SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LONG MEADOW HOMEOWNERS ASSOCIATION, INC., ET AL — APPELLANTS

VS. — CAUSE NO.: 2009-CA-01775

ERNEST C. HARLAND and BONNIE S. HARLAND — APPELLEES

ON APPEAL FROM THE CHANCERY COURT OF LAFAYETTE COUNTY

BRIEF OF APPELLEE

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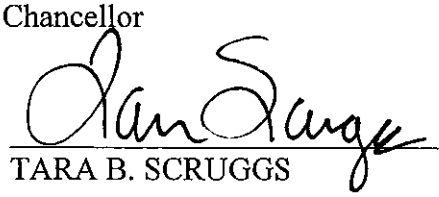
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Appellees certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judge of this Court may evaluate possible disqualification or recusal.

1. Ernest C. Harland, Appellee;
2. Bonnie S. Harland, Appellee;
3. Long Meadow Homeowners Association, Inc., Appellant
4. All residents of Long Meadow Subdivision
5. Carroll B. Leavell, Respondent
6. Deidre Leavell, Respondent
7. Elizabeth Leavell, Respondent
8. Lawrence L. Little & Associates, PA, Counsel for Appellees;
9. Lawrence L. Little, Counsel for Appellees;
10. Tara B. Scruggs, Counsel for Appellees;
11. David L. Minyard, Counsel for Appellees;
12. Kenneth A. Rutherford, Counsel for Appellants;
13. Hon. Percy L. Lynchard, Jr., Special Chancellor



TARA B. SCRUGGS

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STATEMENT OF THE CASE

Appellees, Ernest and Bonnie Harland, purchased three lots in Phase III of Long Meadow Subdivision for the express purpose of one day possibly building a church on those lots. Their decision to buy these lots for that purpose was based upon their finding that the subdivision developer had previously sold six of the twelve lots in Phase III with covenants that permitted such a use of the property. Other homeowners in the subdivision objected to such a use because the covenants applicable to their individual lots did not permit use for a church. Litigation was commenced with both the Harlands and the Long Meadow Homeowners Association requesting a decision as to whether or not a church could be built on the lots purchased by the Harlands. The trial court found in favor of the Harlands and the homeowner's association appealed.

STATEMENT OF THE FACTS

Long Meadow Subdivision is a subdivision located in Lafayette County Mississippi. It consists of three phases, the third of which was platted and developed separately from Phases I and II. (Exhibits R-3, R-5 and R-7). All phases were platted and developed by Robert and Carroll Leavell, both of whom were attorneys. (Test. of Ryland Sneed Tr. at 47-48, 56; Test. of Alan Cameron Tr. at 149). Robert Leavell is now deceased. (Test. of Ryland Sneed Tr. at 47). All phases of Long Meadow subdivision may be accessed from Highway 7 which runs along the eastern border of the subdivision. (Exhibits P-1, R-3 and R-7). At the time Phases I and II were developed, the Leavells also owned the property on the east side of Highway 7 which at one time they intended to be part of Long Meadow Subdivision. (Test. of Ryland Sneed Tr. at 67, 86).

The plat for Phases I and II of the subdivision was prepared by surveyor Ryland Sneed for the Leavells in October of 1990 and recorded in the land records of Lafayette County on March 1, 1993. (Test. of Ryland Sneed Tr. at 49-51, 79). The plat contains a reference to Restrictive Covenants recorded in Book 412 at Page 366 of the land records in the Chancery Clerk's office of Lafayette County, Mississippi. (Exhibit R-5). There is no reference on this plat to a third phase of the subdivision. (Exhibit R-5).

The restrictive covenants referenced on the plat of Phases I and II were filed of record on December 5, 1991. (Exhibit P-10). These covenants are titled "Protective Covenants of Long Meadow Subdivision Phase II". (Exhibit P-10). Prior to the filing of these restrictive covenants or any subdivision plat, the Leavells sold and conveyed Lots 1, 16, 17, 18, 19 and 41. (Exhibits, P-11, P-22, P-23, P-26, P-27, P-28 and P-35; Test. of Ryland Sneed Tr. at 74). Lot 1 is now a lot in Phase III, Lot 41 is a lot in Phase II and the remaining lots are part of Phase I. (Exhibits R-3, R-5 and R-7). The deeds to Lots 1, 16, 17, 19 and 41 contained a version of protective covenants that differs from the covenants referenced on the subsequently filed plat and found at Book 412 at Page 366. (Exhibits, P-11, P-22, P-23, P-26, P-28 and P-35). The deed to Lot 18 contained no protective covenants. (Exhibit P-27).

The plat for Phase III of Long Meadow subdivision was also prepared by Ryland Sneed. It was drawn in November of 1994 and filed of record in the Land Records of Lafayette County on December 16, 1994. (Exhibit R-7). The plat contains a section where any applicable restrictive covenants may be referenced but the space to record the filing information for the covenants was left blank. (Exhibit R-7; Test. of Ryland Sneed Tr. at 53, 56; Test. of Alan Cameron Tr. at 138). Although the Leavells planned for a road through Phase III of the

subdivision and showed it on the filed plat, the road had not been built at the time the plat of Phase III was filed. (Test. of Ryland Sneed Tr. at 55-56). The road, which is known and referred to as County Road 1032, Industrial Park Boulevard and North Pointe Drive, was likely not completed until 2002 as it involved the Leavell's conveying to David Pryor a second piece of property which bordered the road. (Test. of Ryland Sneed Tr. at 73-77; Exhibit P-1 as marked upon at trial by Ryland Sneed). Each conveyance to David Pryor contained a differing set of protective covenants. (Exhibits P-11 and P-12). Other than Lot 1, which was conveyed prior to recording of any plat, no other lot in Phase III was conveyed until 2002. (Exhibit P-17).

Of the twelve lots located in Phase III of Long Meadow Subdivision, nine were conveyed by the Leavells to the first purchaser by a deed containing the restrictive covenant which defined "residential" to include churches and schools. (Exhibits P-5, P-13, P-14, P-16, P-18 and P-19). The initial deed to lot 10 contained protective covenants which allowed only "one family residential structure for each four (4) acres" but did not define residential. (Exhibit P-17). No evidence was offered regarding the lot 10 restrictions. Alan and Mary Cameron purchased lot 8 in Phase III from the Leavells for the sole purpose of attempting to impose the covenants that encumbered Phase II on the lots in Phase III. (Test. of Alan Cameron Tr. at 123). The Camerons negotiated for and received the protective covenants that encumbered lot 8. (Test. of Alan Cameron Tr. at 123-126). It is important to note that Mr. Cameron and the Leavells were all attorneys at the time of the transaction. (Test. of Alan Cameron Tr. at 117-118, 149; Test. of Ryland Sneed Tr. at 47-48, 56). The only other lot in Phase III was lot 1 which was conveyed to David Pryor before the subdivision was ever platted. (Test. of Ryland Sneed Tr. at 74).

When the Harlands initially made an offer to Carroll Leavell to purchase lots 2, 3, and 4 of Phase III of Long Meadow Subdivision, they included the contingency that if permission to build a church on the lots could not be given, then the contract would be void. (Exhibit P-4). The contract and contingency was accepted and agreed to by Carroll Leavell. (Exhibit P-4). Upon learning of this contract, certain homeowner's registered their objections to the Harlands, the Harland's church and Mrs. Leavell. (Exhibits R-12, R-13 and R-20; Test. of Ernest Harland Tr. at 41-42). Despite knowledge of these objections, Ms. Leavell conveyed to the Harlands lots 2, 3, and 4 by a deed which contained the same covenants that encumbered lots 5, 6,7,9, 11 and 12 of Long Meadow subdivision. (Exhibits P-5, P-13, P-14, P-16, P-18 and P-19).

On May 28, 2009, after the commencement of this action, counsel for Appellants e-mailed to Carroll Leavell's attorney, Charles Walker, a Corrected Warranty Deed on the Harland's property to be presented to Mrs. Leavell for signature. (Exhibit P-6). Mr. Walker forwarded the Corrected Warranty Deed to Mrs. Leavell on May 29, 2008. (Exhibit P-7). Ms. Leavell signed the Corrected Warranty Deed and it was filed in the Lafayette County land records on July 15, 2008. (Exhibit P-8). The Corrected Warranty Deed effectively changed the restrictive covenants on the Harland's lots to expressly prohibit the building of a church. (Exhibit P-8). This was done solely at the request of the Long Meadow Homeowners and without the agreement of Ernest and Bonnie Harland. (Exhibits P-6 and P-7; Test. of Ernest Harland Tr. at 13-15). The Harlands subsequently filed a Motion to Set Aside the Corrected Warranty Deed which was granted. (Op. of Ct. pp. 4-5).

SUMMARY OF THE ARGUMENT

The Harlands negotiated, bargained for and received a protective covenant for Lots 2, 3, and 4 of Phase III of Long Meadow Subdivision which permitted the building of a church on those lots. The covenant they asked for and received was the same covenant that had already been granted to six other lots in Phase III. Carroll Leavell, an attorney and real estate developer, could have refused to enter into such a contract, but she did not. She could have refused to sell the lots under those terms but she did not. The reason she did not was because it was actually her intent that churches be permitted in Phase III of the subdivision she developed.

The Homeowner's Association argues that the Harlands should be equitably estopped from placing a church on lots 2, 3 and 4 because the covenants that encumber Phase II and arguably Phase I do not permit the construction of a church and those covenants are the ones on which they relied when purchasing their lots. To prevail on such a claim the Homeowners must have shown that they purchased their lots in reliance upon the conduct of another and that because of that they now or will suffer damage. The Appellants wholly failed to meet that burden of proof at trial. The plat of Phase III clearly contains no reference to restrictive covenants even though there is a place reserved for such a notation. The Appellant's witnesses at trial both purchased the lots on which their homes are located prior to 2002 when development of Phase III truly began. Their testimony showed that certain assumptions were made but these assumptions were either unsubstantiated or insufficient to rise to the level of justifiable reliance. Additionally, the Appellants were unable to state how they would be damaged by the Harlands building a church.

The Appellants also contend that once they voiced their disapproval, the Harlands should have backed down and walked away and that since they did not, the Appellants are entitled to attorneys fees. That is a bully's argument. The Harlands did nothing illegal, inappropriate, unethical or wrong. They negotiated, contracted and purchased property containing the same restrictions that their neighbors had. On the other hand, the Appellants did act inappropriately by having Mrs. Leavell sign a Corrected Warranty Deed which affected the Harland's property without the Harland's agreement during ongoing litigation. As a result, the Harlands incurred additional attorney fees in its fight to have the Corrected Warranty Deed set aside.

ARGUMENT

I. Standard of Review

"Questions concerning the construction of contracts are questions of law that are committed to the court rather than questions of fact committed to the fact-finder. The standard of review for questions of law is de novo." *Belager-Price v. Lingle*, 28 So.3d 706, 710 (Miss. Ct. App. 2010) (internal citations omitted). "If a contract is determined to be ambiguous, it is reviewed on appeal under a substantial evidence/manifest error standard. *Id.* (internal citations omitted). "[T]he findings of a chancellor . . . will not be reversed on appeal where they are supported by substantial, credible, and reasonable evidence." *Id.* at 713 (internal citations omitted).

II. The covenants contained in the May 22, 2007 deed to the Harlands are valid and are not precluded by the covenants encumbering any other phase or lot of Long Meadow Subdivision.

The law in Mississippi regarding restrictive covenants is well settled and can be summed up in the following statement from the case of *Lake Castle Lot Owners Association, Inc. v. Litsinger*:

> 'Generally courts do not look with favor on restrictive covenants. Such covenants are subject more or less to a strict construction and in the case of ambiguity, construction is most strongly against the person seeking the restriction and in favor of the person being restricted.' *Kemp v. Lake Serene Property Owners Ass'n, Inc.*, 256 So.2d 924, 926 (Miss. 1971). 'An important corollary rule, however, is that the clear and unambiguous wording of protective covenants will not be disregarded merely because a use is prohibited or restricted. If the intent to prohibit or restrict be expressed in clear and unambiguous wording, enforcement is available in the courts of this state.' *Andrews v. Lake Serene Property Owner's Ass'n, Inc.*, 434 So.2d 1328, 1331 (Miss. 1983). In addition, a protective covenant must be read in its ordinary sense. *City of Gulfport v. Wilson*, 603 So.2d 295, 299 (Miss. 1992). Finally, we consider the entire document, as well as the circumstances surrounding its development when ascertaining its meaning, purpose, and intent. *Id.*

Lake Castle Lot Owners Ass'n, Inc. v. Litsinger, 868 So.2d 377, 379-380 (Miss. Ct. App. 2004).

The Appellants have chosen the Phase II covenants as the ones they wish to apply to all three phases of the subdivision. It is the Harland's position that the Leavell's intentions should be honored by acknowledging and upholding the covenants they elected to reference in or attach to the Warranty Deeds as they sold each individual lot. There are basically three different sets of covenants filed on the lots of Long Meadow Subdivision. The primary difference between the three versions is the permitted uses of the lots. There is no dispute that the lots in Phase II of the subdivision are subject to the restrictive covenants referenced on the plat and recorded in Book 412 at Page 366. These covenants limit the use of these lots to single family residential only. (Exhibit P-10). Lots 1, 16, 17, 19 and 41 were conveyed by the Leavells prior to the filing of the plat or the Phase II Covenants and the covenants attached to those initial deeds permit single or **double** family residences. (Exhibits P-11, P-22, P-26, P-28 and P-35). There is then the matter of the majority of the covenants in Phase III. Just as the covenants of Lots 1, 16, 17, 19 an 41 permit something besides a single family residence, churches were permitted in Lots 2, 3, 4, 5, 6, 7, 9 11 and 12 by the Leavells.

This is not a situation where there is one covenant on which both parties disagree over its interpretation. This is a situation where homeowners who purchased their property prior to the development of Phase III, now disagree with a legitimate use the developer chose to allow in the final phase of the subdivision. "In construing restrictive covenants, the question is primarily one of intention, and the fundamental rule is that the intention of the parties as shown by the agreement governs . . . " *A.A. Home Improvement Co., Inc. v. Hide-A-Way Lake Club, Inc.*, 393 So.2d 1333, 1336 (Miss. 1981). Credible evidence was presented at trial as to the intent of

Robert and Carroll Leavell on this matter. The best evidence of intent is the contract between Mrs. Leavell and the Harlands and the subsequent warranty deed. (Exhibits P- 4 and P-5). Ms. Leavell knew the Harlands only wanted to purchase property that a church could be built upon. Prior to closing, she also was aware that there were certain people in the subdivision that were opposed to a church being built there. (Exhibits R-12, R-13 and R-20; Testimony of Alan Cameron Tr. at 124-125, 129). If she did not wish to allow a church on Lots 2, 3, and 4, she could have refused to sign the option contract or she could have refused to give permission for a church to be built. However, instead of taking either of those options, she chose to sell the property to the Harlands with a covenant that would allow them to build a church. Additionally, Ryland Sneed, the surveyor who helped the Leavells plan the subdivision and prepared the subdivision plats, testified that Mrs. Leavell had previously expressed a desire to have a church in that community. (Testimony of Ryland Sneed, Tr. at 54, 84-85). Alan Cameron testified that the covenants attached to his lot 8 are evidence of a different intent on the part of the Leavells. (Test. of Alan Cameron Tr. at pp.123-125). However, actions speak louder than words. In the face of much opposition, Carroll Leavell voluntarily sold lots 2, 3, and 4 with covenants permitting use by a church. Therefore, it is abundantly clear that Mrs. Leavell's intent was that the building of a church should be permitted on Lots 2, 3, and 4 of Long Meadow Subdivision.

If the intent to prohibit or restrict be expressed in clear and unambiguous wording, enforcement is available in the courts of this state.' *Lake Castle Lot Owners Ass'n, Inc. v. Litsinger*, 868 So.2d 377, 379-380 (Miss. Ct. App. 2004) (citing *Andrews v. Lake Serene Property Owner's Ass'n, Inc.*, 434 So.2d 1328, 1331 (Miss. 1983)). It logically follows that if a use is permitted in clear and unambiguous language, enforcement should also be available in the

courts. However, should it be determined that there is contradiction in what the Leavells were trying to do, the covenant(s) should be construed most strongly against the person seeking the restriction and in favor of the person being restricted.' *Kemp v. Lake Serene Property Owners Ass'n, Inc.*, 256 So.2d 924, 926 (Miss. 1971). In this case, either application of the law will yield the same result: Lots 2, 3, and 4 are encumbered by a restrictive covenant that limits permissible construction on those lots to either a single family residence or a church. Therefore, the Harlands or their successors in title should be permitted to build a church on those lots without the threat of further legal action from other members of Long Meadow Subdivision.

III. The Harlands are not equitably estopped from using their property in a manner that is compliant with the covenants contained in their May 22, 2007 deed.

A. Equitable Estoppel

The Appellants assert that the Harlands and any successor owners of Lots 2, 3, and 4 of Long Meadow Subdivision Phase III should be equitably estopped from building a church on those lots. In order to prevail on a claim of equitable estoppel, the Appellants had to show (1) that they changed their position in reliance upon the conduct of another and (2) that they suffered detriment caused by that change of position in reliance of such conduct. *PMZ Oil Co. v. Lucroy*, 449 So.2d 201, 206 (Miss. 1984). The Appellants have wholly failed to meet even one of the requisite elements of equitable estoppel.

When questioned regarding his alleged reliance, Alan Cameron was abundantly clear that he did not examine any records relative to Phase III even though they were on file at the time. (Test. of Alan Cameron, Tr. at 150-151). He stated "I didn't do title work relative to the entire subdivision. I was looking at the lot we were purchasing at the time when I made sure that our

lot was covered by protective covenants, as were all the other lots in the area." When asked "So you didn't rely on everything in the record, just what applied to phase two; is that correct?" his response was "Yeah, that's right." (Test. of Alan Cameron, Tr. at 151). In other words, he *assumed* that the covenants that encumbered the lot he was purchasing were the same covenants that were or would be applicable to lots in Phase I and Phase III. Assumption is not the same as reliance. Therefore, Alan Cameron failed to meet his burden of proof on the first element of equitable estoppel.

Likewise, the Appellants only other witness, James Propes, alleged reliance based upon representations made by the Leavell's realtor and protective covenants found in the land records. (Test. of James Propes, Tr. at 162-163, 164-166). His testimony was that the realtor represented to him that all of the lots were residential. (Test. of James Propes, Tr. at 162-163, 164-166). He might have a valid argument if that turned out not to be true. However, all of the lots in the subdivision are limited to residential use. He simply disagrees with the Leavell's definition of what can be considered residential for Phase III. Additionally, just as Mr. Cameron did, Mr. Propes saw the Phase II covenants and *assumed* they covered all phases of the subdivision. The only covenants filed in the land records of Lafayette County, Mississippi that apply to Long Meadow Subdivision that are not filed as an attachment to a deed is a document titled "Protective Covenants of Long Meadow Subdivision Phase II." (Exhibit P-10). At the time Mr. Propes purchased his lot in the subdivision, the only occupied lot in Phase III was Lot 1 one which was owned by David Pryor. The covenants for Lot 1 permit more uses than the Phase II covenants permit. (Exhibit P-11).

The question that must be asked is "Can the property owners in Phase II claim reliance on the Phase II covenants (specifically, that nothing but single family residences could ever be constructed on any lot in any phase of Long Meadow Subdivision) when there existed prior covenants on certain lots that allowed for an additional use?" The answer must be no.

The second element necessary to prove equitable estoppel is that the Appellants prove that they have or will suffer some detriment as a result of their alleged reliance on the Phase II covenants. Both witnesses testified as to their opposition to the building of a church in the subdivision but neither provided any evidence as to exactly how they would be damaged by it. There was speculation from both witnesses that if a church were allowed it could lead to other uses such as strip malls and chicken processing plants. (Test. of Alan Cameron Tr. at 130-132; Test. of James Propes Tr. at 172-173). However, that speculation has no legal basis whatsoever.

The covenants attached to Lots 2, 3, and 4 of Long Meadow Subdivision Phase III are real covenants that run with the land. (Exhibit P-5). As such, they encumber not only the grantee, but also the grantee's successors in title. *Griffen v. Tall Timbers Dev., Inc.*, 681 So.2d 546, 550 (Miss. 1996). The covenant in question states specifically that "[o]nly residential structures shall be permitted on these acres. The term 'residential' shall include churches and shall not prevent structures used for church purposes." (Exhibit P-5). Because the existing covenants run with the land, they cannot be changed at the whim of a current owner. All subsequent owners in the chain of title from the grantee that imposed the covenant are bound by and subject to that covenant that runs with the land. *Id.* Therefore, Lots 2, 3, and 4 can ***never*** be used for anything other than a church or residences.

Baseless speculation is not evidence of detriment. Therefore, the Appellants also failed to meet the second requirement of equitable estoppel. Being unable to prove even one element of equitable estoppel, the Appellants cannot be permitted to impose their will and their own restrictions on Dr. and Mrs. Harland or their successors in title.

B. Case Law

The Appellants rely primarily on two cases involving protective covenants and an assertion of equitable estoppel to support their appeal. However, it is the Harland's opinion that both cases can easily be distinguished from the case at hand.

1. *PMZ Oil Company v. Lucroy*

In the case of *PMZ Oil Company v. Lucroy*, a developer sold lots in an unplatted development by attaching covenants to the individual deeds of conveyance. *PMZ Oil Company v. Lucroy*, 449 So.2d 201. According to the facts of the case, it was a single phase development of sixteen (16) lots and the covenants that were recorded with the deeds were all identical. *Id.* at 203. Those covenants limited restricted construction to only one (1) residence per lot. *Id.* After selling seven (7) lots with this covenant, the developer decided that he wanted to build six townhouses on one lot. *Id.* at 204. The property owners requested an injunction which was granted and later affirmed by the appellate court on the ground of equitable estoppel. *Id.* at 208-209.

In the *PMZ Oil* case as well as the following case to be discussed, it was the developer that created the covenant and then attempted to violate the covenant. That is definitely not what occurred in the instant case. The Leavells developed the property and wrote all the covenants. They knew what covenants they had used in the different areas and knew what

their intent was for the subdivision. The Harlands did not possess this same knowledge. However, the Harlands had researched the land records and found that other lots in Phase III permitted churches. (Test. of Earnest Harland Tr. at 12-13). Therefore, it was not preposterous for them to purchase this property with the express intention of building a church. The Harlands asked for this right, they bargained for this right and they received this right; now, the Appellants wish to strip them of it.

In its opinion, the *PMZ Oil* Court stated "[w]hat ought to be done here is that the covenants should be recorded and enforced against one and all." *Id.* at 208. That is a reasonable result in the *PMZ Oil* case because there existed only one set of covenants for that subdivision. Unfortunately, that result is not so easily applied in the case at hand because Robert and Carol Leavell filed a minimum of three different sets of covenants in Long Meadow Subdivision.

2. *White Cypress Lakes Development Corporation v. Hertz*

The *White Cypress* case is closer factually to the instant case but also easily distinguishable. In this case a single developer, Talmar, Inc. created a thirteen phase development adjoining a lake. According to the developer's sale's literature

> [t]he basic difference between White Cypress Lakes and other rural developments is that its land is measured in acres instead of feet. White Cypress is an acreage development . . . Talmar, Inc. has zoned each area of the huge development for its most suitable use. The zoning plans assure owners that quality will surround them. **The types of structures and the uses of those structures are designated in each area.** (emphasis added)

White Cypress Lakes Dev. Corp. v. Hertz, 541 So.2d 1031, 1033 (Miss. 1989). The covenants at issue in this case were one that limited use to residential purposes and another

that prohibited commercial use. *Id.* at 1033-1034. In spite of these covenants, Talmar, Inc. attempted to construct an RV campground within one of the phases. *Id.* at 1033. The Court ultimately held that the development company was equitably estopped from using the property in a prohibited manner because the surrounding land owners had been substantially induced to "believe that all lots within the entire White Cypress Lakes development areas would be used solely for single family homes. . ." *Id.* at 1035. The *White Cypress* court appeared to have based its ruling largely on evidence that the entire development was heavily marketed in this manner. *Id.*

One similarity between *White Cypress* and the case at hand is that different uses and structures were expressly allowed in different phases of the development. However, what was not allowed in any phase was commercial use. The clear distinction between the two cases is that the *White Cypress* developers were estopped from engaging in a commercial use which was expressly prohibited and grossly inconsistent with the idea of a residential neighborhood while, in the instant case, the building of a church is a use expressly permitted and defined by the developer as a residential use and is not inconsistent with the nature of a residential area. There is a vast difference between a use that is purely commercial and would never be permitted in a residential neighborhood and one that is commonly accepted in residential areas.

The statement of the law in *White Cypress* should not be applied without limitation or practical consideration. Dr. and Mrs. Harland should not be permitted to build a gas station on Lots 2, 3, and 4 of Long Meadow Subdivision. Neither should they be permitted to build a strip mall there. However, there is no valid or legal reason that they should not be

allowed to build a church there. The Appellants should not be permitted to clothe their personal desires in a claim of equitable estoppel in order to prohibit a lawful and reasonable use of private property.

IV. The Chancellor did not err in granting the Harland's Motion to Set Aside the Corrected Warranty Deed.

In order for a deed to be valid, it must be both delivered to and accepted by the grantee. *Martin v. Adams*, 62 So.2d 328, 329 (Miss. 1953); *In re Estate of Hardy*, 910 So.2d 1052, 1055 (Miss. 2005). "The intent to deliver a deed must be mutual with the intent to accept the deed in order for delivery and acceptance to be complete." *Hardy* 910 So.2d at 1055. In the case at hand, there was neither delivery or acceptance of the Corrected Warranty Deed signed by Carroll Leavell.

The Harlands purchased the subject property from Carroll Leavell in May of 2007 and this action was commenced on August 21, 2007. In May of 2008, counsel for Appellants, Ken Rutherford, prepared a Corrected Warranty Deed for Lots 2, 3, and 4 of Phase III of Long Meadow Subdivision and sent it to Mrs. Leavell's attorney, Charles Walker, with a request that she execute it and deliver it to the Harlands. (Exhibit P-6). This Corrected Warranty Deed contained the following false statement:

> Said Warranty Deed attempted to convey the property described therein subject to certain covenants attached to said Warranty Deed as Exhibit "A." The covenants attached to said Warranty Deed contained errors which Grantors wish to correct by executing, delivering and filing of record this Corrected Warranty Deed with attached corrected Protective Covenants which conform to the Protective Covenants presently in force with respect to Long Meadow Subdivision, Phase III.

(Exhibit P-8). On May 29, 2008, Mr. Walker sent the Corrected Warranty Deed to Mrs. Leavell with a copy being provided to counsel for Petitioners, Larry Little. (Exhibit P-7). Charles Walker was immediately notified by phone that the Harlands did not agree to and would not accept such a deed. Despite this repudiation, the Corrected Warranty Deed was executed and filed in the land records of Lafayette County on July 15, 2008. (Exhibit P-8). This was all done without the knowledge of Dr. or Mrs. Harland. (Test. of Earnest Harland Tr. at 13-14, 36).

A grantee should not be permitted to file a correction deed without the agreement of the grantor. It is especially disturbing that this was attempted in order to change a provision that was negotiated, and expressly bargained for. If the trial courts decision to set aside the Correction Warranty Deed is overturned, it will set an alarming precedent that would permit grantors to renege on contracts after a sale. The trial court did not err in setting aside that Corrected Warranty Deed and therefore that decision should not be reversed.

CONCLUSION

"[C]ourts do not look with favor on restrictive covenants. Such covenants are subject more or less to a strict construction and in the case of ambiguity, construction is most strongly against the person seeking the restriction and in favor of the person being restricted." *Lake Castle Lot Owners Ass'n, Inc. v. Litsinger*, 868 So.2d 377, 379-380 (Miss. Ct. App. 2004) (citing *Kemp v. Lake Serene Property Owners Ass'n, Inc.*, 256 So.2d 924, 926 (Miss. 1971)). The Appellants do not want a church in their neighborhood. Their reasoning is that "[o]nce you allow one nonconforming structure, whatever that may be, then it opens the flood gates for other development that would be inconsistent with what's allowed in our subdivision." (Test. of Alan Cameron Tr. at 132). Besides being a legally and factually incorrect assumption, the Appellants claim that this is detrimental to their property and that the Harland's should be equitably estopped from building a church on their property. However, the evidence presented at trial simply does not support such a claim. Alan Cameron could only point to the Phase II covenants as a basis for his alleged reliance. He claims to remember seeing other documentation indicating covenants for Phase III but no such documentation was presented at trial. James Propes likewise bases his alleged reliance on the Phase II covenants and statements made by the Leavell's realtor. The same realtor that assisted the Harlands in preparing the contract contingency regarding church use. (Test. of Ernest Harland Tr. at 24-25; Test. of James Propes Tr. at 162). Additionally, neither Cameron nor Propes could state definitively how they would be damaged by the building of a church. If there is no equitable estoppel, the Appellants must be enjoined from attempting to impose their chosen set of rules on others in the subdivision.

There is sufficient evidence in the record to support the Chancellor's findings regarding the protective covenants of Lots 2, 3, and 4 of Phase III of Long Meadow Subdivision as well as his decision to set aside the Correction Warranty Deed. Therefore, for the foregoing reasons, the ruling of the Chancellor in this matter should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Tara B. Scruggs., Attorney at Law, Oxford, Mississippi, do hereby certify that I have this date mailed by United States Mail, postage prepaid, a true and correct copy of the above and foregoing to:

Hon. Percy L. Lynchard, Jr.
Chancery Court Judge, District 3
PO Box 340
Hernando, MS 38632-0340

Kenneth A. Rutherford
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This, the 15th day of June 2010.

TARA B. SCRUGGS