

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CASE NO. 2009-CA-01775-COA

LONG MEADOW HOMEOWNERS
ASSOCIATION, INC., ET AL.

APPELLANTS

V.

ERNEST C. HARLAND, ET AL.

APPELLEES

ON APPEAL FROM THE
CHANCERY COURT OF LAFAYETTE COUNTY
STATE OF MISSISSIPPI
Cause No. 2007-421

**REPLY BRIEF OF LONG MEADOW HOMEOWNERS ASSOCIATION, ET AL.
APPELLANTS**

ORAL ARGUMENT REQUESTED

Kenneth A. Rutherford - MS Bar [REDACTED]
DANIEL COKER HORTON & BELL, P.A.
265 North Lamar Blvd., Suite R
Post Office Box 1396
Oxford, Mississippi 38655-1396
(662) 232-8979

COUNSEL FOR APPELLANTS

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STATEMENT REGARDING ORAL ARGUMENT

Appellants believe oral argument would be helpful to the Court because of the complexity of the record and the disputed legal issues involved in this appeal.

I. STATEMENT

Long Meadow Subdivision has had only residential dwellings from its inception in 1988. Today, only residential properties can be seen in or around Long Meadow Subdivision. Since Long Meadow Subdivision is outside the city of Oxford in Lafayette County, it is not subject to any zoning regulations. The subdivision must depend upon protective covenants to protect the residential character with which Long Meadow was planned, represented and developed.

The salient facts in this case are largely undisputed. In 1993 a plat was filed in the Lafayette County land records covering Phases I and II of Long Meadow Subdivision (Lots 14 through 46). (Ex. R-5; R.E. 103-09). This plat referenced protective covenants which had been filed in the Lafayette County land records in 1991. These covenants prohibited any structures other than single family residences and associated structures. (R-4; R.E. 94-102).

In 1994 a plat was filed in the Lafayette County land records for Phase III (Lots 1-12) which left blank the reference to the book and page of the protective covenants governing this phase of Long Meadow. (R-7; R.E. 90-92).

Beginning in 1988 with Lot 1, however, protective covenants had been attached to deeds in Phase III of Long Meadow which prohibited any structures other than residential dwellings. (See Ex R-2; R.E. 86-89 and Ex. R-22; R.E. 121-23)

This practice continued with the sale of Lot 10 and an additional portion of Lot 1 in Phase III in 2002. (Ex. R-8; R.E. 124-130; Ex. R-9; R.E. 131-38). These lots were

covered by protective covenants which prohibited all uses except single family residential in all of Long Meadow Subdivision bordering Industrial Parkway (now Northpointe Parkway). All of the lots bordering Northpointe Parkway are in Phase III.

In 2004 Oxford University School made known its interest in building a school on Lots 2, 3 and 4 in Phase III, which border Northpointe Parkway (the "Subject Property"). After objections by the surrounding landowners, Oxford University School withdrew its expression of interest. At that time Homeowners Alan and Mary Cameron already owned Lot 46 in Phase II of Long Meadow, on which their home was situated. In June 2004 the Camerons negotiated the purchase of Lot 8, which adjoins their Lot 46, from the Leavells. Lot 8 is in Phase III and borders both Northpointe Parkway and the Subject Property. As the Harlands admit on page 3 of their Principal Brief, the Camerons' purpose in purchasing Lot 8 was to "clarify the public record and standardize the covenants, in effect, by insuring that it was clear that the residential only protective covenants related to all Long Meadow Subdivision lots, and most particularly phase three since those were the ones that remained to be developed." (Testimony of Alan Cameron, Tr. 123; R.E. 72).

As Alan Cameron testified, without contradiction, "The Leavells [the original developers, who lived in Georgia at the time] agreed to [the Camerons'] wishes that the deed and the plat be structured in a way that it would be clear to the world that the phase three Long Meadow Subdivision lots were all subject to the same covenants as phase two." (Tr. 123-25; R.E. 72-74). The Camerons were shown a revised plat for Phase III by the attorney for the Leavells, Charles Walker, who drafted the deed to Lot 8 with the Camerons' requested protective covenants, as approved by the Leavells. The plat

referenced the protective covenants attached to the Camerons' deed which was filed in the land records of Lafayette County. (Tr. 124-26, 142).

With the agreement of the Leavells to standardize the covenants in Phase III when they executed the deed to the Camerons for Lot 8, the Camerons and the Homeowners in Long Meadow believed that the subdivision would remain single family residential only. The revised plat for Phase III, however, was apparently never filed in the land records of Lafayette County. In any event, it has not been found.

Shortly after the deed to the Camerons for Lot 8 was executed and filed in June 2004, Robert Leavell died. The surviving Leavells subsequently executed deeds to purchasers in Phase III which attempted to change the agreement they had made with the Camerons and permit the construction of schools, churches and related facilities in Phase III of Long Meadow. (See Exs P-13, P-14, P-16, P-18 and P-19; R.E. 110-123, 131-139).

This practice, which was unknown to the Homeowners in Long Meadow in 2004, culminated in November 2006 with the execution by the remaining Leavells to the Harlands of an option to purchase the Subject Property for resale for use by a church. The Homeowners, aware of the Harlands' intent, objected strenuously and notified the Harlands of the protective covenants covering Lot 8, which the Homeowners believed covered the remainder of Phase III. (Exs. R-12, R-13; R.E. 185-88, 189-90).

The Harlands, however, ignored the objections of the surrounding Homeowners and closed on the sale of the property in March 2007. (Ex. R-14; R.E.194-97). The protective covenants contained in the deed from the Leavells to the Harlands prohibited any structures other than "residential structures." The covenants, however, defined the

term “residential” to “include churches and shall not prevent structures used for church purposes.” (Ex. P-5; R.E. 69).

The Leavells subsequently acknowledged in a Corrected Warranty Deed to the Harlands for the Subject Property that they had made a mistake in attempting to change the definition of the term “residential” in the protective covenants. (Ex.R-17; R.E.203-14). The protective covenants in the Corrected Warranty Deed from the Leavells to the Harlands contained the covenants applicable to Lot 8, which adjoined the Subject Property and which prohibited any structure other than one single family residential structure for each lot in Phase III.

The Harlands objected to the Corrected Warranty Deed and its protective covenants.

II. ARGUMENT

In its Principal brief the Homeowners showed that they were entitled to relief because the lower court should have ordered the single-family-residential-only covenants in the Lot 8 covenants (which are the same as in the Harlands’ Corrected Warranty Deed) to be in effect as to the Subject Property. This is because either (1) equity regards as done what should have been done (the filing of the Lot 8 covenants as general covenants in the Lafayette County land records or attaching them to subsequent deeds), or (2) the Leavells and the Harlands are equitably estopped from changing the residential-only use permitted in Phase III, as represented to the Camerons when they purchased Lot 8 in reliance on that representation by the Leavells.

The Homeowners’ legal position arises directly from the Mississippi Supreme

Court cases *PMZ Oil Co. v. Lucroy*, 449 So. 2d 201 (Miss. 1984) and *White Cypress Lakes Development Corp. v. Hertz*, 541 So. 2d 1031 (Miss. 1989).

In *PMZ Oil* the developer had sold lots in the subdivision with the representation (consistent with protective covenants in the deeds) that only residential dwellings would be permitted. As in the present case, however, the developer did not file the protective covenants in the land records covering the entire subdivision either separately or by reference in the subdivision plat. As in this case, the developer later attempted to change the use in the subdivision after previously representing that it would be single family residential only. The Mississippi Supreme Court held that where the developer had previously represented that the subdivision would contain only single family dwellings, he could not change the use to multi-family even though there was no general filing of protective covenants in the county land records. The Court applied the doctrine of equitable estoppel to preclude such change in the subdivision use by the developer.

Similarly, in *White Cypress Lakes* the Mississippi Supreme Court held that where a developer had represented to purchasers that they would be protected in purchasing in a single- family-dwelling-only subdivision in earlier phases of the development, a subsequent developer could not change from residential to commercial use in later phases of the development, even in an adjacent subdivision. Again, the Court applied the doctrine of equitable estoppel to preclude the developer from changing the use in the development after representations were made to the contrary.

These cases are directly on point and are controlling in this case. Here the developers, the Leavells, represented to the Camerons in 2004 that all of Phase III, like

the remainder of Long Meadow subdivision, would henceforth be single family residential only. In reliance upon this representation, the Camerons purchased Lot 8, which adjoins both the Subject Property and the Cameron's Lot 46, on which their home is situated. As in both the *PMZ Oil* case and the *White Cypress Lakes* case the developer (the Leavells) having induced purchasers with representations of single-family-residence-only covenants, attempted to change the permitted uses in later phases of the subdivision development. As in *PMZ Oil* and *White Cypress Lakes*, this Court should not countenance such flip-flopping by the developer. This Court should require the single-family-residence-only covenants to be applicable to Phase III as in the Cameron deed and in the remainder of the subdivision.

Protective covenants are enforced. "If the intent to prohibit or restrict be expressed in clear and unambiguous wording, enforcement [of protective covenants] is available in the courts of this state." *Andrews v. Lake Serene Property Owners Ass'n, Inc.*, 434 So. 2d 1328, 1331 (Miss. 1983). This is true even where a church is involved. See *Christ's Methodist Church v. Macklenburg*, 177 P.2d 1008 (Okla. 1997), and cases cited therein.

The Harlands do not contend that the protective covenants in the Cameron deed to Lot 8 are ambiguous. Rather, the Harlands argue that the intention of the Leavells, when they subsequently executed the warranty deed to the Harlands for the Subject Property, was to permit the construction of a church and other facilities for church use on the Subject Property. The Harlands argue that there were no covenants generally applicable to Phase III, either filed separately from other deeds or referenced in the Phase III plat on

file. Therefore, the Harlands contend, the Leavells should be entitled to change the uses permitted in the subdivision as to lots sold after 2004. The Leavells, however, cite no authority for the argument that a developer may change uses after making contrary representations to previous purchasers.

Essentially, this argument by the Harlands seeks to exploit sloppy or careless paper work (or intentional misrepresentation) by the developers in the establishment and conveyances in Long Meadow. Ordinarily, protective covenants are specified in the subdivision plat and are filed of record in the county land records. That was not done for Long Meadow Phase III, although it was done for Phases I and II. Therefore, the Harlands claim that they are entitled to negotiate any covenant terms they desire with the Leavells, regardless of the Leavells' previous contrary representations to the Camerons and other Homeowners, which representations were known to the Harlands. This argument, of course, ignores the contrary intent of the Leavells for Long Meadow to be residential dwellings only. This residential-only intent is clearly expressed in all protective covenants in Long Meadow through the deed to the Camerons for Lot 8 in June 2004 and in subsequent Phase III covenants, including those in the Harlands' Corrected Warranty Deed in 2008 and the Corrected Warranty Deed to the Mays for Lot 6, in 2009. (Ex. R-10; R.E. 50-56; R-23; R.E. 173-84).

The Harlands also argue that when they purchased the Subject Property in 2007, there were other lots in Phase III which had covenants defining "residential" as permitting schools, churches and related facilities. While there are presently a few lots in Phase III other than the Subject Property which have "church and school" covenants attached to

their deeds (Lots 5, 11 and 12) the covenants applicable to Lots 1, 6, 7, 8, 9 and 10 in Phase III all permit only residential dwellings. (Exs R-8, R-9, R-10, R-11 and R-23; R.E. 124-30, 131-38, 117-18, 173-84).

Significantly, the Harlands' argument ignores the fact that all of the deeds containing the "church and school" permissive covenants were executed by the Leavells *after* the Leavells induced the Camerons to purchase Lot 8 in Phase III with the single-family-dwelling covenants to which the Leavells agreed. All of the protective covenants attached to deeds in all phases prior to and including the deed to the Camerons for Lot 8 in June 2004 provide for residential use only.

Thus the Harlands' real argument is again revealed. The Harlands' real claim is that the Leavells' failure to file covenants generally covering Phase III in the Lafayette County land records created a loophole which entitled the Leavells to change the permitted use in Long Meadow. The Harlands' argument was specifically rejected by the Supreme Court in *PMZ Oil* and *White Cypress Lakes*, and it should be rejected here.

The Harlands also misrepresent the position of the Homeowners with respect to the covenants. For example, on page 8 of their Principal Brief the Harlands contend that the Homeowners rely only on the Phase II covenants on file in the land records of Lafayette County. This contention is mistaken. The Homeowners are also relying on the covenants contained in Phase III deeds covering the Camerons' Lot 8, and similar covenants in deeds to Lots 1 and 10 from the Leavells prior to the deed to the Harlands. These deeds also provide that Phase III is subject to residential-only covenants (not including churches and schools). The Homeowners also rely on subsequent deeds

containing residential-dwelling-only covenants in deeds to Phase III, Lots 6, 7 and 9.

The Harlands also argue that the Camerons did not change their position in reliance on representations by the Leavells. (Brief of Appellees, at 10). In support of this argument, the Harlands disingenuously refer to testimony by homeowner Alan Cameron regarding Lot 46 in Phase II on which the Camerons' home is situated and which they had purchased several years before they purchased Lot 8:

Q. But to be clear, I understood you to say *when you even bought your first lot* [Phase II, Lot 46] that you examined the records, that you relied upon the fact that there was no zoning in the county, and that *you needed protective covenants to take care of your needs in phase two when you bought your first lot?*

A. . . . I did not review any records relative to phase three because at that time [the purchase of Lot 46] we were satisfied with what we bought in phase two. [Tr. 150-151]. (Emphasis added).

This testimony obviously has no relevance to the Camerons' subsequent purchase of Lot 8 in Phase III.

In arguing lack of reliance by the Camerons on the Leavells' representations with respect to Lot 8, the Harlands ignore their own admission on page 3 of their Principal Brief that the Camerons' primary purpose in purchasing Lot 8 in 2004 was to standardize the covenants in the subdivision and to impose the single-family-residential-only covenants on Phase III. The Harlands also ignore the uncontradicted testimony of Alan Cameron quoted in the Principal Brief of the Homeowners, at 11:

Q. . . . did you rely in any way on the language in the protective covenants when you bought lot eight?

A. [by Alan Cameron] Yes.

Q. How is that?

A. Well, again, *we would not have bought lot eight if we thought that it wouldn't have the intended effect of insuring that the residential only covenants were applicable to all areas encompassed within the subdivision. . . . and it was the purpose of our acquisition of that lot to achieve that.* (Tr.127-28; R.E. 76-77) (Emphasis added).

The Harlands also argue that the word "residential" can be defined to include a church and facilities used by churches. (Brief of Appellees, at 11). This argument has been specifically rejected by the Mississippi Supreme Court, which has repeatedly held that the term "single family residence" is not ambiguous and means exactly what it says. See *AA Home Improvement Co., Inc. v. The Hide-A-Way Lake Club, Inc.*, 393 So.2d 1333 (Miss.1981), in which the Court stated, 393 So. 2d at 1336-37:

There is no ambiguity in the expression "no lot shall be used for other than residential purposes." Any additional use must be reasonably incidental to residential uses and such an inconsequential breach of the covenant as to be in substantial harmony with the purpose of the parties in making the covenants, and without substantial injury to the neighborhood. (Emphasis added).

In *AA Home Improvement Co.* The Supreme Court held that a roadway between two subdivisions whose only purpose was to provide a means or ingress and egress between the subdivisions was not incidental to residential uses or in substantial harmony with the intent of the parties to have each subdivision be self-contained. See also *Gast v. Edder*, 600 So. 2d 204, 206-07 (Miss. 1992), in which the Mississippi Supreme Court held that a boathouse built in a subdivision was in violation of a protective covenant prohibiting structures other than a single-family dwelling and a two-car garage. The Court ordered the boathouse removed.

The Mississippi Supreme Court decisions in *PMZ Oil*, *White Cypress Lakes* and the cases cited therein recognize and establish that protective covenants have inherent value, and violation of protective covenants causes legally cognizable injury to protected landowners. In spite of this established principle of law, the Harlands contend that the Homeowners cannot demonstrate any injury from the Harlands' permissive "church use" covenants.

The Harlands' contention that the Homeowners cannot demonstrate any injury if church use is permitted by the Harlands' covenants is factually, as well as legally, incorrect. The covenant attached to the Harlands' deed states: "Only residential structures shall be permitted on these acres. *The term 'residential' shall include churches and shall not prevent structures used for church purposes.*" (Emphasis added). Conceivably "use for church purposes" could include almost any use, including commercial uses. Churches are known to use all kinds of structures and facilities for their members, including gymnasiums, education buildings, fellowship halls, day care centers, schools, thrift shops, bookstores, ball fields, fitness centers and bingo parlors. There is nothing in the covenants the Harlands are seeking to force on the residents of Long Meadow which would prohibit any commercial venture which made money for a church, since such use would arguably be a "church purpose."

Both Alan Cameron and James Propes, who testified at trial as the representative of the Homeowners, testified regarding potential damage from the covenants granted the Harlands initially by the Leavells. (Tr. 130-32, 172-73).

The damage from the inability to enforce a protective covenant is, in summary,

the loss of the value of the covenant to the homeowner. Lafayette County has no zoning regulations. If the Homeowners cannot protect their property values through covenants, then they have no protection at all. It is the potential for such protection that gives the covenants value.

The Harlands also argue that the Corrected Warranty Deed executed and given to them by the Leavells should not be enforced because they did not accept the deed. This argument misses the point. The covenants contained in the original deed to the Harlands which permitted any church use on the property is improper. Therefore, the Harlands have a choice of either accepting the Corrected Warranty Deed with the single-family-dwelling covenants or rescinding the purchase and getting their money back. The Harlands admitted in their Principal Brief, at 4, that when they agreed to purchase the Subject Property, "they included the contingency that if permission to build a church on the lots could not be given, then the contract would be void."

III. CONCLUSION

In summary, the Harlands argue that the confused state of the land records entitled the Leavells to change the residential-only use in Long Meadow in 2007, in spite of their previous representations to the contrary which induced the Camerons to purchase Lot 8 in June 2004 (and in spite of other previous representations and residential-only covenants applicable to all previous sales since 1988). The Mississippi Supreme Court foreclosed the Harlands' argument in *PMZ Oil* and *White Cypress Lakes*. The Homeowners request that this Court follow the holdings of the Mississippi Supreme Court and reverse and render this case in favor of the Homeowners.

Respectfully submitted,

Long Meadow Homeowners
Association, Inc., et al., Appellants

BY:


KENNETH A. RUTHERFORD

Kenneth A. Rutherford MS Bar # [REDACTED]
DANIEL COKER HORTON & BELL, P.A.
265 North Lamar Blvd., Suite R
Post Office Box 1396
Oxford, Mississippi 38655-1396
Ph: (662) 232-8979
Fax: (662) 232-8979

ATTORNEY FOR APPELLANTS

CERTIFICATE OF SERVICE AND FILING

I, Kenneth A. Rutherford, of counsel for the Appellants, Long Meadow Homeowners Association, Inc., et al., pursuant to Rule 25 of the Mississippi Rules of Appellate Procedure, do hereby certify that I have this day filed, by mailing, by first class mail, postage prepaid, the original and three (3) copies of the above Reply Brief of Long Meadow Homeowners Association, Inc., et al., Appellants, to the Clerk of the Mississippi Supreme Court and Court of Appeals. I further certify that I have this day mailed a true and correct copy of same to the following:

Hon. Percy L. Lynchard, Jr.
Chancery Court Judge, District 3
5 West Commerce Street
P.O. Box 340
Hernando, MS 38632-0340

Larry L. Little, Esq.
Tara B. Scruggs, Esq.
Lawrence L. Little & Associates, P.A.
829 North Lamar Blvd., Suite 6
Oxford, MS 38655

David L. Minyard, Esq.
Hill & Minyard
Post Office Box 429
Oxford, MS 38655-0429

THIS, the 30th day of July, 2010.


KENNETH A. RUTHERFORD