The Supreme Court of South Carolina

In the Matter of Teresa L. White, Petitioner.

ORDER

The records in the office of the Clerk of the Supreme Court show that on November 21, 1985, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the Supreme Court of South Carolina dated February 2, 2006, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Teresa

L. White shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

Justice E. C. Burnett, III, not participating

Columbia, South Carolina

March 9, 2006

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 11

March 13, 2006
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Myron Johnson & Building Environmental Services, Inc., Appellants,

v.

Key Equipment Finance, A Division of KCCI, CTI Business Management Systems, LLC, Paul M. Candelaria, Rick White, & Brenda Williams, Of whom Key Equipment Finance, A Division of KCCI, is Respondent.

Appeal from Dorchester County
Diane Schafer Goodstein, Circuit Court Judge

Opinion No. 26124
Heard January 17, 2006 – Filed March 13, 2006

REVERSED

Peter Brandt Shelbourne, of Summerville, for Appellants.

Robert T. Strickland and Andrea C. Pope, both of Barnes, Alford, Stork and Johnson, of Columbia, for Respondent.

ACTING JUSTICE CLYDE N. DAVIS, JR.: This case involves the scope of a forum selection clause contained in a lease agreement between Myron Johnson and Building Environmental Services (Appellants) and Key Equipment Finance (Key). We reverse.

FACTUAL / PROCEDURAL BACKGROUND

Appellants entered into a lease agreement with Key to lease a telephone marketing system. The lease contained a provision which included a forum selection clause. The clause read in part:

> This lease shall in all respects be interpreted and governed by the internal laws of the State of New York. You consent to and agree that personal jurisdiction over you and subject matter jurisdiction over the equipment shall be with courts of the State of New York or the Federal District Court for the Northern District of New York solely at our option with respect to any provision of the lease. . . .

Appellants received the equipment and began operating the equipment as directed. However, soon after implementing the marketing system, Appellants discovered that the equipment violated the Federal Telephone Consumer Protection Act of 1991. Because of the violation of the consumer protection act, Appellants were subject to fines. As a result, Appellants filed suit against Key because Appellants discovered that Key was aware that the equipment was illegal prior to executing the lease. Accordingly, Appellants sued claiming that Key induced them into entering a contract to lease equipment that Key knew to be illegal.

Appellants brought this action alleging breach of contract, breach of contract accompanied by a fraudulent act, a violation of the South Carolina Unfair Trade Practices Act, and conspiracy. The trial judge granted Key's motion to dismiss pursuant to Rule 12(b)(2), SCRCP. The trial judge found the forum selection clause to be controlling and the clause prevented Appellants from filing suit in South Carolina. Appellants filed an appeal in the court of appeals and the case was certified to this Court pursuant to Rule 204(b), SCACR. The following issues are before this Court for review:

I. Did the trial court err in dismissing Appellants' claim because the forum selection clause does not encompass causes of action that arose prior to the signing of the lease agreement?

II. Did the trial court err in failing to find that notwithstanding a forum selection clause, S.C. Code Ann. § 15-7-120 allows for personal jurisdiction of a party in South Carolina?

LAW /ANALYSIS

I. Scope of Forum Selection Clause

Appellants argue that the trial court erred in dismissing their claim because the forum selection clause does not encompass causes of action that arose prior to the signing of the lease agreement or those claims that were the product of misrepresentations prior to the lease agreement. We agree.

The issue of whether a forum selection clause applies to causes of action alleging that a plaintiff was induced to enter into a contract or lease by the misrepresentations of the defendant is a question of first impression for this Court. Generally, when wrongs arise inducing a party to execute a contract and not directly from the breach of that contract, the remedies and limitations specified by the contract do not apply. *Sterling Financial Inv. Group, Inc. v. Hammer*, 393 F.3d 1223, 1225 (11th Cir. 2004); *Maltz v. Union Carbide Chemicals & Plastics Co., Inc.*, 992 F.Supp. 286, 297 (S.D.N.Y. 1998); *Busse v. Pacific Cattle Feeding Fund #1, Ltd.*, 896 S.W.2d 807, 812-13 (Tex. Ct. App. 1995). Further, the above-cited line of cases is consistent with South Carolina's general disfavoring of forum selection clauses. *See Ins. Products Marketing, Inc. v. Indianapolis Life Ins. Co.*, 176 F.Supp.2d 544, 550 (D.S.C. 2001) (analyzing South Carolina's general disfavor for forum selection clauses).

In the present case, Appellants have alleged several causes of action against Key including conspiracy, breach of contract accompanied by a fraudulent act, and an alleged violation of the South Carolina Unfair Trade Practices Act. All of these actions relate to events that took place prior to the

signing of the lease between the parties. We hold that the forum selection clause does not prevent Appellants from filing suit in South Carolina because of the allegations that Key induced Appellants into entering the contract by misrepresenting or hiding pertinent information from Appellants. We believe that it would not make logical sense to allow a forum selection clause to operate to prevent suit in South Carolina where the acts alleged occurred prior to the execution of the contract.

Key argues that the forum selection clause prevents Appellants from filing suit because of the significant nexus between the contract and the events of non-contract claims. *See Forrest v. Verizon Communications, Inc.*, 805 A.2d 1007, 1014 (D.C. 2002) (stating that non-contract claims are subject to the forum selection clause because the events arise out of the same operative facts). However, the events in the present case can be separated because but for the events leading to the signing of the contract, the agreement allegedly would not have been consummated. In addition, the forum selection clause in the present case is narrowly tailored to encompass all events related to the lease, whereas *Forrest* involved a clause that related to all claims arising between the two parties.

Accordingly, we hold that a forum selection clause that is narrowly tailored to certain activities between the parties does not foreclose the opportunity to file suit in South Carolina where the cause of action relates to acts inducing the execution of the contract. This type of action is entirely distinguishable from a case where the suit is based solely on the breach of the actual contract.

II. S.C. Code Ann. § 15-7-120

Because we find that the forum selection clause does not prevent suit in South Carolina we do not address Issue II.

CONCLUSION

Based on the above cited authority, we reverse the decision of the trial court to dismiss the case pursuant to Rule 12(b)(2) and we remand for proceedings not inconsistent with this opinion.

MOORE, A.C.J., BURNETT, PLEICONES, JJ., and Acting Justice Edward B. Cottingham, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Minorplanet Systems USA Limited, Respondent,

v.

American Aire, Inc., Appellant.

Appeal From Beaufort County
Curtis L. Coltrane, Circuit Court Judge

Opinion No. 26125
Heard January 17, 2006 – Filed March 13, 2006

AFFIRMED

Jack D. Simrill, of Hilton Head Island, for Appellant.

Stanley H. McGuffin, and Lindsey Carlberg, both of Haynsworth, Sinkler Boyd, P.A., of Columbia, for Respondent.

ACTING JUSTICE CLYDE N. DAVIS, JR.: This is an appeal from an order directing entry of a Texas judgment against Appellant, American Aire, Inc. (American Aire). We affirm.

FACTS

On January 22, 2003, the president of American Aire, E. Vernon McCurry, entered into a "VMI Equipment, GSM Data Service and Software

License Agreement" with Respondent, Minorplanet Systems USA Limited (Minorplanet), a Texas Corporation. The agreement was signed at American Aire's home office in Hilton Head, South Carolina, and contains the following forum selection clause:

> GOVERNING LAW: CONSENT TO JURISDICTION AND VENUE: THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF TEXAS, WITHOUT GIVING EFFECT TO THE CONFLICT OF LAWS (RULES) OR CHOICE OF LAWS (RULES) THEREOF. **CUSTOMER CONSENTS TO THE EXCLUSIVE PERSONAL JURISDICTION AND VENUE OF THE STATE DISTRICT COURT RESIDING IN DALLAS COUNTY, DALLAS, TEXAS** (OR IF APPLICABLE THE FEDERAL DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION) FOR ALL LITIGATION WHICH MAY BE BROUGHT WITH RESPECT TO OR ARISING OUT OF THE TERMS OF AND THE TRANSACTIONS AND RELATIONSHIPS CONTEMPLATED BY THIS AGREEMENT.

(Emphasis supplied).

On December 19, 2003, Minorplanet obtained a default judgment against American Aire in the District Court, County of Dallas, Texas, in the amount of $25,660.12, plus prejudgment interest and attorney's fees. In February 2004, Minorplanet filed a Notice of Filing of Foreign Judgment in Beaufort County. American Aire filed a Motion for Relief from judgment, contending it was void for lack of personal jurisdiction. The circuit court denied American Aire's motion for relief, and ordered entry of judgment.

ISSUE

Did the circuit court err in holding the forum selection clause contained in the parties' contract was sufficient to establish personal jurisdiction over American Aire?

SCOPE OF REVIEW/LAW

An action to enforce a foreign judgment is an action at law. See Carson v. Vance, 326 S.C. 543, 485 S.E.2d 126 (Ct. App. 1997). In an action at law, tried by a judge without a jury, the findings of the trial court must be affirmed if there is any evidence to support them. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976).

"Full Faith and Credit shall be given in each state to the . . . judicial proceedings of every other State." U.S. Const. Art. IV, § 1. In accordance with this mandate, the courts of one state must give such force and effect to a foreign judgment as the judgment would receive in the state where rendered. Hamilton v. Patterson, 236 S.C. 487, 115 S.E.2d 68 (1960). The validity and effect of a foreign judgment must be determined by the laws of the state which rendered the judgment. Hamilton v. Patterson; Security Credit Leasing, Inc. v. Armaly, 339 S.C. 533, 529 S.E.2d 283 (Ct. App. 2000); Purdie v. Smalls, 293 S.C. 216, 220, 359 S.E.2d 306, 308 (Ct. App.1987). A judgment presumes jurisdiction over the subject matter and over the persons, and if it appears on its face to be a record of a court of general jurisdiction, jurisdiction is to be presumed unless disproved by extrinsic evidence, or by the record itself. Taylor v. Taylor, 229 S.C. 92, 97, 91 S.E.2d 876, 879 (1956).

DISCUSSION

American Aire asserts the forum selection clause is insufficient to establish personal jurisdiction. We disagree. We find the clause enforceable under Texas law.

Texas courts have recognized that the "enforcement of forum-selection clauses is mandatory unless the party opposing enforcement clearly shows that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." In re Automated Collection Technologies, Inc., 156 S.W.3d 557, 559 (Tex.2004); see also In

re AIU Ins. Co., 148 S.W.3d 109, 112 (Tex.2004).[1] Further, under Texas law, a defendant waives any objection to lack of personal jurisdiction by agreeing to a clause naming Texas as the forum. AIU Insurance, 148 S.W. 3d at 112. The party opposing enforcement of the forum-selection clause carries a heavy burden of showing the forum-selection clause should not be enforced. A forum selection clause will be invalidated only (1) if it was the product of fraud or overreaching, (2) if the agreed forum is so inconvenient as to deprive the litigant of his day in court, or (3) if enforcement would contravene a strong public policy of the forum in which the suit is brought. Tri-State Building Specialties, Inc. v. NCI Building Systems, ___ S.W.3d ___, 2005 WL 2470528 (Tex. App. 2005).

American Aire relies upon three cases which are inapplicable here. First, it cites Loyd & Ring's Wholesale Nursery, Inc. v. Woodley Landscaping, 315 S.C. 88, 431 S.E.2d 632 (1993), for the proposition that a forum selection clause is, by itself, insufficient to confer personal jurisdiction because, under **Florida law**, there must be an independent basis and other minimum contacts for a Florida court to exercise jurisdiction. However, this case does not involve Florida law but, rather, Texas law which does allow for jurisdiction based upon a forum selection clause. See In re Automated Collection Technologies, Inc., supra.

American Aire also cites Michiana Easy Livin' Country Inc. v. Holten, 127 S.W.3d (2003), *reversed* 168 S.W.3d 777 (2005), as standing for the proposition under Texas law that a forum selection clause is not, in and of itself, sufficient to confer personal jurisdiction and that there must be sufficient independent minimum contacts. Michiana involved a Texas resident's (Holten's) purchase of a motor home from an Indiana Corporation. Holten contacted Michiana in Indiana, and Michiana had the motor home delivered to a third party in Indiana for delivery to Holten in Texas. The

[1] Under South Carolina law, a consent to jurisdiction clause is generally presumed valid and enforceable when made at arm's length by sophisticated business entities. Republic Leasing Co., Inc. v. Haywood, 329 S.C. 562, 495 S.E.2d 804 (Ct.App.1998), *vacated on other grounds*, 335 S.C. 207, 516 S.E.2d 441 (1999), Security Credit Leasing, Inc. v. Armaly, 339 S.C. 533, 529 S.E.2d 283 (Ct. App. 2000), *citing* M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972). See also Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991) (upholding forum-selection clause notwithstanding form contract in which one party did not have bargaining parity).

sales contract contained a forum selection clause designating Indiana as the forum state over any disputes arising over the sale. Thereafter, Holten instituted suit against Michiana in the Texas courts alleging breach of contract and violation of the Texas Deceptive Trade Practices Act. The trial court held Michiana had sufficient minimum contacts to support jurisdiction in Texas, and that the forum selection clause did not preclude Texas litigation because Michiana could or should have foreseen it might become subject to suit in Texas, i.e., the clause did not necessarily indicate that Michiana had no minimum contacts anywhere else. On appeal, the trial court's ruling was reversed. 168 S.W.3d 777 (2005). The Supreme Court held Michiana had insufficient minimum contacts to subject it to suit in Texas, and that Holten failed to prove the forum-selection clause was unjust or unreasonable, such that he was bound by it. 168 S.W.3d at 793.

Michiana simply does not address the validity of the Indiana forum selection clause or whether, had Holten been sued by Michiana in Indiana, the clause would have been sufficient to subject him to personal jurisdiction of the Indiana courts, which is the issue in this case. Accordingly, we find Michiana inapplicable to the case before us.

Lastly, American Aire cites Blair Communications, Inc. v. Survey Equipment Services, Inc., 80 S.W.3d 723 (Tex. App. 2002). In Blair, the Texas Court of Appeals held the non-resident company, a Delaware corporation with its principal place of business in New York, had insufficient minimum contacts to warrant the Texas court's exercise of jurisdiction. There, the Texas corporation, SES, faxed a proposed contract to Blair at its New York office, and thereafter mailed a hard copy of the agreement, which included a forum selection clause designating Texas as the chosen forum. The court held Blair's contacts with Texas were insufficient to confer jurisdiction; however, the court specifically declined to address the validity of the forum selection clause as it was not asserted by SES as a basis for jurisdiction. 80 S.W.3d at 728, n. 4. Accordingly, Blair simply does not resolve the issue before the Court.

We find that, under Texas law, enforcement of a forum-selection clause is mandatory unless the party opposing enforcement "clearly show[s] that

enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." In re AIU Insurance Co., 156 S.W.3d at 559. As the Texas Court of Appeals recently stated, "If a party signs a contract with a forum selection clause, then that party has either consented to personal jurisdiction or waived the requirements for personal jurisdiction in that forum." Tri-State Building Specialties, Inc. v. NCI Building Systems, L.P., 2005 WL 2470528 (Tex. App., 1st Dist). Accordingly, under Texas law, it is clear the forum selection clause here was sufficient to establish jurisdiction. Accord Phoenix Network Technologies Ltd. V. Neon Systems, Inc., 177 S.W.3d 605 (Tex. Ct. App. 2005) (recognizing that under Texas law, forum selection clauses are prima facie valid and enforceable).

CONCLUSION

The trial court properly ruled the forum selection clause here was valid and enforceable. Accordingly the judgment below is

AFFIRMED.

MOORE, A.C.J., BURNETT, PLEICONES, JJ., and Acting Justice Edward B. Cottingham, concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Miriam M. Gardner, Respondent,

v.

James Troy Gardner, (By James Troy Gardner, Jr. His Personal Representative), Appellant.

Appeal from Kershaw County
Marion D. Myers, Family Court Judge

Opinion No. 26126
Heard February 14, 2006 – Filed March 13, 2006

AFFIRMED

Douglas J. Robinson, of Camden; and Thomas M. Neal, III, of Columbia, for Appellant.

Michael W. Self and Emma I. Bryson, both of McDougall & Self, of Columbia, for Respondent.

CHIEF JUSTICE TOAL: This action arises out of the divorce of Miriam M. Gardner (Wife) and James Troy Gardner (Husband). At issue is

whether the family court erred in distributing the marital property between the parties. We affirm the family court's ruling.

FACTUAL / PROCEDURAL BACKGROUND

Husband and Wife were married in December of 1956. In March of 2001 the couple separated. In April of 2001 Wife filed for separate support and maintenance, alimony, and equitable distribution. In March of 2002, during the litigation, Husband died. As a result, the personal representative of his estate, James Troy Gardner, Jr. (Son), was substituted as a party to this litigation.

In March of 2004, the family court issued an order in the case identifying, valuing, and distributing the marital property between the parties (60% to Wife and 40% to Husband) pursuant to the family court's consideration of the equitable distribution statute. Husband appealed.

This case was certified by this Court pursuant to Rule 204(b), SCACR. As a result, the following issues are before this Court:

I. Did the family court err in valuing and distributing the marital assets between the parties?

II. Did the family court err in awarding attorney's fees to Wife?

LAW / ANALYSIS

I. Marital Assets

Husband argues that the family court erred in identifying, valuing, and distributing the marital assets. We disagree.

In making an equitable distribution of marital property, the court must (1) identify the marital property, both real and personal, to be divided between the parties; (2) determine the fair market value of the identified property; (3) apportion the marital estate according to the contributions, both direct and indirect, of each party to the acquisition of the property during the

marriage, their respective assets and incomes, and any special equities they may have in marital assets; and (4) provide for an equitable division of the marital estate, including the manner in which the distribution is to take place. *Johnson v. Johnson,* 296 S.C. 289, 293, 372 S.E.2d 107, 110 (Ct. App. 1988).

In general, marital property subject to equitable distribution is valued as of the date the marital litigation is filed or commenced. *Fields v. Fields*, 342 S.C. 182, 186, 536 S.E.2d 684, 686 (Ct. App. 2001). However, the parties may be entitled to share in any appreciation or depreciation in marital assets occurring after separation but before divorce. *See Dixon v. Dixon*, 334 S.C. 222, 228, 512 S.E.2d 539, 542 (Ct. App. 1999) (stating that because our family courts handle a large number of cases, there often is a substantial delay between the commencement of an action and its ultimate resolution. Thus, it is not unusual for the value of marital assets to change between the time the action was commenced and its final resolution.)

In the present case, Husband argues the family court erred in the valuation of several marital assets. Husband's retirement account is the asset at the center of this disagreement. While the litigation was pending, Husband died. As a result of Husband's death, the retirement account ceased to exist. However, other assets awarded to both Husband and Wife also declined in value during the litigation. Further, Husband failed to offer any evidence of appropriate values for the marital property at the family court level and does not offer any suggestion of value in the brief before this Court.

Accordingly, we hold that the date of the filing of the litigation should be used as the date of valuation in the present case. In addition, we hold that a court reviewing a property distribution must look at the appreciation or depreciation of marital assets with regard to the entire martial estate and not the assets individually.

Therefore, we affirm the family court's decision using the date of filing to determine the value of the marital assets. Further, we hold that the family court correctly looked at the entire marital estate's changed value.

CONCLUSION

For the foregoing reasons, we affirm the family court's decision. In determining how marital property should be divided, the family court considered all the relevant factors, including the situation of the parties at the time of the divorce, and made the appropriate division of the property.

Regarding the remaining issues, we affirm pursuant to Rule 220, SCACR and the following authority: *Glasscock v. Glasscock*, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991); *Honea v. Honea*, 292 S.C. 456, 458, 357 S.E.2d 191, 192 (Ct. App. 1987); and S.C. Code Ann. § 20-7-472 (Supp. 2005).

MOORE, BURNETT, PLEICONES, JJ., and Acting Justice Mark J. Hayes, II, concur.

The Supreme Court of South Carolina

William Rush, Petitioner

v.

State of South Carolina, Respondent

ORDER

In this post-conviction relief case, petitioner has filed a notice of appeal from an order dated December 8, 2005. This order states that petitioner moved to withdraw his post-conviction relief action at the start of the proceeding, and that the post-conviction relief judge advised petitioner that any withdrawal would result in a dismissal of the action with prejudice. The order indicates that petitioner was questioned by the judge and includes a finding that petitioner's decision to withdraw the action was being made knowingly and voluntarily. The order grants the motion to withdraw and dismisses the action with prejudice.

A party cannot appeal an order issued with the consent of the party. Hooper v. Rockwell, 334 S.C. 281, 513 S.E.2d 358 (1999); American Publishing and Engraving Co. v. Gibbes & Co., 59 S.C. 215, 37 S.E. 753 (1901); Smith v. Lowery, 56 S.C. 493, 35 S.E. 129 (1900); Varn v.

Varn, 32 S.C. 77, 10 S.E. 829 (1890); Calcutt v. Calcutt, 282 S.C. 565, 320 S.E.2d 55 (Ct. App. 1984). We see no reason why this rule should not be equally applicable to appellate review in post-conviction relief cases.

In this case, petitioner moved to withdraw despite the fact that he was advised that the withdrawal would result in the dismissal of this matter with prejudice. Since it was petitioner who sought the withdrawal, he may not appeal the order that resulted when his request was granted.[1] Accordingly, the notice of appeal is dismissed.

IT IS SO ORDERED.

s/ Jean H. Toal C. J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ Costa M. Pleicones J.

Burnett, J., not participating.

Columbia, South Carolina
March 9, 2006

[1] If there was any error in the findings of fact or conclusions of law in the order, these errors should have been raised by a timely motion under either Rule 52 or 59, SCRCP.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Cedar Cove Homeowners Association, Inc., Respondent,

v.

Rudy DiPietro and Margaret L. DiPietro, Appellants.

Appeal From Richland County
Joseph M. Strickland, Master-In-Equity

Opinion No. 4092
Heard February 6, 2006 – Filed March 13, 2006

REVERSED

Rolf Mouin Baghdady, for Appellants.

Spencer Andrew Syrett, of Columbia, for Respondent.

KITTREDGE, J.: This appeal concerns the construction of restrictive covenants. Rudy and Margaret DiPietro are residents of the Cedar Cove subdivision in Richland County, South Carolina. The Cedar Cove

Homeowners' Association (the Association) sought and obtained an injunction requiring the DiPietros to remove a brick patio that encroached approximately three feet onto the common area of the subdivision. The DiPietros appeal, and we reverse. We find the Declaration of Covenants governing the Cedar Cove Subdivision and a balancing of the equities preclude the issuance of the injunction.

FACTS / PROCEDURAL HISTORY

Margaret and Rudy DiPietro have been residents in Cedar Cove since 1998. The subdivision is managed by the Association, which operates pursuant to by-laws. The property of Cedar Cove is subject to restrictive covenants, known as the "Declaration of Covenants, Conditions, and Restrictions for Cedar Cove Subdivision."

A previous owner of the DiPietro lot built a wooden deck behind the house, part of which encroached onto the common area. The Association has never challenged the wooden deck and its encroachment onto the common area. In 2001, the DiPietros desired to construct a patio underneath the deck, primarily because the area under the deck was "unsightly, and there was some soil erosion . . . ." Like the wooden deck, the patio would slightly encroach onto the common area. Rudy DiPietro pursued the desired patio by following the then longstanding informal approach to such matters in Cedar Cove, for strict compliance with the procedural requirements in the restrictive covenants was largely ignored.[1] Rudy prepared a sketch of the proposed patio and presented it to Clark Cowsert, a member of the Architectural Review Committee at the time.

Cowsert met with Rudy, reviewed the sketch, and even assisted with "pull[ing] a string across" the ground to determine the precise location and parameters of the patio. Cowsert recommended approval of the patio request

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[1] For example, Terry Frownfelter, a longtime Cedar Cove resident, acknowledged that many of the residents "that have lived there over the fourteen years that I've been there basically have been able to do what they want to. I'm thirty feet into the common area myself."

to Mike Reed, then president of the Association's Board of Directors. According to Cowsert, "I gave it to Mr. Reed who was president of the Board[] and everything went according to what my recommendation was." Reed also inspected the site, and the record establishes that Reed approved of the patio. Even the Association concedes that "there was some level of approval by Mike Reed." Rudy then proceeded with construction of the patio.

In 2002, new officers were elected, and the days of lax governance were over. As the Association's new president, Doug Harder, said, "We try to run the Association like a business." The DiPietros were perhaps the first to experience the "business" approach. On April 8, 2002, Harder and Charles Zinco, chairman of the Architectural Review Committee, delivered a letter to Rudy, directing Rudy to "stop construction." As of April 8, 2002, the patio was substantially completed.[2] Rudy was angered by the Association's tactics and so informed Harder and Zinco with a "few choice words." When Zinco was asked whether it was his "impression that [Rudy] intended to complete the project without further consultation with you all," he responded, "Oh, yes. Yes, sir." Harder expressed similar sentiments, stating that Rudy "did make it known to us" that he was not going to stop construction. As expected, Rudy proceeded to complete the patio.

The Association delayed in taking action, perhaps because the new officers knew Reed, the former board president, gave "some level of approval" to the DiPietros' patio project. According to Harder, there were a number of reasons for the board's prolonged inaction:

> First of all, we are a volunteer board, and we have lives to live and families to raise, and all three of us, as I recall were traveling a great deal during that spring and summertime. I suppose in trying to –

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2 The Association's final brief refers to the patio as "80% completed when [Rudy] received the [April 8] letter from the Board." The Association characterizes the 80% figure as a concession by the DiPietros. (Respondent's final brief, 6).

> we were trying to come up with some way that maybe we could convince Rudy to voluntarily stop, but I guess the summer got away from us enjoying our time on the lake. So it was no conscious decisioin [sic] about, you know, delaying for any reason. We had no attorney for the association at the time. We had to begin, you know, a search for one. That took some time.

The Association filed its Complaint on January 15, 2003. By then, the patio was completed. The Complaint alleges a trespass on the basis that the patio encroaches on the common areas, in violation of Articles V and VI of the restrictive covenants. The claim for damages was withdrawn at trial, and the Association sought a mandatory injunction "directing [the DiPietros] to remove that portion of the brick patio that encroaches and trespasses onto the common areas owned by [the Association]." The master granted the injunction on the basis that the DiPietros failed to "secure the approval" of the Association in accordance with the restrictive covenants. The DiPietros appealed following an unsuccessful motion to reconsider.

STANDARD OF REVIEW

While a trespass action is one at law, the Association withdrew its claim for damages and sought only an injunction. The character of an action as legal or equitable depends on the relief sought. Compare O'Shea v. Lesser, 308 S.C. 10, 14, 416 S.E.2d 629, 631 (1992) (holding an action for breach of restrictive covenants was at law, because relief sought was general damages for loss of view and invasion of privacy) and Kneale v. Bonds, 317 S.C. 262, 265, 452 S.E.2d 840, 841 (Ct. App. 1994) ("An action to enforce restrictive covenants by injunction is in equity."); see also S.C. Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001) (holding an action to enforce restrictive covenants by injunction is an equitable action). Because the Association's action is one to enforce restrictive covenants by injunction, it is in equity, and we may find facts in accordance with our own view of the evidence. Brenco v. S.C. Dep't of Transp., 363 S.C. 136, 142, 609 S.E.2d 531, 534 (Ct. App. 2005). We

acknowledge the superior position of the trial judge to assess witness credibility. We would not, even under *de novo* review, lightly disregard a trial judge's credibility determinations. The resolution of this appeal, however, turns not on a credibility assessment, but on the application of largely undisputed facts to unambiguous restrictive covenants. Moser v. Gosnell, 334 S.C. 425, 430, 513 S.E.2d 123, 125 (Ct. App. 1999) (holding that when a covenant or contract is clear and unambiguous, matters of construction are questions of law for the court).

LAW/ANALYSIS

The DiPietros contend the master erred in granting the injunction. We agree.

We first dispense with the suggestion that because the common area of the Cedar Cove subdivision is involved, the law of trespass governs and trumps the clear language of the restrictive covenants. Where, as here, issues involving the common area of a subdivision—as raised by the pleadings—are resolved by reference to the applicable restrictive covenants, those covenants control. The Association's charge of trespass against the DiPietros emanates solely from the restrictive covenants. Indeed, the Association's Complaint cites no source to support its claim for relief other than the restrictive covenants. This case was pled and tried on the theory that the DiPietros violated the restrictive covenants—specifically Articles V and VI—by failing to properly secure approval for the patio.

Article V of the restrictive covenants controls the resolution of this appeal:

> ARTICLE V
> ARCHITECTURAL CONTROL
>
> No building, fence, wall or other structure shall be commenced, erected or maintained upon the Properties, nor shall any exterior addition to or change or alteration therein be made until the plans

> and specifications showing the nature, kind, shape, color, height, materials and location of the same shall have been submitted to and approved in writing as to harmony of external design and location in relation to surrounding structures and topography by the Declarant, or by a designated representative. Such approval shall be determined by consideration of the workmanship, materials, harmony or exterior design with existing structures, and location with respect to topography and grade. **PROVIDED HOWEVER, that if approval or disapproval is not submitted, or no suit to enjoin construction is commenced prior to substantial completion thereof, it shall be presumed that the party has fully complied with this restriction.**

(Emphasis added).

We find that Mike Reed gave "approval" to the patio project, according to the longstanding informal approach to restrictive covenant compliance that existed at the time. In any event, we believe the DiPietros must prevail irrespective of formal approval of the project. It is undisputed that there has *never* been a formal "disapproval" as contemplated by the restrictive covenants. Harder was asked whether his "letter of April 8th [was] intended to be a disapproval of [the] project?" Harder answered, "No." The goal sought by the Association in the April 8 letter was "to stop, talk, and try to come to a resolution." Association representatives, however, understood well that Rudy intended to finish the project, and yet the Association took no action until months later after the patio was completed. The Association, which claims a desire for strict compliance with the covenants, may not escape from its own lack of compliance with the restrictive covenants.

We are then left with the provision that compliance with the restrictive covenants "shall be presumed . . . [if] no suit to enjoin construction is commenced prior to substantial completion thereof." It is unchallenged, and the master so found, that after the April 8 letter and prior to this action, the

DiPietros "proceeded to complete the project." We adhere to the unambiguous terms of the restrictive covenants.[3] Accordingly, we hold the DiPietros are entitled to the presumption of compliance and that the granting of the injunction was therefore in error. See Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987) (noting that restrictive covenants are voluntary contracts between the parties, and courts should enforce such contracts unless they are indefinite or violate public policy).

Our reversal of the injunction based on a straightforward application of Article V of the restrictive covenants is further supported by our firm view that a balancing of the equities compels the denial of injunctive relief. See Wells, 294 S.C. at 274, 363 S.E.2d at 896 ("A court does not automatically issue a mandatory injunction once it finds a restrictive covenant has been violated [as] [t]he court must balance the equities between the parties . . . ."); Hunnicutt v. Rickenbacker, 268 S.C. 511, 515, 234 S.E.2d 887, 889 (1977) ("[I]t is not every case of a structure erected in violation of a restriction which will call for [a mandatory injunction]."); Rabon v. Mali, 289 S.C. 37, 40, 344 S.E.2d 608, 610 (1986) (holding equity will refuse her aid when a party, knowing his rights, suffers his adversary to incur expenses, enter into obligations, or otherwise change his position before asserting a claim for enforcement, "especially if an injunction is [requested]"); Janasik v. Fairway Oaks Villas Horizontal Prop. Regime, 307 S.C. 339, 344-45, 415 S.E.2d 384, 387-88 (1992) (holding a horizontal property regime waived its right to enforce a restrictive covenant by failing to bring a claim for enforcement against a known violation until after a substantial amount was spent on improvements). Having reversed the mandatory injunction, we do not reach the DiPietros' remaining assignments of error. Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (noting

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[3] We reach this result without the aid of the settled principle that "[r]estrictive covenants are to be construed most strictly against the grantor and persons seeking [to] enforce them, and liberally in favor of the grantee, all doubts being resolved in favor of a free use property and against restrictions." Sprouse v. Winston, 212 S.C. 176, 184, 46 S.E.2d 874, 878 (1948) (quoting 26 C.J.S. Deeds, § 163).

that an appellate court need not address the remaining issues when disposition of a prior issue is dispositive).

CONCLUSION

We find that under the terms of the restrictive covenants the Association is not entitled to a mandatory injunction requiring the removal of the patio. The order of the master granting the injunction is

REVERSED.

HEARN, C.J., concurs, and ANDERSON, J., dissents in a separate opinion.

ANDERSON, J. (dissenting in a separate opinion): I disagree with the majority's reasoning and analysis. I **VOTE** to **AFFIRM**.

FACTUAL/PROCEDURAL BACKGROUND

Margaret and Rudy DiPietro are the owners of Lot 5 in the Cedar Cove Subdivision and have resided there since 1998. The subdivision is governed by the Cedar Cove Homeowners' Association (the Association), a non-profit corporation organized and existing under the laws of South Carolina. Management of the Association is governed by the By-Laws. Both the common areas of the subdivision and Lot 5 are subject to the Declaration of Covenants, Conditions, and Restrictions for Cedar Cove Subdivision (the restrictive covenants).

Pursuant to the restrictive covenants, to gain approval for exterior work on one's home, an owner must submit plans to the architectural review committee. The plans are then presented to the Board for final approval. In 2001, the DiPietros made an oral application to the Chairman of the

Architectural Control Committee, Clark Cowsert, for approval to construct a brick patio behind their residence. Cowsert visually inspected the proposed project and assisted the DiPietros in laying out the plan. There is a question as to whether the plan contemplated an encroachment onto the common areas of the Association. No written approval of the project was ever issued. Cowsert only had authority to recommend the project to the Board of Directors. He could not approve any project himself.

Prior to completion of the DiPietros' addition, the Board membership changed. The new Board considered the project and determined that it had no authority to consent to an encroachment onto the common areas. The Board instructed the DiPietros to cease work and directed them to remove the portion of the patio that encroached on the common areas. Mr. DiPietro informed the Board he had permission from the previous Board and he did not intend to stop construction. The Board concluded that though there may have been some previous level of approval, the current project extended beyond that approval. There is no record as to the extent of the previous approval.

On January 15, 2003, the Association brought an action against the DiPietros alleging trespass and violations of the restrictive covenants. The trial court found the DiPietros violated the covenants and committed trespass in building the patio. The court ordered the DiPietros to remove that portion of the brick patio that encroaches onto the common areas. The DiPietros' deck extends into the common area, but the Board has not asked that it be removed due to the possible expense. The DiPietros' Motion to Reconsider was denied.

STANDARD OF REVIEW

The DiPietros raise numerous issues on appeal, most of which can be divided between Cedar Cove's claim involving trespass and its claim for violations of the restrictive covenants. "When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal." Kiriakides v. Atlas Food Systems & Services, Inc., 338 S.C. 572, 580, 527 S.E.2d 371, 375 (Ct.

App. 2000) (citation omitted), aff'd as modified, 343 S.C. 587, 541 S.E.2d 257 (2001).

A trespass action is an action at law. Butler v. Lindsey, 293 S.C. 466, 469, 361 S.E.2d 621, 622 (Ct. App. 1987) (citing Uxbridge Co. v. Poppenheim, 135 S.C. 26, 133 S.E. 461 (1926); Corley v. Looper, 287 S.C. 618, 340 S.E.2d 556 (Ct. App. 1986)); see also Black's Law Dictionary 1508 (7th ed. 1999) (defining trespass as "a legal action for injuries."). On appeal from an action at law that was tried without a jury, the appellate court can correct errors of law, but the findings of fact will not be disturbed unless found to be without evidence which reasonably supports the judge's findings. Townes Assocs. Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976); Ellie, Inc. v. Miccichi, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004) (citing Cohens v. Atkins, 333 S.C. 345, 509 S.E.2d 286 (Ct. App. 1998)); Sherman v. W & B Enterprises, Inc., 357 S.C. 243, 592 S.E.2d 307 (Ct. App. 2003).

An action to enforce restrictive covenants by injunction is in equity. Holling v. Margiotta, 231 S.C. 676, 679, 100 S.E.2d 397, 398 (1957); Gibbs v. Kimbrell, 311 S.C. 261, 267, 428 S.E.2d 725, 729 (Ct. App. 1993). On appeal, in an equitable action tried by a master alone, this Court is able to find facts in accordance with its own view of the evidence. Townes, 266 S.C. at 86, 221 S.E.2d at 775 (citing Crowder v. Crowder, 246 S.C. 299, 143 S.E.2d 580 (1965)); Floyd v. Floyd, 365 S.C. 56, 93, 615 S.E.2d 465, 485 (Ct. App. 2005). "However, we are not required to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility." Floyd, 365 S.C. at 93, 615 S.E.2d at 485 (citing Ingram v. Kasey's Assocs., 340 S.C. 98, 105, 531 S.E.2d 287, 291 (2000)); accord Tiger, Inc. v. Fisher Agro, Inc., 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1990).

LAW/ANALYSIS

I. Trespass

The DiPietros argue the trial court erred in applying the law of trespass as they have an "undivided interest in the common areas" and a "right and easement of enjoyment in and to the common area." I disagree.

Trespass is an intentional tort. Snow v. City of Columbia, 305 S.C. 544, 553, 409 S.E.2d 797, 802 (Ct. App. 1991) "Trespass is any intentional invasion of the plaintiff's interest in the exclusive possession of his property." West v. Newberry Elec. Co-op., 357 S.C. 537, 544, 593 S.E.2d 500, 503 (Ct. App. 2004) (quoting Hedgepath v. Am. Tel. Co., 348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001)); accord Silvester v. Spring Valley Country Club, 344 S.C. 280, 286, 543 S.E.2d 563, 566 (Ct. App. 2001). As this Court stated in Hawkins v. City of Greenville, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004),

> "To constitute actionable trespass, however, there must be an affirmative act, invasion of land must be intentional, and harm caused must be the direct result of that invasion." Snow v. City of Columbia, 305 S.C. 544, 553, 409 S.E.2d 797, 802 (Ct. App. 1991); accord Mack v. Edens, 320 S.C. 236, 240, 464 S.E.2d 124, 127 (Ct. App. 1995). The gist of trespass is the injury to possession, and generally either actual or constructive possession is sufficient to maintain an action for trespass. Macedonia Baptist Church v. City of Columbia, 195 S.C. 59, 71, 10 S.E.2d 350, 355 (1940).

Hawkins, 358 S.C. at 296-97, 594 S.E.2d at 565-66.

In Snow v. City of Columbia, we instructed,

> The unwarrantable entry on land in the peaceable possession of another is a trespass, without regard to the degree of force used, the means by which the enclosure is broken, or the extent of the damage inflicted. Lee v. Stewart, 218 N.C. 287, 10 S.E.2d 804 (1940). The entry itself is the wrong. Thus, for example, if one

> without license from the person in possession of land walks upon it, or casts a twig upon it, or pours a bucket of water upon it, he commits a trespass by the very act of breaking the enclosure. See Moore v. Duke, 84 Vt. 401, 80 A. 194 (1911); 1 G. Addison, A TREATISE ON THE LAW OF TORTS, 388 (Wood ed. 1881); Restatement 2d of Torts, 158, comment i, illustration 3 (1965). It is immaterial whether any further damage results. See Brown Jug, Inc. v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 959, 688 P.2d 932 (Alaska 1984). The mere entry entitles the party in possession at least to nominal damages. Lee v. Stewart, supra. To constitute an actionable trespass, however, there must be an affirmative act, the invasion of the land must be intentional, and the harm caused must be the direct result of that invasion. Alabama Power Co. v. C.G. Thompson, 278 Ala. 367, 178 So.2d 525 (1965). Trespass does not lie for nonfeasance or failure to perform a duty. Id.
>
> Intent is proved by showing that the defendant acted voluntarily and that he knew or should have known the result would follow from his act. Snakenberg v. Hartford Casualty Insurance Co., 299 S.C. 164, 383 S.E.2d 2 (Ct. App. 1989). Although neither deliberation, purpose, motive, nor malice are necessary elements of intent, the defendant must intend the act which in law constitutes the invasion of the plaintiff's right. Id. Trespass is an intentional tort; and while the trespasser, to be liable, need not intend or expect the damaging consequence of his entry, he must intend the act which constitutes the unwarranted entry on another's land. See Phillips v. Sun Oil Co., 307 N.Y. 328, 121 N.E.2d 249 (1954); Lee v. Stewart, supra (it is immaterial whether defendant in committing the trespass actually contemplated the resulting damage to plaintiff).

Snow, 305 S.C. at 52-53, 409 S.E.2d at 802.

The essence of trespass is the unauthorized entry onto the land of another. Ravan v. Greenville County, 315 S.C. 447, 464, 434 S.E.2d 296,

306 (Ct. App. 1993). "The distinction between trespass and nuisance is that trespass is any intentional invasion of the plaintiff's interest in the exclusive possession of his property, whereas nuisance is a substantial and unreasonable interference with the plaintiff's use and enjoyment of his property." Silvester, 344 S.C. at 286, 543 S.E.2d at 566 (citation omitted); see also F.P. Hubbard & R.L. Felix, The South Carolina Law of Torts 427 (2d ed. 1997) ("The requirement of a physical entry distinguishes trespass from nuisance, which protects the right to enjoyment of land rather than the right of possession.").

II. Homeowners' Associations/Trespass Actions Against Residents

The DiPietros argue that the patio cannot be considered a trespass as they have an interest in the common area. The "common area" is defined in the By-Laws and the restrictive covenants as "all real property owned by the Association for the common use and enjoyment of the owners." The issue of whether homeowners' associations may maintain trespass actions against residents is novel in South Carolina. The By-Laws as well as South Carolina law concerning trespass is instructive. My research of other jurisdictions reveals only one state analyzing a homeowners' association's action for trespass. In Pine Knoll Ass'n, Inc. v. Cardon, 484 S.E.2d 446 (N.C. Ct. App. 1997), the court stated the property owners' association did not establish unauthorized entry onto the association's seawall, and thus, failed to establish a trespass claim, where the landowner was an association member and association members had a right to use common properties. Id. at 448.

The DiPietros liken their interest in the common areas to that of ownership and state: "ownership, together with a right of possession, is a defense to liability for trespass." However, their rights, as defined in the By-Laws and the restrictive covenants only extend to the "common use and enjoyment" of the area. The Association is the owner. The DiPietros were essentially given consent to use and enjoy the common area, but not to go beyond the type of use contemplated in the By-Laws and the restrictive covenants. A trespass may be accomplished by going beyond the consent

given for the original entry. See Groce v. Greenville, S. & A. Ry. Co., 94 S.C. 199, 78 S.E. 888 (1913) (holding that if the entry for the purpose of construction was made under the grant or by consent, actual or presumed, the defendant would nevertheless be liable for any trespass committed outside the right of way granted or for any invasion of the property rights of the plaintiff not incident to the proper location and construction of its road, just as it would be in case of an entry without such consent); Burnett v. Postal Telegraph & Cable Co., 79 S.C. 462, 60 S.E. 1116 (1908) (holding that if a company which is given permission to enter on land and construct a line of telegraph wires thereon constructs it in a different place than that designated by the owner, it is guilty of a trespass, and the owner in suing for damages is not confined to a remedy under the condemnation statutes which apply when the entry is by permission and the acts done on the land are incident to the exercise of the right granted by the owner).

By building a patio that encroached onto the common areas owned by the Association, the DiPietros went beyond the original consent given by the Association for the use and enjoyment of the common areas. It is clear from the record that the patio built by the DiPietros encroaches onto the common areas by up to 4.2 feet. In their trial testimony, the DiPietros admitted their right to use the common areas was not absolute and was subject to limitations. For example, they conceded that they could not build a residence on the common areas but could walk over the area. To the extent that the patio encroaches onto the common area, the encroachment constitutes a trespass.

The DiPietros additionally argue the trial court erred in finding the DiPietros do not have a legal or equitable interest in the common area, because their rights are limited to the same rights "that a shareholder in a corporation would have, essentially none." However, the trial court used this statement merely as an analogy. It was made in reference to the fact that the Association is a corporation, and the DiPietros are members of the corporation with no substantial rights involving the decisions of the Association concerning the common areas.

The DiPietros specifically dispute the following findings of fact by the trial court concerning the trespass: the trial court's finding that the patio is solely for the DiPietros' personal use; the trial court's finding concerning the patio as an enhancement; the trial court's finding concerning the purpose of the patio as constructed and maintained for the benefit of the other homeowners; and the trial court's finding whether there was a prohibition against the DiPietros from beautifying and enhancing the common area in a way that does not interfere with any other homeowner's right to use the area. However, evidence was presented at trial that reasonably supports the trial court's findings of fact. See Townes Assoc. Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976) (noting that on appeal from an action at law tried without a jury, the findings of fact will not be disturbed unless the findings are not reasonably supported by the evidence). Furthermore, the disputed facts, even if found to be incorrect, would not alter the determination that the patio constitutes a trespass. That the patio may be an enhancement or for the neighborhood's benefit is not a defense to trespass.

III. Restrictive Covenants

The DiPietros argue the trial court erred in finding the DiPietros violated the restrictive covenants and in requiring them to remove the portion of their patio that extends into the common area. I disagree.

The DiPietros raise numerous arguments concerning the restrictive covenants, beginning with the contention that the trial court erred in finding the DiPietros violated Articles V and VI of the restrictive covenants. Article V (Architectural Control) of the restrictive covenant states:

> No building, fence, wall or other structure shall be commenced, erected or maintained upon the Properties, nor shall any exterior addition to or change or alteration therein be made until the plans and specifications showing the nature, kind, shape, color, height, materials and location of the same shall have been submitted to and approved in writing as to harmony of external design and location in relation to surrounding structures and topography by the Declarant, or by a designated representative. Such approval

> shall be determined by consideration of the workmanship, materials, harmony or exterior design with existing structures, and location with respect to topography and grade. PROVDIED HOWEVER, that if approval or disapproval is not submitted, or no suit to enjoin construction is commenced prior to substantial completion thereof, it shall be presumed that the party has fully complied with this restriction.

Article VI refers to restrictions on the use of the property.

"Restrictive covenants are contractual in nature." Seabrook Island Property Owners' Ass'n v. Berger, 365 S.C. 234, 239, 616 S.E.2d 431, 434 (Ct. App. 2005.) (internal quotation marks omitted) (quoting Hoffman v. Cohen, 262 S.C. 71, 75, 202 S.E.2d 363, 365 (1974)); see also Seabrook Island Property Owners Ass's v. Pelzer, 292 S.C. 343, 347, 356 S.E.2d 411, 414 (Ct. App. 1987) ("Restrictive covenants are contractual in nature and bind the parties thereto in the same manner as any other contract.") (citing Palmetto Dunes Resort v. Brown, 287 S.C. 1, 336 S.E.2d 15 (Ct. App. 1985)). "The word 'covenant' means to enter into a formal agreement, to bind oneself in contract, and to make a stipulation." 20 Am. Jur. 2d Covenants, Conditions, and Restrictions § 1.1 (footnotes omitted).

In Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 363 S.E.2d 891 (1987), our supreme court edified:

> The historical disfavor of restrictive covenants by the law emanates from the widely held view that society's best interests are advanced by encouraging the free and unrestricted use of land. See, Hamilton v. CCM, Inc., 274 S.C. 152, 263 S.E.2d 378 (1980); Edwards v. Surratt, 228 S.C. 512, 90 S.E.2d 906 (1956). See also, Knox v. Scott, 62 N.C.App. 732, 303 S.E.2d 422 (1983). Courts tend to strictly interpret restrictive covenants and resolve any doubt or ambiguities in a covenant on the presumption of free and unrestricted land use. Edwards v. Surratt, supra. Thus, to enforce a restrictive covenant, a party must show that the restriction applies to the property either by the

> covenant's express language or by a plain unmistakable implication. Hamilton v. CCM, Inc., supra; see also, Davey v. Artistic Builders, Inc., 263 S.C. 431, 211 S.E.2d 235 (1975).
>
> The rule of strict construction governing restrictive covenants does not preclude their enforcement. A restrictive covenant will be enforced if the covenant expresses the party's intent or purpose, and this rule will not be used to defeat the clear express language of the covenant. Palmetto Dunes v. Brown, 287 S.C. 1, 336 S.E.2d 15 (1985); Hamilton v. CCM, Inc., supra. See generally, Vickery v. Powell, 267 S.C. 23, 225 S.E.2d 856 (1976); Hoffman v. Cohen, 262 S.C. 71, 202 S.E.2d 363 (1974). This restrictive covenant is a voluntary contract between the parties. Courts shall enforce such covenants unless they are indefinite or contravene public policy. Vickery v. Powell, supra.

Sea Pines, 294 S.C. at 270, 363 S.E.2d at 893-94.

A covenant may run with the land where there is "an indication that the parties intended for the covenant to run with the land." Charping v. J.P. Scurry & Co., Inc., 296 S.C. 312, 315, 372 S.E.2d 120, 122 (Ct. App. 1988) (citing Cheves v. City Council of Charleston, 140 S.C. 423, 138 S.E. 867 (1927)). In Epting v. Lexington Water Power Co. 177 S.C. 308, 320, 181 S.E. 66, 71 (1935), the court explained that covenants running with the land must "relate to the realty demised, having for its object something annexed to, or inherent in, or connected with the land; that its performance or nonperformance must affect the nature, quality, value, or mode of enjoyment of the demised premises; and in this State, certainly, the mere fact of its being a part of the consideration is not sufficient."

> Restrictive covenants often authorize the creation of a homeowners' association, usually in the form of a not-for-profit corporation, and grant it authority to manage common areas, make regulations, levy assessments, and other similar privileges. Homeowners' associations are contractually limited by the restrictive covenants establishing them.

> While homeowners' associations typically have the power to regulate the use of common areas, their regulations cannot prohibit a usage contrary to any restrictions creating easements or rights of use of property in owners.

17 S.C. Jur. Covenants § 88 (1993 & Supp. 2005) (footnotes omitted) (citing Lovering v. Seabrook Island Property Owners' Ass'n, 289 S.C. 77, 344 S.E.2d 862 (Ct. App. 1986), modified, 291 S.C. 201, 352 S.E.2d 707 (1987); Seabrook Island Property Owners' Ass'n v. Pelzer, 292 S.C. 343, 356 S.E.2d 411; Battery Homeowners Ass'n v. Lonconln Fin. Resources, 309 S.C. 247, 422 S.E.2d 93 (1992)).

Covenants that restrict the free use of property must be strictly construed against limitations upon the property's free use. Hyer v. McRee, 306 S.C. 210, 212, 410 S.E.2d 604, 605 (Ct. App. 1991). Where there is doubt, the doubt must be resolved in favor of the property's free use. Id. As voluntary contracts, restrictive covenants will be enforced unless they are indefinite or contravene public policy. Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987).

In Sprouse v. Winston, the supreme court observed:

> The rule of construction applicable here is set forth in 26 C.J.S., Deeds, § 163:
>
> > 'Restrictive covenants are to be construed most strictly against the grantor and persons seeking [to] enforce them, and liberally in favor of the grantee, all doubts being resolved in favor of a free use of property and against restrictions. This rule, however, obtains only where the parties have failed to express their meaning with sufficient clarity to enable the court to say that its construction is plain and admits of no doubt; the rule will not be applied to defeat the obvious purpose of the restriction, nor does

> it require an unnatural and strained construction of the words used; and before giving effect to the rule the court will have recourse to every aid, rule, or canon of construction to ascertain the intention of the parties, since it is the duty of courts to enforce, not to make, contracts.'
>
> Further quoting C.J.S., Deeds, § 163, it is stated:
>
> 'Words used are to be taken in their ordinary and popular sense, unless they have acquired a peculiar and special meaning in the particular relation in which they appear, or with respect to the particular subject matter, or unless it appears from the context that the parties intended to use them in a different sense. * * *'

212 S.C. 176, 184-85, 46 S.E.2d 874, 878 (1948). See also Forest Land Co. v. Black, 216 S.C. 255, 57 S.E.2d 420 (1950) ("The fundamental rule in construing covenants and restrictive agreements is that the intention of the parties as shown by the agreement, governs.").

There are numerous cases throughout the country with facts similar to those in the instant case. In Wescott v. Burtonwood Manor Condominium Ass'n Bd. of Managers, 743 S.W.2d 555 (Mo. App. 1987), the court held that condominium unit owners' construction of improvements without permission of the condominium association board of managers, and in violation of condominium by-laws, warranted the issuance of a mandatory injunction to remove flood retaining walls and glass greenhouse covers from common elements, even though they had been erected to prevent flood damage to the owners' units. Id. at 561. Similarly, in The Fountains of Palm Beach Condominium, Inc. v. Farkas, 355 So.2d 163 (Fla. Dist. Ct. App. 1978), the court upheld an injunction where the defendant/owner's husband attempted to obtain permission for the construction of a patio on the common elements. The management firm told the owner it had no objections, and the board of directors of the condominium association informed him that they had no legal

status and were therefore unable to grant or deny permission. Id. at 163. The owner proceeded with construction, and the association filed suit seeking a mandatory injunction requiring the removal of the patio slab at the owner's expense. Id. The Declaration of Condominium provided that each owner agreed not to make structural additions or alterations to his unit and not to make alterations of the common elements without the prior written consent of the management firm and the association. Id. at 164. The declaration provided for the remedy of injunction to seek compliance with the provisions of the declaration. Id. The court granted a mandatory injunction requiring the removal of the patio slab, even though defendant argued that the failure of the management firm and the association to object to her intentions should operate as an estoppel or as a waiver of the association's right to complain after the patio slab had been laid. Farkas, 355 So.2d at 164.

Though it is not clear in the trial court's order which section of Article VI the DiPietros violated, it is not necessary to find the DiPietros violated Article VI at all, as they violated Article V. The DiPietros failed to seek approval as contemplated by the restrictive covenants prior to construction of their patio and did not stop construction when instructed to by the Board. The DiPietros rely heavily on an exception in the restrictive covenants which provides that "if approval or disapproval is not submitted, or no suit to enjoin construction is commenced prior to substantial completion thereof, it shall be presumed that the party has fully complied with this restriction." However, the evidence presented at trial supports the finding that the patio was not substantially complete prior to the letter informing the DiPietros to cease construction. The bricks for the patio had not been laid when the letter was delivered.

While "[a] court does not automatically issue a mandatory injunction once it finds a restrictive covenant has been violated as the court must balance the equities between the parties," the instant case merits an injunction. Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 363 S.E.2d 891 (1987).

> "The right to enforce a restrictive covenant is not limited to mere preventive action, but will, in a proper case, extend to requiring a

> defendant, by mandatory injunction, to repair an injury already done, or to remove a structure already erected . . . . However, it is not every case of a structure erected in violation of a restriction which will call for such relief. The issuance of a mandatory injunction depends upon the equities between the parties, and it rests in the sound judicial discretion of the court whether such an injunction should be granted. Where a great injury will be done to the defendant, with very little if any to the plaintiff, the courts will deny equitable relief."

Hunnicutt v. Rickenbacker, 268 S.C. 511, 515-16, 234 S.E.2d 887, 889 (1977)) (quoting 29 Am. Jur. 2d Covenants, etc., § 328). This is not a case where the harm to the DiPietros would outweigh the benefit to the Association. The trial court found that the patio may be easily removed, and the testimony supports this finding.

The DiPietros specifically dispute the following findings of fact concerning the restrictive covenants: the trial court's failure to find approval of the patio by the Board; the finding that work was commenced "some months later" after the initial meeting with Cowsert; the failure to find evidence of action other than a telephone call with the chairman; and the finding that the DiPietros "conceded that they submitted no written proposal as required by the covenants." The evidence supports all of these findings of fact. The evidence submitted at trial supports the finding that there was a delay in beginning construction of the patio from the time Mr. DiPietro met with Clark Cowsert. Mr. Cowsert stated, in response to the question of whether there was some delay, "I think so." Other than a telephone call from the Chairman of the Committee to the Chairman of the Board, there was no evidence of any action on the DiPietros' application. The trial court apparently was referring to action by the Board itself and not by individual members of the Board. Cowsert testified that he did not have the ability to grant permission; he only had the authority to recommend approval to the Board. Though it was asserted that Mike Reed gave the DiPietros permission, he did not testify at trial. Lastly, the DiPietros argue that because they showed Cowsert a drawing of the design for the patio, it should constitute a written request. The trial court determined this was not the type

of written request contemplated by the restrictive covenants and this conclusion is supported by the evidence.

IV. Additional Arguments Concerning Findings of Fact

The DiPietros raise numerous additional arguments concerning findings of fact by the trial court. These arguments stem from the trial court's order, but do not necessarily relate to either the claim of trespass or the violation of restrictive covenants. I find these arguments unpersuasive.

The DiPietros contend the trial court erred in finding that they ignored the letter of April 8, 2002. This finding is completely supported by the evidence at trial. Mr. DiPietro readily admitted that work did not cease after the receipt of the letter, and even though he knew the Board wanted him to stop building the patio, he continued. The DiPietros maintain the trial court erred in failing to find that the Association's lawsuit against the DiPietros was motivated by spite and a personal vendetta. I agree with the trial court that the DiPietros failed to support this argument at trial. Other than Mr. DiPietro's own testimony that he thought it was a vendetta, no other evidence was presented at trial that would support such an accusation. There was evidence that other encroachments exist in the neighborhood that have not been the subject of litigation, but no evidence was submitted of other encroachments, unfinished at the time of the new Board that were overlooked. In fact, the evidence showed that the new Board took initiative in making sure homeowners complied with the building requirements with a letter issued March 15, 2002, asking that homeowners wishing to build submit requests to the committee for approval.

The DiPietros contend the trial court erred in failing to find that the patio was approved and substantially complete prior to the appellant's receiving the request to cease and in finding an ouster. I find no error. The DiPietros further argue the trial court erred in finding no written document granting an easement in the common areas. However, the trial court's order actually stated, "There is no written document granting the Defendants any easement or permission to maintain the encroachment." In its order, the trial court was clearly referring to approval of the encroachment after it was built,

not a prior easement. The final three issues raised by the DiPietros are general complaints concerning the decision of the trial court, and do not need to be dealt with individually as the specifics of these arguments were dealt with in the analysis of other issues raised.

CONCLUSION

I would hold that an action for TRESPASS may be maintained by a homeowners' association against a resident homeowner in regard to the common elements property. I would rule that an action for VIOLATION OF RESTRICTIVE COVENANTS may be utilized by a homeowners' association against a resident homeowner in regard to the common elements property.

In my view, the homeowners' association proved the theories of TRESPASS and VIOLATION OF RESTRICTIVE COVENANTS against the resident homeowners in reference to the common elements property. Accordingly, I **VOTE** to **AFFIRM**.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State,	Respondent,
v.	
James E. Rogers,	Appellant.

Appeal From Williamsburg County
Clifton Newman, Circuit Court Judge

Opinion No. 4093
Submitted January 1, 2006 – Filed March 13, 2006

AFFIRMED

David Craig Brown, of Florence, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy Attorney General John W. McIntosh, Assistant Deputy Attorney General Salley W. Elliott, Senior Assistant Attorney General Harold M. Coombs, Jr., all of Columbia; and Solicitor Cecil Kelly Jackson, of Sumter, for Respondent.

HUFF, J.: Appellant, James Rogers, was tried for and convicted of accessory before the fact of armed robbery. He appeals, asserting the trial judge erred in failing to suppress evidence of money found in the back of a police car because it was the fruit of an illegal stop. We affirm.[1]

FACTUAL/PROCEDURAL BACKGROUND

On January 31, 2002, a man with a gun walked into Cash U.S.A., demanded money from the assistant manager of the business, and left with over $1,000. Thereafter, the Williamsburg County Grand Jury indicted Rogers, along with Cortez Brown, Kajuna Mitchum, and Quantrell Wilson, with various offenses concerning the armed robbery at Cash U.S.A.

At the start of the case, Rogers made a pretrial motion to suppress money evidence in this case arguing it was the result of an illegal stop. Rogers asserted the money, found in the back of a police car after he was transported in the car, was fruit of the poisonous tree because the authorities did not have probable cause to stop the vehicle in which Rogers was riding. The trial court held an in camera hearing, at which time the State presented the testimony of Sergeant Shannon Coker with the Kingstree Police Department.

Sergeant Coker testified that around 2:15 p.m. on January 31, he received a call from a confidential informant who was working with the Kingstree Police Department on various cases. He then met with the informant, who told Sergeant Coker about a robbery that was to take place that afternoon at the Cash U.S.A. on Long Street. He told the officer the individuals who would be involved in the armed robbery were James Rogers, Quantrell Wilson, Cortez Brown, and Kajuna Mitchum. The informant also stated the men were supposed to use a white Honda automobile that Rogers had been seen driving. The

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[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

confidential informant told Sergeant Coker that he heard a conversation regarding the armed robbery that was supposed to take place, including where it would occur, the vehicle used, and the individuals involved. This discussion occurred on the afternoon before the robbery. Sergeant Coker remembered that the informant identified at least one of the co-defendants, Kajuna Mitchum, as having been involved in this conversation. Sergeant Coker testified he had used the confidential informant that provided the information about the robbery numerous times in the past, and the past information he had provided proved to be reliable.

The sergeant called his supervisor and relayed the information he had received. As he was driving the confidential informant home, a call came over the radio indicating there had been an armed robbery at the Cash U.S.A. The officer let the informant out of his vehicle and proceeded to the Pine Avenue area, where Rogers resided. While watching Rogers' house, he observed a white Honda with four occupants pull up to a stop sign and turn right onto Pine Avenue. The officer pulled in behind the vehicle and recognized it as the vehicle in which Rogers had been seen. Sergeant Coker continued to follow the vehicle until his supervisor and other deputies arrived in the area. He then activated his blue lights.

Rogers exited the passenger side of the vehicle and the officers instructed him to get back into the vehicle. Rogers continued to walk away from the vehicle, and the vehicle "took off," leaving Rogers behind. Coker's supervisor dealt with Rogers while the sergeant engaged in a vehicle pursuit of the Honda.

Based on the testimony of Sergeant Coker, the trial judge denied Rogers' motion to suppress finding that there was reasonable suspicion, "based on sufficient facts to suspect that criminal activity was involved," such that the authorities had a reasonable basis to stop the car.

STANDARD OF REVIEW

When reviewing a Fourth Amendment search and seizure case, the appellate standard of review is limited to determining whether any evidence supports the trial court's ruling. State v. Missouri, 361 S.C. 107, 111, 603 S.E.2d 594, 596 (2004). The appellate court will reverse only when there is clear error. Id.

LAW/ANALYSIS

Rogers appeals his conviction arguing the trial judge erred in denying his motion to suppress the money found in the back seat of a police car in which he had been transported because it was tainted fruit seized as the result of an illegal stop. We disagree.

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The stopping of a vehicle and the detention of its occupants constitute a seizure and implicate the Fourth Amendment's prohibition against unreasonable searches and seizures. State v. Butler, 353 S.C. 383, 389, 577 S.E.2d 498, 501 (Ct. App. 2003) (citing Delaware v. Prouse, 440 U.S. 648, 653-54 (1979)). Our courts have held that in South Carolina, an officer may stop and briefly detain the occupants of a car without treading on Fourth Amendment rights, even without probable cause to arrest, if he has a reasonable suspicion that the occupants are involved in criminal activity. Id.; Sikes v. State, 323 S.C. 28, 30-31, 448 S.E.2d 560, 562 (1994); Knight v. State, 284 S.C. 138, 141, 325 S.E.2d 535, 537 (1985). "'[A] policeman who lacks probable cause but whose observations lead him reasonably to suspect that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to investigate the circumstances that provoke that suspicion.'" State v. Nelson, 336 S.C. 186, 192, 519 S.E.2d 786, 789 (1999) (quoting Berkemer v. McCarty, 468 U.S. 420, 439 (1984)).

"'Reasonable suspicion' requires a 'particularized and objective basis that would lead one to suspect another of criminal activity.'" State v. Khingratsaiphon, 352 S.C. 62, 69, 572 S.E.2d 456, 459 (2002) (quoting United States v. Cortez, 449 U.S. 411, 418 (1981)). "In determining whether reasonable suspicion exists, 'the totality of the circumstances--the whole picture--' must be considered." Id. (quoting Cortez, 449 U.S. at 417); see also State v. Woodruff, 344 S.C. 537, 546, 544 S.E.2d 290, 295 (Ct. App. 2001) ("The term 'reasonable suspicion' requires a particularized and objective basis that would lead one to suspect another of criminal activity. In determining whether reasonable suspicion exists, the whole picture must be considered.") Reasonable suspicion is something more than an inchoate and unparticularized suspicion or hunch. State v. Butler, 343 S.C. 198, 202, 539 S.E.2d 414, 416 (Ct. App. 2000). However, it is less than the level required for probable cause. Id.

Rogers contends there were insufficient indicia of reliability of the information provided by the confidential informant for the police to make an investigatory stop. Accordingly, Rogers maintains the stop was improper, and the trial judge therefore erred in allowing the introduction of any evidence as a result of the investigatory stop. We disagree.

In making his argument, Rogers relies on the case of State v. Green, 341 S.C. 214, 532 S.E.2d 896 (Ct. App. 2000), which relied on the case of Florida v. J.L., 529 U.S. 266 (2000), both of which held an anonymous tip provided insufficient indicia of reliability to justify an investigatory stop. We find Green and J.L. clearly distinguishable from the case at hand. Both Green and J.L. involved investigatory stops based on anonymous tips, wherein the courts found the anonymous tips provided insufficient indicia of reliability to make an investigatory stop. Here, on the other hand, the tip was provided, not by an anonymous tipster, but a known confidential informant, whom the officers had used numerous times in the past and whose information had proved to be reliable. In J.L., the United States Supreme Court noted, "Unlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to

be fabricated, an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity." J.L., 529 U.S. at 270 (citations omitted). In Green, this court, citing to J.L., stated as follows:

> The only information available to the officer was the statement of an unknown, unaccountable informant who neither explained how he knew about the money and narcotics, nor supplied any basis for the officer to believe he had inside information about Green. Since the telephone call was anonymous, the caller did not place his credibility at risk and could lie with impunity. Therefore, we cannot judge the credibility of the caller, and the risk of fabrication becomes unacceptable.

Green, 341 S.C. at 218, 532 S.E.2d at 898 (citations omitted).

In the case at hand, the officer received the information from a known, accountable informant whose reputation could be assessed and who explained how he knew about the planned robbery, thereby supplying a basis, outside of his already proven reliability, for Sergeant Coker to believe the confidential informant had inside information on the matter.

We further note, this case is distinguishable from Green and J.L. in that, at the time of the investigatory stop here, the officers knew that a crime had, in fact, already occurred. Here, the officers were not investigating the possibility that a crime may be occurring, but were investigating a crime that had occurred and had been independently reported.

The record shows a known and reliable informant provided Sergeant Coker with the names of four persons, including Rogers, that were planning to commit an armed robbery at the Cash U.S.A. on Long Street that afternoon, and indicated the men planned to use a white Honda automobile that Rogers had been seen driving. When Sergeant Coker received information that the robbery had just occurred, he drove

to the area where Rogers lived, watched Rogers' house, and observed a white Honda with four occupants, the same number of people that the informant reported were to be involved in the robbery. As he pulled in behind the Honda, he recognized the vehicle as the one "Rogers had been in or had been seen to be in." Under the totality of the circumstances, we hold Officer Coker had a particularized and objective basis that would lead Sergeant Coker to suspect the occupants of the Honda had committed a crime such that reasonable suspicion existed to justify the investigatory stop. Accordingly, there is evidence to support the trial judge's findings and we find no error.

For the foregoing reasons, Rogers' conviction is

AFFIRMED.

HEARN, C.J., and BEATTY, JJ., concur.