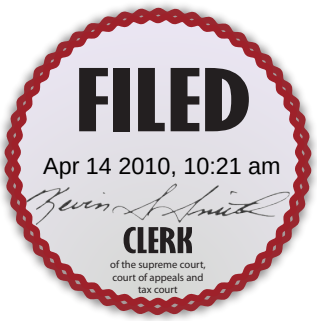

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IN THE
COURT OF APPEALS OF INDIANA

SPEEDWAY WOODS COMMUNITY ASSOCIATION, INC.,	)	
Appellant-Plaintiff,	)	
vs.	)	No. 49A05-0909-CV-537
RONALD MCVEY,	)	
Appellee-Defendant.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable David Dreyer, Judge
Cause No. 49D10-0609-PL-39422

April 14, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Speedway Woods Community Association, Inc. (SWCA) filed suit against Ronald McVey, seeking injunctive relief, costs, and attorney fees, following McVey's installation of a pool on his property without prior written authorization of SWCA's Architectural Review Committee. Following a hearing, the trial court entered judgment in favor of McVey. On appeal, SWCA presents the following restated issue for review: Does sufficient evidence support the trial court's judgment?

We reverse and remand.

The relevant facts are undisputed. Since early 1999, McVey has owned a residence in the Speedway Woods subdivision in Indianapolis. The property is subject to certain restrictive covenants set forth in the Plat Covenants and Restrictions (the Plat) and the Declaration of Covenants, Conditions and Restrictions of Speedway Woods (the Declaration), of which McVey was made aware at the time of purchase. Two provisions are particularly relevant in this case. First, section 22 of the Plat provides that "[n]o above-ground swimming pools shall be permitted in the Subdivision." *Appendix* at 99. Second, and more generally, Article VI, paragraph 6.2(i) of the Declaration provides in relevant part as follows:

> No residence, building, structure, antenna, walkway, fence, deck, wall, patio or other improvement of any type or kind shall be erected, constructed, placed or altered on any Lot … without the prior written approval of the Architectural Review Committee. Such approval shall be obtained only after written application has been made to the Architectural Review Committee by the owner of the Lot requesting authorization from the Architectural Review Committee. Such written application shall be in the manner and form prescribed from time to time by the Architectural Review Committee and, in the case of construction or placement of any improvement shall be accompanied by two (2) complete sets of plans and specifications for any such

> proposed construction or replacement. Such plans shall include plot plans showing the location of the improvement…. Such plans and specifications shall set forth the color and composition of all exterior materials proposed to be used and any proposed landscaping, together with any other material or information with the Architectural Review Committee may reasonably require….

Id. at 77.

Desiring to have a pool in his backyard, McVey attended a SWCA board meeting in the fall of 2004. There, he spoke with Bruce Levy[1] about putting in an above-ground pool on his (McVey's) property. Levy told McVey, "as long as you don't have it no more than a foot out of the ground that it was acceptable" and "it was okay to have an above ground pool in the ground as long as it looked nice and it was, had a deck around". *Transcript* at 44.

The following spring construction began on McVey's lot for the installation of an above-ground pool in the ground. The portion of the pool left above ground was less than a foot, and decking was built around the pool. According to McVey, "[the pool] looks just like an in ground pool". *Id.* at 52.

McVey did not seek written approval from the Architectural Review Committee (as required by Article VI, paragraph 6.2(i) of the Declaration) prior to installing his pool. Further, after receiving a stop-work order from the SWCA, McVey submitted a written request for approval, which was denied by the SWCA on July 7, 2005. McVey was directed to halt construction and remove the pool.

[1] It is not clear from the record what position Levy held within the SWCA. One may reasonably assume, however, that he was either a member of the SWCA's Board of Directors or its Architectural Review Committee. On appeal, McVey interchangeably refers to Levy being a member of these two bodies.

On September 25, 2006, the SWCA initiated the instant action against McVey. After a number of delays and continuances, the matter was heard by the trial court on July 13, 2009. The SWCA appeared by counsel and McVey proceeded pro se, along with his wife. Following the rather informal evidentiary hearing at which limited evidence was presented, the trial court took the matter under advisement. Thereafter, on July 15, 2009, the trial court entered judgment in favor of McVey, noting simply that the SWCA had failed to prove its case by a preponderance of the evidence. Following an unsuccessful motion to correct error, the SWCA now appeals. Additional information will be provided below as necessary.

Our standard of review is well settled. A general judgment, such as the one entered in this case, will be affirmed upon any legal theory consistent with the evidence, and we will neither reweigh the evidence nor judge the credibility of the witnesses. *Splittorff v. Aigner*, 908 N.E.2d 669 (Ind. Ct. App. 2009), *trans. denied*. Rather, we will consider only the evidence most favorable to the judgment together with all reasonable inferences to be drawn therefrom. *Shelby Eng'g Co., Inc. v. Action Steel Supply, Inc*., 707 N.E.2d 1026 (Ind. Ct. App. 1999). Further, because the SWCA is appealing from a negative judgment, we will reverse only if the evidence is without conflict and all reasonable inferences to be drawn from the evidence lead to a conclusion other than that reached by the trial court. *Bonewitz v. Parker*, 912 N.E.2d 378 (Ind. Ct. App. 2009), *trans. denied*.

Much of the parties' arguments focus on whether an above-ground pool installed almost entirely in a hole in the ground is still an "above-ground pool", as prohibited by section 22 of the Plat. While we tend to agree with the SWCA's position, we need not dive

into deciding this issue on such a shallow record. This is because the undisputed evidence indicates that McVey never obtained written approval from the Architectural Review Committee. Without such approval, McVey was not entitled to install his pool, regardless of whether it was ultimately determined to be an above-ground or in-ground pool.

Article VI, paragraph 6.2 (ii) of the Declaration sets out the Architectural Review Committee's power to disapprove applications made as required by paragraph 6.2 (i). Specifically, the Architectural Review Committee may refuse to approve a requested change when:

> (a) The plans, specifications, drawings or other material submitted are inadequate or incomplete, or show the Requested Change to be in violation of any restrictions in this Declaration or in a Plat of any part of the Speedway Woods Real Estate;
>
> (b) The design or color scheme of a Requested Change is not in harmony with the general surroundings of the Lot or with the adjacent buildings or structures; or
>
> (c) The Requested Change, or any part thereof, in the opinion of the Architectural Review Committee, *would not preserve or enhance the value and desirability of the Speedway Woods Real Estate* or would otherwise be contrary to the interests, welfare or rights of the Developer or any other Owner.

Appendix at 77 (emphasis supplied). Thus, even assuming arguendo that the Architectural Review Committee incorrectly determined that McVey's pool was an above-ground pool, it was entirely within the committee's discretion to determine that the pool in question would not preserve or enhance the value and desirability of the Speedway Woods community.[2]

[2] For example, the committee could reasonably determine that an above-ground pool installed in the ground (as opposed to a traditional, more expensive, and differently constructed in-ground pool) was not the type and quality of pool desired in the neighborhood.

Regardless of the criteria used by the Architectural Review Committee, the fact is that McVey did not seek prior written approval and when he belatedly sought such approval, it was denied.

In response, McVey initially argues that the SWCA should be equitably estopped from arguing that he failed to obtain prior written approval. Equitable estoppel is a "'concept by which ones own acts or conduct prevents the claiming of a right to the detriment of another party who was entitled to and did rely on the conduct.'" *MicroVote Gen. Corp. v. Office of Sec'y of State*, 890 N.E.2d 21, 27 (Ind. Ct. App. 2008) (quoting *Brown v. Branch*, 758 N.E.2d 48, 52 (Ind. 2001)), *trans. denied*. Among other elements, therefore, the party asserting estoppel must establish that they were entitled to rely upon the other party's representation or conduct. *MicroVote Gen. Corp. v. Office of Sec'y of State*, 890 N.E.2d 21.

Here, McVey's estoppel argument is based on the statements made at an association meeting by Bruce Levy, who apparently holds some position with the SWCA. According to McVey and his wife, Levy told them that an above-ground pool placed in the ground was acceptable if it was no more than a foot out of the ground and it looked nice and had a deck around it. We observe, however, that there is no indication in the record that Levy told the McVeys they could avoid the entire approval process through the Architectural Review Committee and, in essence, determine what "looked nice" on their own. Further, the McVeys could not reasonably assume that the opinion of one person associated with the SWCA was sufficient to avoid the established and required approval process through the three-person Architectural Review Committee. To the extent that McVey believed that he was somehow

relieved of his contractual obligation to seek approval of the Architectural Review Committee as a result of Levy's general statements regarding the acceptability of above-ground pools being placed in the ground,[3] McVey was not entitled to do so.

Finally, McVey argues in passing that the SWCA has unclean hands because two other homeowners have installed similar pools in the neighborhood without the repercussions McVey has faced. McVey asserts that these other homeowners were "allowed to build" their swimming pools. *Appellee's Brief* at 13. We observe, however, that there is no indication in the record that either of these pools was approved by the Architectural Review Board or that such approval was even sought. Rather, McVey's opinion that other homeowners were allowed to build similar pools seems to be based simply on the fact that no action has been taken against these homeowners.[4]

McVey's argument with respect to unclean hands is more appropriately analyzed as an acquiescence defense. Under said defense, "[a] party opposing equitable enforcement of a restrictive covenant may plead as a defense the opponent's acquiescence to similar violations." *Hrisomalos v. Smith*, 600 N.E.2d 1363, 1367 (Ind. Ct. App. 1992).

Article XII, paragraph 12.2 of the Declaration provides:

> Delay or Failure to Enforce. No delay or failure on the party [sic] of any aggrieved party…to invoke any available remedy with respect to any violation or threatened violation of any covenants, conditions, restrictions or commitments enumerated in this Declaration or in a Plat of any part of the Speedway Woods Real Estate or otherwise shall be held to be a waiver by that

[3] McVey testified in this regard, "[y]es I did not take them a drawing and get permission but I thought going to the meeting gave me the permission stating what [Levy] said that it was okay to have an above ground pool in the ground as long as it looked nice and it was, had a deck around". *Transcript* at 44.

[4] At least one of these pools was installed after McVey's.

> party (or an estoppel of that party to assert) any right available to it upon the occurrence, recurrence or continuance of such violation or violations.

Appendix at 85. In light of this unambiguous non-waiver clause, McVey is barred from raising the defense of acquiescence. *See Johnson v. Dawson*, 856 N.E.2d 769, 775 (Ind. Ct. App. 2006) ("'[t]o hold otherwise would render the non-waiver provision meaningless and violate the expressed intention of the contract among the property owners'") (quoting *Burke v. Voicestream Wireless Corp. II*, 87 P.3d 81, 86 (Ariz. Ct. App. 2004)). *See also Drenter v. Duitz*, 883 N.E.2d 1194 (Ind. Ct. App. 2008).

In sum, we conclude that the trial court erred in denying injunctive relief to the SWCA. We reverse and remand to the trial court with instructions that it order the removal of the unapproved pool. Further, pursuant to Article XII, paragraph 12.1, the trial court shall calculate and award the costs and attorney fees reasonably incurred by the SWCA in the prosecution of this action, both at trial and on appeal.[5]

Judgment reversed and remanded.

KIRSCH, J., and ROBB, J., concur.\

[5] McVey's bald assertion that we should apportion attorney fees based upon his success at the trial level is entirely without merit, as the only prevailing party in this matter is the SWCA.