRICE AND RETHA A.
PRICE; RICHARD TUCKER AND
CAROLYN TUCKER; AARON D.
PUCKETT, JR. AND LESLIE PUCKETT;
AND MARY ANNE NARRON — APPELLANTS

V. — NO.: 2008-CA-02102-COA

RICHARD LINGLE AND NAOMI T. LINGLE — APPELLEES

REPLY BRIEF OF APPELLANTS

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The Homeowners respond to the issues raised by the Lingles as follows:

A. The Status of Mary Anne Narron

The Lingles suggest that the Homeowners have been inconsistent in describing Mary Anne Narron's role as a Petitioner. This is not the case. Her status was very clearly described in the Statement of the Case in the Homeowner's Brief. For convenience only, all of the Petitioners/Appellants were referred to collectively as the "Homeowners".

B. Horse Barns versus Horses

The Lingles contend that, in the lower court, the Homeowners sought to prohibit construction of a horse barn but not the placing of horses on the property. The Lingles' argument is without merit.

This lawsuit came about when Mr. Lingle sent a letter to other owners in the Kristin Hills Subdivision expressing his intent "to erect our horse barn on the property and move a couple of horses to the property as soon as possible." *See* Trial Exhibit 8.

As a result, when the Petition was filed, the Homeowners explained that the Lingles had expressed their intent to "construct an appurtenance, specifically a horse barn, but [the Lingles] have no present plans to begin construction of a single family residence as required by the covenants." *See* Petition ¶11, R. 3.

Not surprisingly, during trial, there was repeated testimony that the "horse barn" was, in fact, ***intended for the boarding of horses***. *See* Trial Transcript Vol. I, pages 30, 78 and Trial Transcript Vol. II, pages 122, 125.

The Chancellor certainly understood that the issue before him involved not only a physical structure known as a "horse barn" but the boarding of horses ***in it***. The Chancellor recited, for example, that other homeowners in the subdivision had horses on their property and

that the prior owner of the Lingles' property had kept at least one horse on the property at some point. *See* Final Judgment ¶35, R. 72; R. Ex. 016.

When the Chancellor submitted his Final Judgment and Findings of Fact Including Conclusions of Law, he quoted at length Mr. Lingle's letter of October 23, 2007 regarding the Lingle's intent to "erect our horse barn on the property and move a couple of horses to the property as soon as possible." *See* Final Judgment ¶23, R. 67 - 68; R. Ex. 011 - 012.

The Lingles' argument is comparable to saying that the Petitioners only sought to bar the construction of a motel but not the act of renting out rooms. What the Lingles intended to do was build a horse barn ***to board their horses***, and that is what the Homeowners sought to enjoin until such time as the single family dwelling was constructed.

C. The Testimony of Homeowner Richard Tucker

For some reason, the Lingles rely heavily upon the testimony of Homeowner Richard Tucker stating that he had no objection to the barn that the Lingles described as long as the Lingles built the house first. This is mentioned on both page 3 and page 14 of the Lingles' Brief.

It is puzzling why the Lingles find support for their case in Mr. Tucker's testimony. He clearly explained his position that the house should be built first, with the barn being an appurtenance to it. He simply did not object to the <u>design</u> the Lingles were proposing for the barn.

D. The Lingles' Lot versus other Lots

The Lingles argue that it is somehow unfair that the protective covenants applicable to their lot are different in some respects from those applicable to other lots. Although the Lingles do not mention any difference that is relevant to this case, it would not matter if they did. What is at issue in this case are the restrictive covenants that are applicable to <u>the Lingles' lot</u>.

E. Finds of Fact versus Conclusions of Law

The question of whether an instrument is ambiguous is a pure question of law for the court. *Crisler v. Crisler*, 963 So.2d 1248, 1251 (Miss.Ct.App. 2007). Only if the instrument is ambiguous does the factfinder undertake the task of interpreting it. *Id.*

In this appeal, the Homeowners are challenging the legal conclusion of the Chancellor that the restrictive covenant in question is ambiguous. The Homeowners do not challenge any findings of fact made by the Chancellor after he held the covenant was ambiguous and then sought to interpret it. Since the covenant is not ambiguous as a matter of law, it must be enforced as written, and there was simply no need to the Chancellor to make fact findings to "interpret" the covenant.

Although the Homeowners' position on this is very clear, on pages 3-13 of their Brief the Lingles purport to quote the "findings of fact" of the Chancellor. In doing so, the Lingles actually include a number of Chancellor's statements that are clearly *conclusions of law* and not findings of fact. *See, e.g.,* the Chancellor's statements in Paragraphs 45-54 of his Final Judgment. R. 75-78.

The Chancellor's use of the word "finds" when making his conclusions of law does not turn them into findings of fact as the Lingles seem to imply. The ruling by the Chancellor that the restrictive covenant was ambiguous is a legal conclusion, not a finding of fact, even if the Chancellor may have prefaced his statements with phrases such as "the Court finds."

F. Remedies for Violation of the Restrictive Covenants

In their initial Brief, the Homeowners noted the potential for economic waste if this Court orders the Lingles to tear down the horse barn. The Homeowners suggested an alternative approach that would give the Lingles time to begin construction of the single family residence

and would only require the Lingles to remove the horse barn if they did not (a) commence good faith construction of the residence and (b) diligently pursue it to completion.

In their Brief, the Lingles oppose this remedy, arguing that their "protective covenants do not contain ANY LANGUAGE regarding these matters." *See* Appellees' Brief, p. 18.

The Lingles are missing the point. What the restrictive covenants prohibit is the construction of the horse barn until such time as the Lingles construct a single-family residence. The proposal of the Homeowners that the Lingles be given a certain fixed time to commence construction of their residence is a simply proposed remedy for the violation of the restrictive covenants.

G. The Restrictive Covenants are not Ambiguous

By now, this Court has probably heard enough argument as to whether the single sentence restrictive covenant at issue is ambiguous. The Homeowners ask the Court's indulgence one more time while they make this simple point.

It is well-established that in construing written instruments, the Court will "give the words of the document their commonly accepted meaning." *Fradella v. Seaberry*, 952 So.2d 165, 175 (Miss. 2007). "In construing a written contract the words employed will be given their ordinary and popularly accepted meaning, in the absence of anything to show that they were used in a different sense." *Miller v. Fowler*, 28 So.2d 837, 838 (Miss. 1947).

Following this principal, the court in *Miller* turned to the "standard dictionaries of our language." Let us do the same.

The protective covenant says this: "The subject property can only be used to build and construct only one single family residence and appurtenances thereto." Taking these words and giving them their commonly accepted meaning, this is what we find:

"**The subject property**" – the land; the lot the Lingles bought.

"**can only**" – without others or anything further; alone; solely; exclusively

"**be used**" – to employ for some purpose; put into service; make use of

"**to build and construct**" – create

"**only**" – without others or anything further; alone; solely; exclusively

"**one**" – a single unit

"**single family residence**" – a detached residential building designed for occupancy by one family

"**and**" – as well as; in addition to; BUT NOT "and/or"

"**appurtenances**" – that which belongs to something else; and adjunct; an appendage

"**thereto**" - to that ("that" being the single family residence)

Put simply, the restrictive covenant unambiguously tells the owner of the land that "you can only use this property to build a house for your family to reside in, and if you want to build something else that is used in connection with a residence, that is fine. But, that 'something else' has to be appurtenant to the residence."

CONCLUSION

For the reasons set forth above, the Homeowners request that this Court reverse the decision of the Chancellor and remand this action to the Chancellor with instructions to enter the injunctions as set forth in the initial Brief of Appellants.

Respectfully submitted, this the 21 day of September, 2009.

MARSHALL E. BELAGER-PRICE and BRENDA C. BELAGER-PRICE; BRIAN E. PRICE and RETHA A. PRICE; RICHARD TUCKER and CAROLYN TUCKER; AARON D. PUCKETT, JR. and LESLIE PUCKETT; and MARY ANNE NARRON

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CERTIFICATE OF SERVICE

I, S. Craig Panter, attorney for the Plaintiffs-Appellants, hereby certify that I have caused a true and correct copy of the foregoing document to be served via U.S. mail, postage prepaid, to the following:

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This, the 21 day of September, 2009.

S. Craig Panter