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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LONG MEADOW HOMEOWNERS' ASSOCIATION, INC.

APPELLANTS

v.

ERNEST C. HARLAND and  
BONNIE S. HARLAND

APPELLEES

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

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2. Whether the lower court erred in holding that the Leavell Appellees were not estopped from changing the permitted uses under the Protective Covenants for Long Meadow Subdivision, including Lots 2, 3, and 4, when the Leavell Appellees had represented to Appellants that the Covenants and uses would not be changed, and Appellants purchased lots in Long Meadow Subdivision in reliance on those representations.	
3. Whether the lower court erred in holding that the Protective Covenants filed of record with the initial Warranty Deed to the Harland Appellees conveying Lots 2, 3 and 4 of Long Meadow Subdivision are valid.	
4. Whether the lower court erred in granting Appellees' Motion to Set Aside the Corrected Warranty Deed from the Leavell Appellees to the Harland Appellees for Lots 2, 3 and 4 of Long Meadow Subdivision.	
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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 OF THE ISSUES**

The issues presented on appeal are as follows:

1. Whether Protective Covenants filed with Deeds to Lots in Long Meadow Subdivision which predate the Harland Appellees' Deed to Lots 2, 3 and 4 of Long Meadow Subdivision are applicable to Lots 2, 3 and 4.
2. Whether the lower court erred in holding that the Leavell Appellees were not estopped from changing the permitted uses under the Protective Covenants for Long Meadow Subdivision, including Lots 2, 3, and 4, when the Leavell Appellees had represented to Appellants that the Covenants and uses would not be changed, and Appellants purchased lots in Long Meadow Subdivision in reliance on those representations.
3. Whether the lower court erred in holding that the Protective Covenants filed of record with the initial Warranty Deed to the Harland Appellees conveying Lots 2, 3 and 4 of Long Meadow Subdivision are valid.
4. Whether the lower court erred in granting Appellees' Motion to Set Aside the Corrected Warranty Deed from the Leavell Appellees to the Harland Appellees for Lots 2, 3 and 4 of Long Meadow Subdivision.
5. Whether Appellants should be awarded litigation costs and attorney fees.

## **II. STATEMENT OF THE CASE**

This suit involves Lots 2, 3 and 4 of Long Meadow Subdivision, a residential subdivision in Lafayette County, Mississippi (the "Subject Property"). All 48 platted lots in Long Meadow contain over four acres except one, which has over three acres. The subdivision has three phases. Plats for Long Meadow were approved by the Board of Supervisors and filed in the land records

of Lafayette County in the early 1990's by the developers, Robert N. Leavell and his family.

Protective Covenants permitting only one single family residence for each four acres were filed in the Lafayette County land records in 1991. These Covenants specifically referenced Phase II of the subdivision and were included by reference in the Plat for Phases I and II (Lots 14-46) filed in the land records of Lafayette County in 1993. The Plat for Phase III (Lots 1-12), filed in 1994, referenced Protective Covenants but did not reference the book and page of the Covenants. In 1997 the developers wrote the Homeowners that the subdivision development was complete.

Separate Protective Covenants permitting only residential use were typically filed with each deed from the Leavells to purchasers in all phases for over ten years. Some of the deeds to Lots in Phase III, including the lots adjacent to, and across the street from, the Subject Property, contain Protective Covenants stating that all Lots in Phase III are to be single family residential only. A chronology of the history of Long Meadow is contained in Ex. R. 22; R.E. 121-123.

Robert Leavell died in July 2004. In early 2007 the Homeowners in Long Meadow learned that the remaining Leavell family members (Appellees here) intended to sell the last three unsold lots (the Subject Property, Lots 2, 3 and 4, which are in Phase III) to Appellees Ernest and Bonnie Harland for use by a church.

In spite of strenuous objections from the Homeowners, and in spite of the history of Long Meadow Subdivision, the Leavells went through with the sale of the Subject Property to the Harlands. The deed to the Harlands contained Protective Covenants which permitted residential use only, but purported to define the term "residential" to include churches and related facilities.

Appellees Ernest C. Harland and Bonnie S. Harland, brought this suit requesting the Court either to remove the Subject Property from the filed Subdivision Plat for Phase III or to validate the Protective Covenants filed with their deed which appear to allow a church and church-related

structures on the Subject Property.

Adjoining landowners, including the twenty-two families of Homeowners who are members of the Long Meadow Homeowners Association (Appellants here, collectively referred to as the "Homeowners") objected to the change in permitted use and urged the lower court to apply the Protective Covenants which they believe covered all of the subdivision lots. The Homeowners filed a Counterclaim requesting a Declaratory Judgment that the Protective Covenants filed with the deeds to the Camerons and others in Phase III, which prohibited any use other than single family residential, be held binding on all Lots in Phase III, that the Protective Covenants run with the land, and that the construction of churches and other nonconforming uses are prohibited in Phase III, as in the other phases of the subdivision. (R. 49-82; R.E.139-72).

This appeal is from the final Judgment signed on October 12, 2009, and entered in this case on October 15, 2009, (R.174; R.E.38-43) and from the Opinion of the lower court signed on September 28, 2009 and entered in this case on September 29, 2009, (R. 169; R.E. 44-48 ) holding that the Protective Covenants which had been in effect in Long Meadow Subdivision for over ten years were not valid as to a subsequent sale of the Subject Property by the same sellers who had previously granted the Protective Covenants to adjoining landowners. The lower court further held that the sellers of the Subject Property were not estopped from changing the uses permitted on the Subject Property in spite of previous Protective Covenants granted by the same sellers prohibiting such uses in the subdivision. Appellants seek to reverse these holdings of the lower court.

### **III. STATEMENT OF THE FACTS**

#### **A. History of Long Meadow Subdivision and its Protective Covenants**

Long Meadow Subdivision is located a few miles north of the city limits of Oxford, the

county seat of Lafayette County, Mississippi. Long Meadow was developed by Robert Leavell, deceased, his wife Carroll Leavell and their children, Deidre L. Leavell and Elizabeth F. Leavell.

Lafayette County has no zoning regulations.

Long Meadow Subdivision contains 48 platted Lots, in three phases, all residential, and numbered consecutively from 1 to 46, with Lot 13 deleted. Lots 25, 27 and 28 have been split into Lots 25A and B, 27A and B, and 28A and B. All of the lots contain four acres or more except one, which contains over three acres. (Exs. R-5, R-7; R.E. 103-09, 90-92).

Homes in Long Meadow are high-end residences. The Subdivision Covenants require a minimum of 1800 heated and cooled square feet in each residence, and most are substantially larger. There is an Architectural Control Committee charged with the responsibility of assuring quality residences which conform with the neighborhood. (Exs. R-10, R-19; R.E. 50-56, 57-64).

Long Meadow Subdivision is bordered on the east by Mississippi State Highway 7. County Road 1032, also known as Northpointe Parkway, (formerly Industrial Boulevard ) runs west from Highway 7 through the southern part of the Subdivision. (Exs. R-1; R.E. 49; P-1; R.E. D-1).

From the location of the Subject Property, where the east end of Northpointe Parkway dead-ends into Highway 7, no structures can be seen which are not residential dwellings or appurtenances thereto. To the south of Long Meadow Subdivision lies Woodland Hills, a high-end residential subdivision. The east side of Highway 7 across from Long Meadow is all residential. There is nothing but farm land for a mile to the north of Long Meadow Subdivision. To the west of Long Meadow Subdivision along Northpointe Parkway are three other high-end residential subdivisions, Northpointe (for which the parkway is named), Audubon Park and Oxmoor Place. (Tr. 65-66; R.E. 68-69).

The Leavells began selling lots in what is now Long Meadow Subdivision in the late 1980's. The first sale occurred on July 19, 1988, when a Warranty Deed from the Leavells to David Pryor was filed in the land records of Lafayette County, Book 389, Page 220. This Deed covered 9.49 acres of what is now Lot 1 of Long Meadow Subdivision, Phase III. (Ex. R-2; R.E. 86-89). This property was part of the official Plat of Phase III, filed in December 1994. (Ex. R-7; R.E. 90-92).

Protective Covenants filed with the Pryor Deed state: "No structure shall be erected, altered, placed or permitted to remain on the tract other than one double or single family residential structure for each four (4) acres of land excluding a private garage or carport, barn, swimming pool, storage buildings, playhouses and the like." (Ex. R-2; R.E. 86-89).

A "Plat of Survey for Long Meadow," denominated "Key Map," showing Lots 14 through 46, was signed by the surveyor on October 1, 1990 and filed in the land records of Lafayette County (Ex. R-3; R.E. 93). No "Key Map" for Lots 1 through 13 was presented at trial. These lots must have been planned when the Key Map (Ex. R-3; R.E. 93) was filed in 1990, however, since the Subdivision, as a whole, has Lots numbered 1 through 46.

On December 5, 1991 Protective Covenants were filed in the land records of Lafayette County in Deed Book 412, Page 366. (Ex. R-4; R.E. 94-102). These Protective Covenants, entitled "Protective Covenants of Long Meadow Subdivision Phase II," contain notarized signatures of the Leavells and landowners in Long Meadow Subdivision. The first two paragraphs of these Protective Covenants state:

We, the owners of the land described in the Long Meadow Subdivision Plat filed for record and recorded in the office of the Chancery Court Clerk of Lafayette County, Mississippi, and which comprises a subdivision in Lafayette County, Mississippi, do hereby establish, charge, and place upon said land the hereinafter described protective covenants.

1. No structure shall be erected, placed or permitted to remain on any lot other than one single family residential structure for each four (4) acres of land excluding the following: (i) a private garage or carport, barn, swimming pool, storage buildings, playhouses and the like, as approved by the Architectural Control Committee; (ii) public or private utility structures as approved by the Architecture Control Committee.

The last paragraph (unnumbered) of the Protective Covenants states:

All the provisions, requirements, restrictions, and conditions hereinabove set forth shall be construed as covenants running with the land and binding upon the parties hereto, their respective heirs, successors and assigns.

Paragraph 10 of the Protective Covenants discusses the composition and powers of an Architectural Control Committee, which essentially serves in place of the developers, who have withdrawn. The Architectural Control Committee may change the Covenants in many respects, but it is not permitted to change Paragraph 1 (one single family residence only), or Paragraph 2 (1800 square foot minimum heated and cooled space requirement). (Ex. R-4; R.E. 94-102).

A "Plat of Survey for Long Meadow" showing Lots 14 through 46, drafted on October 1, 1990, was filed of record in the land records of Lafayette County on March 1, 1993 in Plat Cabinet A, Slide 93 (Ex. R-5; R.E. 103-09). This Plat covers 206.426 acres. The Plat was approved by the Lafayette County Board of Supervisors on March 1, 1993, the same date it was filed in the land records of Lafayette County. This Plat was signed by the original developers, the Leavells.

The "Plat of Survey for Long Meadow" includes the Protective Covenants set out in Exhibit R-4 by reference to the Book and Page of filing. The Protective Covenants in Exhibit R-4 have also been attached to, or referenced in, many of the Deeds filed from the date the Covenants were recorded in 1991 to the present. See, e.g., Warranty Deed from the Leavells to Jimmy Earl Shankle and wife, Margaret Nancy Shankle for Lot 44, Long Meadow Subdivision, recorded on December 12, 1991, in Deed Book 412, Page 453 (Ex. R-6; R.E. 110-16); Warranty

Deed from Dustin Cliburn to Gifford Properties for Lots 7 and 9, Phase III, dated September 21, 2006 (Ex. R-11; R.E. 117-18).

On December 16, 1994 a "Plat of Survey for Long Meadow Phase III," showing Lots 1 through 12 was filed of record in the land records of Lafayette County, Plat Cabinet A, Slide 95 (Ex. R-7; R.E. 90-92). This Plat covers 67.888 acres. This Plat was signed by the Leavells and approved by the Lafayette County Board of Supervisors on December 16, 1994, the same date it was recorded.

In 1995 James Propes and his wife bought Lot 23 in Long Meadow Subdivision, Phase II, from the Leavells. They were shown around Long Meadow by the Leavells' real estate agent, Dick Marchbanks. Mr. Marchbanks told the Propes that all of Long Meadow would be single family residential. Marchbanks showed the Propes Lots 2, 3, 4, and other lots in Phase III along Northpointe Parkway, as available residential lots. (Tr. 161-65; R.E. 80-84). Marchbanks also directed the Propes to the Lafayette County Chancery Clerk's office to obtain copies of the Protective Covenants applicable to the Subdivision. These Covenants (Ex. R-4; R.E. 94-102) prohibit any use of the property other than single family residential. The Propes relied on these representations by Marchbanks, the Leavells' agent, and the Protective Covenants they found at the courthouse in 1995 for the purchase and construction of their home on Lot 23. (Tr. 166; R.E. 85).

On June 20, 1997 Robert Leavell wrote the lot owners in Long Meadow Subdivision announcing that the Leavells had completed development of Long Meadow Subdivision. (Ex. R-18; R.E. 119-20). From that time forward, the Leavells announced, they would not engage in further maintenance of Long Meadow Subdivision. The Leavells became mere lot owners, subject to the same Protective Covenants as the other lot owners.

### **B. Covenants Specifically Applicable to Long Meadow Subdivision, Phase III**

In addition to the Protective Covenants filed with the Deed to Lot I in Phase III of the Subdivision in 1988 (Ex. R-2; R.E. 86-89), other Deeds to Phase III Lots with single family residential only Protective Covenants were routinely filed through 2004. None of the Deeds filed prior to October 2004 permitted any use other than true residential. (Ex. R-22; R.E. 121-23).

On April 18, 2002 Protective Covenants were filed with the Warranty Deed to Lot 10, Long Meadow Subdivision, Phase III, which borders Northpointe Parkway (formerly Industrial Boulevard). (Ex. R-8; R.E. 124-30). The Deed from the Leavells to Dr. Joe T. Harris and wife, N. Eileen Harris, recorded in Deed Book 502, Page 264, contains Protective Covenants beginning with the following language:

#### Protective Covenants of Leavell Property Bordering Industrial Boulevard [Northpointe Parkway]

We, the owners of the land described in this Plat filed for record and recorded in the office of the Chancery Court Clerk of Lafayette County, Mississippi, and which shall comprise a subdivision in Lafayette County, Mississippi, which shall be known as Long Meadow III subdivision," do hereby establish, charge, and place upon said land the hereinafter described protective covenants.

1. No structure shall be erected, placed or permitted to remain on any lot other than one family residential structure for each four (4) acres of land excluding the following: (i) a private garage or carport, barn, swimming pool, storage buildings, playhouses and the like, (ii) public or private utility structures as approved by the Architecture Control Committee or its designee.

The last paragraph (unnumbered) of the Protective Covenants states:

All the provisions, requirements, restrictions, and conditions hereinabove set forth shall be construed as covenants running with the land and binding upon the parties hereto, their respective heirs, successors and assigns.

These Covenants also require dwellings to be a minimum of 1800 square feet heated and cooled space and to contain the reference to the Architectural Control Committee. No church, school, or other non-single family residential use is permitted under these Covenants.



On March 20, 2002, the same Protective Covenants as in the Harris Deed (Ex. R-8; R.E. 124-30) were filed with the Warranty Deed from the Leavells to David Pryor for an additional portion of Lot 1, Long Meadow Phase III. (Ex. R-9; R.E. 131-38). The deed is recorded in Deed Book 501, Page 508 in the land records of Lafayette County. Lot 1 is directly across Northpointe Parkway from the Subject Property in Phase III of the Subdivision.

By this time, Lots 1, 5 and 7 had been reconfigured, resulting in Lot 1 having 12.4 acres, Lot 5 having 4 acres and Lot 7 having 3.16 acres, although no Plat referencing these changes has been filed of record. (Tr. 70; R.E. 70).

In early 2004 Oxford University School, a private academy in Oxford, showed interest in purchasing some of the unimproved lots in Long Meadow Subdivision along Northpointe Parkway, including the Subject Property. (Ex. R-22; R.E. 121-23). Residents of Long Meadow Subdivision objected on the basis of violation of the residential-only Protective Covenants. The school did not continue with its proposed purchase. (Tr. 122-23; R.E. 71-72).

On June 23, 2004, after Oxford University School had withdrawn its interest, the Leavells sold Lot 8 of Long Meadow Subdivision, Phase III, to Alan B. Cameron and wife, Mary D. Cameron (Ex. R-10; R.E. 50-56). Lot 8 borders the Subject Property on the west. The Camerons' Lots 8 and 46, and the Subject Property, all border the north side of Northpointe Parkway. (Ex. P-1; R.E. 216).

At the time of their purchase of Lot 8, the Camerons already owned Lot 46 in Phase II of Long Meadow Subdivision, which borders Lot 8 on the north and west. Lot 46 had single-family residential only covenants. (Ex. R-4; R.E. 94-102). The Camerons were concerned that another school, church or a commercial enterprise might attempt the same purchase, and they wanted to assure covenant protection for their residence and for the entire subdivision. Alan Cameron

testified at trial, without contradiction:

A. . . . In order to keep this [nonconforming use] from happening ever again . . . my wife and I decided to purchase lot eight adjoining our properties with the idea that we would clarify the public record and standardize the covenants . . . by insuring that it was clear that the residential only protective covenants related to Long Meadow Subdivision lots, and most particularly, phase three since those were the ones to be developed.. . .

Q. And so did Mrs. Leavell through her representatives agree to do that? . . .

A. Yes. *The Leavells agreed to our 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) (Emphasis added).

When purchasing Lot 8 in June 2004, the Camerons negotiated Protective Covenants with the Leavells which stated:

#### PROTECTIVE COVENANTS OF LONG MEADOW SUBDIVISION

##### PHASE III

1). *No structure shall be erected, placed or permitted to remain on any lot other than one single family residential structure for each lot described on the plat of Long Meadow Subdivision, Phase III, excluding the following: (i) a private garage or carport, barn, swimming pool, storage building, playhouses and the like, as approved by the Architectural Control Committee; (ii) public or private utility structures as approved by the Architectural Control Committee.* (Emphasis added).

The last paragraph (unnumbered) of the Protective Covenants states:

All the provisions, requirements, restrictions, and conditions hereinabove set forth shall be construed as covenants running with the land and binding upon the parties hereto, their respective heirs, successors and assigns. (Ex. R-10; R.E. 50-56).

The Covenants also contain the provision for control by an Architectural Control Committee and an 1800 square foot minimum per dwelling. (Ex. R-10; R.E. 50-56).

The Warranty Deed and Protective Covenants from the Leavells to the Camerons were recorded on June 25, 2004 in Deed Book 527, Page 212 in the land records of Lafayette County.

(Ex. R-10; R.E. 50-56).

When the Camerons were negotiating their purchase of Lot 8, the Leavells' attorney, Charles Walker, and the Leavells' real estate agent, Dick Marchbanks, showed the Camerons a revised Plat for Phase III and represented to the Camerons that any non-single family residential use would be precluded on any Lot of Phase III of Long Meadow Subdivision. (Tr.124-26; R.E. 73-75). The Camerons clearly relied on these representations when purchasing Lot 8. Appellant Alan Cameron testified:

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

A. 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).

In June 2004 the "residential use only" issue for all lots in Long Meadow Subdivision was thought by the Camerons and the other Long Meadow residents to be resolved for good. The single family residential Protective Covenants were filed in the land records of Lafayette County. The Protective Covenants run with the land, and they were thought to have value because they would prohibit the construction of any building on any lot in Long Meadow Subdivision except residential dwellings and associated appurtenances. The landowners in Long Meadow Subdivision believed that no church, school, or other non-single family residential use would be permitted in Long Meadow Subdivision under these Covenants. (Tr. 123-25, Tr. 127-28, Tr. 138-39; R.E. 72-74, 76-77, 78-79).

The Amended Plat for Phase III reflecting the Protective Covenants filed with the

Cameron Deed, however, was apparently never filed by the Leavells. Robert Leavell died in July 2004, shortly after the Camerons' Deed was executed. After his death, the remaining Leavells attempted to change the Covenants in Long Meadow Subdivision. The remaining Leavells executed Deeds with Protective Covenants which purported to permit churches and schools to be constructed on a few lots in Phase III. The Leavells changed the language of the Protective Covenants in previous deeds in Phase III. These later deeds from the Leavells attempted to redefine the term "residential" to include schools and churches (initially covering Lots 5, 6, 7, 9, 11 and 12 of Phase III). (Exs. P-13, P-14, P-16, P-18 and P-19).

Through subsequent deeds, Protective Covenants on some of these lots have now reverted to contain "single family residence use only" Covenants. On September 21, 2006 Protective Covenants were filed in the land records of Lafayette County with a Warranty Deed covering Lots 7 and 9 of Phase III from Dustin Cliburn to Gifford Properties, Instrument No. 200610385 (Ex. R-11; R.E. 117-18). These Covenants include by reference the language of Exhibit R-4, which permits only one single-family residential dwelling per four acres.

On August 14, 2009 Protective Covenants were filed in the land records of Lafayette County with a Corrected Warranty Deed covering Lot 6 of Phase III from the Leavells to Timothy and Carla Mays which would permit only one single family residence per lot and would not permit a church or school. Instrument No. 200907000. (Ex. R-23; R.E. 173-84).

Single family residences have been constructed on Lots 1, 6, 7, 9 10 and 12 in Phase III of Long Meadow Subdivision. All of these lots except Lot 6 border Northpointe Parkway. (Ex. P-1) Nothing has been constructed in Phase III except single family residences. (Tr. 65; R.E. 68) Protective Covenants covering Lots 1, 6, 7, 8, 9 and 10 of Phase III of Long Meadow Subdivision now clearly prohibit any use other than single family residential dwellings. (Exs. R-8 , Ex. R- 9,

Ex. R-10, Ex. R-11 and Ex. R-23; R.E. 124-30, 131-38, 50-56, 117-18, 173-84).

**C. The Disputed Covenants on the Subject Property**

In November 2006 the Harlands acquired an option from the remaining Leavells to purchase the Subject Property (Lots 2, 3 and 4 of Long Meadow Subdivision). (Ex. P-4). In early 2007, *before the sale to the Harlands was consummated*, the Elders of the Oxford Church of Christ announced that they were planning to build a new church with associated structures on the Subject Property. *Residents of Long Meadow Subdivision immediately objected* to the attempt to change the permitted use of the Subject Property. Included among the objectors were the Camerons, who owned the property adjacent to the Subject Property on Northpointe Parkway.

Appellant Alan Cameron, a Long Meadow Homeowner and an attorney for the other Homeowners, wrote two letters to the Elders of the Church of Christ, including Appellee Ernest Harland, and to the Leavells in February 2007 notifying them of the applicable Protective Covenants and of the Homeowners' objections to the use of the property for a church or any use other than the single family residential use permitted by the Protective Covenants. (Exs. R-12, R-13; R.E. 185-88, 189-90). Appellee Ernest Harland admitted receiving notice of the Protective Covenants and the objections of the Homeowners before he purchased the Subject Property. (Tr. 27; R.E. 215).

In spite of knowledge of both the single family dwelling Protective Covenants and the objections to other uses, the Harlands proceeded to purchase the Subject Property on March 13, 2007 by Warranty Deed from the remaining Leavells. (Ex. R-14; R.E. 194-97). The Deed was recorded on May 22, 2007 in the land records of Lafayette County, Instrument No. 200704986. Attached to this deed as Exhibit A were purported Protective Covenants which stated:

1. Only residential structures shall be permitted on these acres. The term "residential" shall

include churches and shall not prevent structures used for church purposes. The term "residential" shall also include public or private utility structures, garages or carports, storage buildings and the like which usually accompany residential structures.

On April 3, 2007, after the closing on the Subject Property but before the deed was recorded, another attorney for the Homeowners, Tom Suszek, again notified the Harlands and the Church of Christ Elders of the objections to the attempted change in use of the Subject Property (Ex. R-15; R.E. 198-99).

On November 17, 2007 Appellant James Propes, the President of the Long Meadow Homeowners' Association, again wrote the Harlands objecting to any use of the Subject Property other than single family residential. (Ex. R-16; R.E. 200-01). Other Long Meadow Homeowners also wrote their objections to the change in use. (Ex. R-20; R.E. 202).

Subsequently the Leavells acknowledged that they had made a mistake in the Protective Covenants attached to the Harlands' initial Deed. In a Corrected Warranty Deed to the Harlands for the Subject Property (Ex. R-17; R.E. 203-14), the Leavells admitted the error and included Protective Covenants with the following language:

#### PROTECTIVE COVENANTS OF LONG MEADOW SUBDIVISION PHASE III

1. *No structure shall be erected, placed or permitted to remain on any lot other than one single family residential structure for each lot described on the plat of Long Meadow Subdivision, Phase III, excluding the following: (i) a private garage or carport, barn, swimming pool, storage building, playhouses and the like, as approved by the Architectural Control Committee (ii) public or private utility structures as approved by the Architectural Control Committee. (Emphasis added).*

The last paragraph (unnumbered) of the Protective Covenants states:

All the provisions, requirements, restrictions, and conditions hereinabove set forth shall be construed as covenants running with the land and binding upon the parties hereto, their respective heirs, successors and assigns.

The language in these Protective Covenants is the same as the Protective Covenant

language in the earlier deed from the Leavells to the Camerons for Lot 8 of Long Meadow Subdivision, Phase III. (Ex. R-10; R.E. 50-56). The Corrected Warranty Deed from the remaining Leavells to the Harlands, with the above-quoted Protective Covenants, was recorded on July 15, 2008 in the land records of Lafayette County as Instrument No. 200806737 and has been delivered to the Harlands.

Subsequently the Leavells, who no longer owned any interest in either the Subject Property or Long Meadow Subdivision, sent the Harlands three Quitclaim Deeds purportedly regarding Lots 2, 3 and 4 of Long Meadow Subdivision, Phase III. (Ex. P-9). These deeds were filed in the land records of Lafayette County on February 27, 2009 and purported to change the applicable Covenants back to those permitting a church on the Subject Property.

At trial Ernest Harland admitted that the Church of Christ has no present intention of moving to the Subject Property and that other acreage is available around Oxford if the church should decide to move. Appellee Harland also testified that he would never use or sell the property for any use other than residential or for a church. (Tr. 32-34; R.E. 65-67).<sup>1</sup>

#### **IV. SUMMARY OF THE ARGUMENT**

1. The undisputed evidence in this case demonstrates that the Leavells, through their agents, represented to numerous purchasers of lots in Long Meadow for over ten years that the subdivision would always be residential only. The undisputed evidence demonstrates that the Leavells specifically represented to Alan and Mary Cameron in June 2004 that Phase III of Long Meadow Subdivision would be subject to Protective Covenants prohibiting any use except single

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<sup>1</sup>

After this case was on appeal, the Homeowners learned that the Subject Property had been conveyed to the Church of Christ by the Harlands.

family residential. The undisputed evidence further demonstrates that the Camerons reasonably relied on those representations to their detriment when they purchased Lot 8 in Phase III of Long Meadow, adjacent to the Subject Property.

2. If the Leavells intended to file Protective Covenants like the Cameron's covering Phase III, or an amended Plat of Phase III referencing the such Covenants, in the land records of Lafayette County, Mississippi, in June 2004 and mistakenly failed to do so, then the Court should declare such Covenants or Plat to have been properly filed and order such to be filed in fact. Equity regards as having been done that which the parties intended to have been done, and the Court should order it done.

3. If, on the other hand, the Leavells misrepresented to the Camerons their intentions regarding the remaining lots in Phase III of Long Meadow Subdivision, the Leavells are estopped from changing the residential use of the subdivision they represented to the Camerons. The Court should declare the Protective Covenants in the Cameron Deed to Lot 8 to be applicable to all of Phase III of Long Meadow Subdivision, as was represented to the Camerons in June 2004.

4. The Protective Covenants in the Deed from the Leavells to the Harlands recorded in the land records of Lafayette County on May 22, 2007, should be declared null and void, insofar as they attempt to define the term "residential" to mean churches and church-related structures.

5. The Homeowners should be awarded attorneys' fees and costs of litigation under the Litigation Accountability Act, Miss Code Ann. §11-55-1, *et seq.*, since the Harlands were aware of the facts and the Supreme Court case law adverse to their position and insisted on pursuing the litigation.



## **V. ARGUMENT**

### **A. The Proceedings**

Petitioners Ernest C. Harland and Bonnie S. Harland (the "Harlands") brought this suit seeking either to remove Lots 2, 3 and 4 (the "Subject Property") from Long Meadow Subdivision or to declare that the Protective Covenants applicable to the Subject Property permitted construction of a church and related structures on the Subject Property. The Harlands subsequently amended their petition to request that the Court set aside the Corrected Warranty Deed to them from the Leavells, the grantors of the subject property. The Harlands named as Respondents in the final (Third) Amended Petition, Lot owners in Long Meadow Subdivision and the original developers, the Leavells.

The Long Meadow Homeowners' Association, which represents Homeowners in Long Meadow Subdivision, and the twenty-two families who own homes in Long Meadow and are Appellants in this case (collectively, the "Homeowners"), answered and objected to the relief sought in the Harlands' Petition. Answers and objections to the Harlands' Petition were also filed by other lot owners in Long Meadow Subdivision: Hon. William A. Gowan, Shellee C. Gowan, Robert D. Russell and Margaret H. Russell. The Homeowners also filed a Counterclaim against the Harlands and a Crossclaim against the Leavells asking the Court to declare that the Protective Covenants in the first Deed to the Harlands were invalid, insofar as they attempted to define "residential" to include churches and related structures; to declare that certain Protective Covenants which, inter alia, prohibited any structures except single family residential dwellings and associated structures on the Subject Property, apply to all of Phase III of Long Meadow, including the Subject Property; that the Leavells were estopped from changing the permitted uses in Long Meadow, including the Subject Property and that the Covenants run with the land. (R. 49-

82; R.E. 139-72). The Leavells filed no response to the Crossclaim and did not appear at trial.

Trial was begun on March 2, 2009. The Harlands and the Homeowners appeared and were represented by counsel. At the close of the Harlands' case, the Homeowners moved to dismiss on two grounds: (1) that the Petitioners had failed to make a prima facie case, and (2) that Petitioners had failed to join and properly serve all necessary parties as Respondents. The Court determined that all necessary parties had not been joined, and recessed the trial until their joinder and service could be accomplished. (Tr. 101-07; R.E. 216-22).

The Court having determined that all necessary parties had been joined and served, trial recommenced on August 10, 2009 with the presentation of the Homeowners' case. Both parties rested at the close of the evidence.

Respondents filed a Motion to Supplement the Record to add as an exhibit (Ex. R-23; R.E. 173-84) the executed and filed Corrected Warranty Deed from the Leavells to Timothy and Carla Mays. This Deed was executed on August 7, 2009 by the Leavells, but through no fault of the Homeowners it was not delivered to the Mays until August 12, after Respondents had put on their proof. By separate Order the Court allowed this additional exhibit. ( R.152; R.E. 223).

#### **B. The Standard of Review**

The issues in this appeal involve the application of legal principles to the facts in the case. The standard of review for questions of law is de novo. This Court must reverse for erroneous interpretations or applications of law by the lower court. *Mississippi Transportation Comm. v. Fires*, 693 So. 2d 917, 919 (Miss. 1997).

#### **C. Protective Covenants Filed with the Deed from the Leavells to the Camerons Were Applicable to All of Phase III of Long Meadow Subdivision**

Regardless of the previous history of Protective Covenants applicable to Phase III of Long

Meadow Subdivision, the issue was laid to rest on June 25, 2004 when the Leavells deeded Lot 8, Phase III, Long Meadow Subdivision to Alan and Mary Cameron. The Protective Covenants filed with the Deed to the Camerons specifically permitted only one single family residence per Lot in Phase III and appurtenances to that single family residence. Nothing else. (Ex. R-10; R.E. 50-56). The Camerons were aware of the previous attempts by the Leavells to change the uses permitted in Long Meadow Subdivision. The Camerons agreed to purchase Lot 8 only if the Leavells would represent and include in the Protective Covenants a restriction permitting only single family residences on each lot in Phase III of Long Meadow Subdivision. The Leavells agreed; the Leavells made this representation; and the agreement was recorded in the land records of Lafayette County with the Deed from the Leavells to the Camerons on June 25, 2004.

The Mississippi Supreme Court has repeatedly held that the term "single family residence" is not ambiguous and means exactly what it says. In *AA Home Improvement Co., Inc. v. Hide-A-Way Lake Club, Inc.*, 393 So. 2d 1333 (1981) the Court considered application of a protective covenant providing that "no lot shall be used for other than residential purposes." In holding that the provision was not ambiguous, 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).*

The Supreme Court went on to hold that a roadway between two subdivisions whose only purpose was to provide a means of 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.

In *Gast v. Edder*, 600 So. 2d 204 (1992) the Court applied a similar covenant which

permitted only single family dwellings and appurtenances. The Court held that a boathouse built in the subdivision was a violation, and the boathouse was ordered removed:

The restrictive covenants imposed upon the residents of Davidson Hills [residential structures only] are unambiguous, definite and clearly prohibit structures other than a single-family dwelling and a two-car garage. This Court has enumerated that restrictive or protective covenants are enforceable if their language manifests a clear intent to prohibit or restrict.”

600 So. 2d at 207-208.

These cases make it clear that the term “residential” is not ambiguous and means exactly what it says. A church, Sunday School building, fellowship hall, gymnasium or other buildings appurtenant to a church are not “residential” as that term is interpreted by the Supreme Court.

Presumably, the Leavells meant what they said. When the Leavells represented to the Camerons that all of the Lots in Phase III, like all of the Lots in Phases I and II of Long Meadow Subdivision, were to be single family residential only, and the Camerons purchased Lot 8 based upon that representation, the issue was closed. No longer could relaxation of the restrictions in the covenants be permitted.

The Camerons reasonably expected that the appropriate documentation would be filed in the land records of Lafayette County to accomplish what the Leavells had agreed to do. Protective Covenants covering Phase III should have been filed like those covering Phase II. The Phase III Covenants should have been referenced in a filed Plat for Phase III like Phases I and II, and like the Plat shown the Camerons by the Leavells’ agents. Apparently neither of these documents were filed in the Lafayette County land records. This failure caused injury to the Camerons and the other homeowners in Long Meadow because the Leavells subsequently ignored the Camerons’ Covenants when they sold Lots 2, 3 and 4 to the Harlands for resale to a church for non-single family residential use.

Equity, however, regards as having been done that which should have been done. *PMZ Oil Co. v. Lucroy*, 449 So. 2d 201, 208 (Miss. 1984). The Protective Covenants in the Camerons' Deed to Lot 8 were clearly intended to preclude construction of any non-single family residential structures. The lower court should have entered a declaratory judgment that the appropriate documents to accomplish this intent would be deemed to have been filed in the Lafayette County land records in June 2004, and the court should have ordered that the appropriate documents be filed promptly. The lower court erred when it failed to do so.

**D. The Leavells and the Harlands are Estopped from Changing  
the Applicable Protective Covenants**

Regardless of whether the Leavells' failure to file the appropriate documents was mere oversight, or whether the representation to the Camerons and others that the Protective Covenants permitting only one single family dwelling per lot was false when made, the result under the law is the same because of application of the doctrine of equitable estoppel.

The doctrine of equitable estoppel arises when one party makes representations on which the other party relies to his detriment. *PMZ Oil Co. v. Lucroy, supra*, 449 So. 2d at 206. *PMZ Oil* is directly on point here. The Mississippi Supreme Court applied the doctrine of equitable estoppel to prevent a developer from changing uses of subdivision lots after previously representing that the subdivision would be entirely residential.

In *PMZ Oil*, the developer told lot purchasers, including the Lucroys, that its subdivision would be restricted to one single family dwelling per lot. The restriction was stated in protective covenants shown the purchasers and attached to their deeds. When the developer subsequently sought to build townhouse condominiums on several of the remaining lots which had no specific covenants, the Chancellor enjoined the condominium construction, finding the developer

equitably estopped by his previous representations from any use other than single family residential. The Lucroys were held entitled to rely on the single family dwelling use representation, *even though the subdivision plat and protective covenants had not been separately filed in the county's land records.*

In affirming the Chancellor's decision, the Supreme Court held, 449 So. 2d at 207:

PMZ and its officers should reasonably have anticipated that these representations would induce persons such as the Lucroys first to buy lots and then to build their homes. Prospective home builders such as the Lucroys, as a matter of common sense, should reasonably be expected not only to rely on such representations regarding protective covenants but to insist upon such covenants before undertaking the substantial investment that construction of a residence involves in this day and time.

PMZ's president, Mr. Pinkston, acknowledged that a single family residential subdivision was probably his original plan, but insisted that he never considered any of his plans to be final. Despite Mr. Pinkston's lack of decisiveness, the Supreme Court found the representations to be more than sufficient to estop PMZ:

The rationale of the rule is that a grantor, who induces purchasers, by use of a plat, to believe that streets, squares, courts, parks, or other open areas shown on the plat will be kept open for their use and benefit, and the purchasers have acted upon such inducement, is required by common honesty to do that which he represented he would do. It is the use made of the plat in inducing the purchasers, which gives rise to the legally enforceable right in the individual purchasers, and such is not dependent upon a dedication to public use, or upon the filing or recording of the plat.

449 So. 2d. at 208.

The Supreme Court found that knowledge of the "general plan or scheme" of a subdivision was sufficient to invoke the doctrine of equitable estoppel against the developer and anyone else with knowledge:

This rule has been applied when the protective covenants have been contained in the deed to all knowing parties and also when the deed

contains no covenants at all . . . *If a subsequent purchaser with knowledge of the general plan or scheme may be bound, surely the original developer who created the general plan or scheme in the first place, must be bound.* (Citations omitted) (emphasis added).

449 So. 2d at 208.

The lower court attempted to distinguish *PMZ Oil* on the basis that there was only one phase and 16 lots involved and that the developer was responsible for the protective covenants in the first place. Here the developers, the Leavells, were responsible for the Protective Covenants for all of the lots, including Lot 8 purchased by the Camerons from the Leavells with the Covenants intended to cover all of Phase III. There is no distinguishing feature on this issue.

Similarly the fact that there was only one phase in *PMZ Oil* does not render that case inapplicable. Directly on point is the Mississippi Supreme Court's decision in *White Cypress Lakes Development Corp. v. Hertz*, 541 So. 2d 1031 (Miss. 1989). In *White Cypress*, the first eleven phases of the subdivision were developed as single family residential lots with over three acres each. Purchasers were assured that all of the land included in the development would be developed in a manner suitable for high-end residences.

After the development company changed hands, the new developer began construction of a recreation vehicle campground in a sister subdivision adjacent to the homeowners' subdivision. The homeowners objected to the developer "changing horses in midstream." The trial court enjoined the development company from changing the use of the *adjacent* subdivision.

The Mississippi Supreme Court affirmed on the basis that the development company was equitably estopped from any use in the subdivision other than the original:

The record before us is replete with evidence that the development company and, more particularly, its predecessor in title, substantially induced purchasers including these Plaintiffs to believe that all lots in the entire White Cypress Lakes development area would be used solely for single family

homes located upon lots of at least one acre in size. “Quality will surround [you].” On these facts *the development company is equitably estopped from using the lands in Mallard Point, Phases V and VI, in a manner inconsistent with the general representations it and its predecessors made in marketing the lots in the other phases of the White Cypress Lakes development.* (Emphasis added).

541 So. 2d at 1035-36.

The evidence in this case demonstrates that the Leavells, through their agents, Dick Marchbanks and Charles Walker, made representations to induce purchasers, including the Propes and the Camerons, to believe that all the lots in Long Meadow, including Phase III, would be used solely for single family homes. The Leavells, through their agents, had knowledge of reliance by purchasers, including the Camerons, on these representations. If the Leavells can change the Protective Covenants in Long Meadow after these representations and reliance by the purchasers, the Covenants would lose their value to the Homeowners.

Before their purchase of the Subject Property, the Harlands had knowledge of the Long Meadow Protective Covenants, including the Covenants applicable to the Camerons’ Lot 8 adjacent to the Subject Property and other Phase III lots. The Harlands had been directly advised of those Covenants and of the objections of the Homeowners to any use other than single family residential through the letters from Appellant Alan Cameron before their purchase. (Exs. R-12, Ex. R-13; R.E. 185-88, 189-90).

It makes no difference whether Long Meadow Subdivision is considered one subdivision or three. The representation to the Camerons by the Leavells’ representatives that Phase III would be single family only, together with the Camerons’ purchase of Lot 8 in Phase III in reliance on that representation in 2004, is, without more, sufficient to preclude any other use in Phase III from that date forward. As the Mississippi Supreme Court held in *White Cypress*,



*supra*:

It may be that only a handful of White Cypress Lakes' many homeowners object to the RV campground. No matter. The truculence of a single landowner, with or without justification, can prevail over those who propose to use realty in a prohibited manner. . . . Rightly or wrongly he believes that the comfort of his dwelling will be imperiled by the change, and so he chooses to abide by the covenant as framed. The choice is for him only. . . . Others may consent. One owner, one defendant, satisfied with the existing state of things, refuses to disturb it. He will be protected in his refusal by all the power of the law.

541 So. 2d at 1035-36

Likewise, it makes no difference that the non-conforming use is for a church. Courts throughout the nation have repeatedly held that churches are subject to the same prohibition against violating residential-only Covenants as any other person or entity. See Justice Cardozo's opinion in *Evangelical Lutheran Church of the Ascension of Snyder v. Sahlem*, 172 N.E. 455 (N.Y. 1930). (Suit by church contended that protective covenants which allowed only one single family dwelling with usual barns and other appurtenances were no longer in effect as to land on which church wished to build. Court held that "residential use only" covenants were valid and enforceable against religious institutions). See also *Christ's Methodist Church v. Macklenburg*, 177 P.2d 1008 (Okla. 1997), and cases cited therein. (Churches as purchasers take subject to residential covenant restrictions).

Accordingly, the Leavells, the Harlands, and any subsequent purchasers are all equitably estopped from using the Subject Property for any use other than for one single family residential dwelling per lot, regardless of the Covenants in their own deed, and regardless of whether Phase III of Long Meadow Subdivision is subject to the Protective Covenants on other phases of the Subdivision.

**E. The Purported Covenants Attached to the Harlands' Original Deed Are Invalid**

The Court also erred when it set aside the Corrected Warranty Deed from the remaining Leavells to the Harlands. The Harlands have admittedly received the deed. Regardless of whether the Harlands accepted or rejected the Corrected Warranty Deed from the remaining Leavells, the Harlands cannot prevail in applying the defective covenants in their first deed to the Subject Property. The purported Covenants in the deed recorded May 22, 2007, violate the established Covenants in the Subdivision, including Phase III, and are invalid.

Since the initial Warranty Deed from the remaining Leavells to the Harlands was defective, the Harlands had two options: (1) to keep the property for single family residential use with the Protective Covenants in the Corrected Warranty Deed, or (2) to rescind the transaction and get a refund of their purchase money, with interest, from the Leavells. The Leavells, the Harlands, and any subsequent purchasers are equitably estopped, however, from changing the use of the property and insisting on the validity of defective Covenants which the grantor had no right to give.

The subsequent purported quitclaim deeds from the Leavells to the Harlands (Ex. P-9) regarding the Subject Property are of no legal effect. A quitclaim deed imparts only the interest the grantor has in the property. Miss. Code Ann. § 89-1-39. Since the Leavells had parted with all interest in the Subject Property before they quitclaimed to the Harlands, the Harlands acquired nothing by way of the purported quitclaim deeds. The Protective Covenants in the purported quitclaim deeds, like the deeds themselves, are void and do not permit a church as a use on the Subject Property.

**F. The Homeowners are Entitled to Litigation Expenses and Attorney Fees**

The Homeowners have requested an award of litigation expenses, including attorney fees.

The evidence in this case, particularly the letters from LMHOA and its counsel (Exs. R-12, Ex. R-13, Ex. R-15, and Ex. R-16; R.E. 185-88, 189-90, 198-99, 200-01) demonstrated clearly that before their purchase of the Subject Property, Petitioners, the Harlands, were fully aware of the objections of the Homeowners' Association and its members and of the public records of Protective Covenants in Long Meadow Subdivision. During the course of these proceedings, if not before, the Petitioners were notified of the Mississippi Supreme Court cases which were directly contrary to their position. Petitioners have presented no authority to the Court which disputes the *PMZ Oil* and *White Cypress* cases, which are controlling in this case.

The Litigation Accountability Act, Miss. Code Ann. §11-55-1, *et seq.*, provides for an award of litigation costs, including reasonable attorney fees, when a litigant files or proceeds with litigation which is without substantial justification. Mere hope of success, without a reasonable basis for such hope, is not substantial justification under the statute. *Foster v. Ross*, 804 So. 2d 1018, 1024 (Miss. 2002).

The Petitioners proceeded with the filing and prosecution of this case without substantial justification, after being made aware of the facts and the law against them. Thus Petitioners caused the Homeowners to expend funds for legal representation to protect their rights defending against a baseless claim. The filing and continuation of this case by Petitioners entitle the Homeowners to their litigation costs, including reasonable attorney fees expended in this case.

## **VI. CONCLUSION**

For the foregoing reasons the Homeowners respectfully request this Court to reverse the Final Judgment and Opinion of the lower court and render judgment in favor of the Appellants that (1) the Protective Covenants from the deed from the Leavells to the Camerons for Lot 8, Long Meadow Subdivision, Ex. R-10, are valid and binding covenants applicable to the Subject

Property and to all Lots in Phase III of Long Meadow Subdivision, (2) those Protective Covenants run with the land, (3) those Protective Covenants must be filed with respect to Phase III of Long Meadow in the land records of Lafayette County, Mississippi, and (4) the Protective Covenants filed with the Deed from the Leavells to the Harlands are null and void insofar as they attempt to define the term "residential" to include churches and church-related structures.

The Homeowners also request that this case be remanded to the lower court for an award of litigation costs, including reasonable attorney fees, against Appellees, jointly and severally.

Respectfully submitted,

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

BY:

  
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ATTORNEY FOR APPELLANTS

**CERTIFICATE OF SERVICE**

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

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THIS, the 13<sup>th</sup> day of April, 2010.

  
KENNETH A. RUTHERFORD