

STATE OF OHIO, MAHONING COUNTY  
IN THE COURT OF APPEALS  
SEVENTH DISTRICT

ROBERT FREDERICK, II,	)	
	)	CASE NO. 05 MA 107
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	OPINION
	)	
COCCA DEVELOPMENT, LTD.,	)	
	)	
DEFENDANT/THIRD-PARTY	)	
PLAINTIFF-APPELLANT,	)	
	)	
- VS -	)	
	)	
7655 LLC,	)	
	)	
THIRD-PARTY	)	
DEFENDANT-APPELLEE.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Case No. 04CV2505.

JUDGMENT: Reversed.

JUDGES:  
Hon. Joseph J. Vukovich  
Hon. Gene Donofrio  
Hon. Cheryl L. Waite

Dated: May 11, 2006

APPEARANCES:

For Plaintiff-Appellee:

Attorney Michael Harlan  
6630 Seville Drive  
Canfield, Ohio 44406

For Defendant/Third-Party  
Plaintiff-Appellant:

Attorney William Myers  
100 DeBartolo Place, Suite 100  
Boardman, Ohio 44512

Attorney James Roberts  
Attorney David Barbee  
Attorney David Moore  
100 Federal Plaza East, Suite 600  
Youngstown, Ohio 44503

For Third-Party Defendant-Appellee:

Attorney Richard Thomas  
Attorney John Heino  
34 Federal Plaza West, Suite 600  
Youngstown, Ohio 44503

VUKOVICH, J.

{¶1} Defendant-appellant Cocca Development Ltd. appeals the decision of the Mahoning County Common Pleas Court which upheld a magistrate's decision granting summary judgment in favor of plaintiff-appellee Robert Frederick, II. The main issue is whether the language of a restrictive covenant over the land on which a new car dealership is to be constructed clearly and unambiguously prohibits the operation of that dealership's service department. For the following reasons, the judgment of the trial court must be reversed as the covenant clearly prohibits various functions of a new car dealership such as the service department.

STATEMENT OF THE CASE

{¶12} Cocca purchased Lot No. 4, a ten acre plot of land in Southwoods Executive Centre in Boardman, Ohio, from grantor 7655 LLC. In April 2003, a declaration of restrictive covenants was recorded in favor of Cocca, whereby the grantor applied various restrictive covenants to its remaining lots at the site, including Lot. No. 6, the lot at issue herein. The restrictive covenants provide:

{¶13} “For a period of twenty (20) years from the date of recordation of this Declaration, the Property shall not be used, in whole or in part, for any or all of the following uses or purposes:

{¶14} “(a) Tire, battery and automobile accessory store(s);

{¶15} “(b) Automobile and/or truck facility such as used for paint shops, garages (whether for body or mechanical repair), or the dispensing of petroleum products;

{¶16} “(c) Storage, use, or disposal \* \* \* of ‘Hazardous Substance’ in violation of any applicable legislation or regulation. \* \* \*

{¶17} “(d) Automobile or truck washing facility;

{¶18} “(e) Amusement or game rooms or similar establishments, including without limitation, the use of pinball machines, electronic games, and similar apparatus, except as an ancillary use;

{¶19} “(f) Laundromat; or

{¶10} “(g) \* \* \* establishment that offer for sale, rental or viewing drug-related paraphernalia or materials of a pornographic nature.”

{¶11} Robert Frederick, an owner of Frederick Dodge, thereafter wished to purchase Lot No. 6, a seven acre lot, from the grantor to construct a new automobile dealership. Cocca’s owner, Anthony Cocca, voiced his opinion that various functions of a new car dealership would violate the restrictive covenants.

{¶12} In June 2004, Mr. Frederick deposited \$25,000 with the grantor for an option to purchase Lot. No. 6 for \$1,275,000. Then, in July 2004, Mr. Frederick filed a complaint for declaratory relief against appellant, seeking a declaration that: (1) the restrictive covenants do not specifically preclude a new car dealership and thus such dealership can be constructed; or (2) the covenants are ambiguous so they must be construed in favor of free use of the land including the right to construct the dealership;

or (3) there was a lack of intent to preclude a new car dealership when the covenants were entered.

{¶13} Cocca counterclaimed for a declaration that the covenants clearly prohibit the functions of this new car dealership. Cocca also filed a third-party complaint against the grantor, stating that inclusion of the actual owner of the property at issue was necessary to resolve the issue.

{¶14} Mr. Frederick and Cocca filed cross-motions for summary judgment. The grantor filed a response in support of Mr. Frederick's motion. First, Mr. Frederick argued that the restrictive covenants do not specifically preclude car lots so they unambiguously allow car lots. Second, he argued that if the covenants were ambiguous, then they must be construed in his favor as the free use of land is encouraged. He also argued that the grantor did not intend to prohibit new car dealerships and alleged that the covenants lacked consideration.

{¶15} Cocca responded that the restrictive covenants clearly prohibit certain things and that Mr. Frederick admits that these things are inherent in a new car dealership. Thus, he concluded that the covenants unambiguously restrict a new car dealership's right to perform the prohibited acts. He urged that the covenants' use of the word "facility" does not only apply to stand-alone repair shops. He also noted that if the covenants are clear and unambiguous, then extrinsic evidence on intent cannot be considered.

{¶16} The matter had been referred to a magistrate. On May 6, 2005, the magistrate held that the covenants were clear, unambiguous and subject to only one interpretation. The magistrate noted that the covenants do not prohibit the sale of automobiles. The magistrate then concluded that where the grantor seeks to limit development through restrictions, the covenants must be unambiguous.

{¶17} Although the magistrate found the covenants to be unambiguous, he then considered extrinsic evidence. For instance, the magistrate inferred that Cocca wished to prohibit car lots but because the grantor did not wish to prohibit such use, a specific restriction against car lots was not provided. The magistrate opined that Cocca should have convinced the grantor to put in a specific restriction or should have refused to purchase the land if a restriction against car lots was so important to him. The magistrate concluded that Cocca was asking him to rewrite the covenants to

accomplish what he could not successfully negotiate with the grantor. Thus, the magistrate granted summary judgment in favor of Mr. Frederick.

{¶18} Cocca filed timely objections to the magistrate's decision. On June 27, 2005, the trial court overruled those objections, adopted the magistrate's decision, denied Cocca's motion for summary judgment, granted Mr. Frederick's motion for summary judgment and entered judgment in favor of Mr. Frederick.

{¶19} Cocca [hereinafter appellant] filed timely notice of appeal. We have allowed appellant's motion to substitute two successors in interest to Mr. Frederick as appellees. These successors are N1031 Property I, LLC and 7554 Market Street.

#### APPELLEE'S INITIAL ARGUMENT

{¶20} Prior to analyzing appellant's assignments of error, we shall dispose of appellee's initial argument. Appellee first claims that we must conduct a review of this summary judgment decision only for abuse of discretion rather than conduct a de novo review because appellant violated Civ.R. 53(E)(3)(c). Appellee also raised this argument in his reply to appellant's objections.

{¶21} Civ.R. 53(E)(3)(c) provides:

{¶22} "Any objection to a finding of fact shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that fact or an affidavit of that evidence if a transcript is not available."

{¶23} This case was not tried to the magistrate. It was decided upon motions for summary judgment. Summary judgment involves purely legal issues. Thus, there was no need to submit a transcript of the evidence or an affidavit stating that a transcript of the evidence was not available.

{¶24} The case file (which contains the motions and all the Civ.R. 56(C) evidence) is always part of the record before the trial court when considering objections to summary judgment. There was nothing more for appellant to provide to the trial court.

{¶25} An affidavit that a transcript is not available is not required where there was no hearing from which a transcript could be generated. This is especially obvious considering that an evidentiary hearing is not even permitted on summary judgment decisions. See *Long v. Noah's Lost Ark, Inc.*, 158 Ohio App.3d 206, 2004-Ohio-4155, ¶26 (7th Dist.). This argument set forth by appellee is without merit.

ASSIGNMENTS OF ERROR NUMBER ONE AND TWO

{¶26} Appellant sets forth four assignments of error. The first two assignments are overlapping, as are the last two. We shall begin by setting forth the arguments presented by each party under the related assignments of error. Because recitation of the law for the first two assignments encompasses the answer to the questions presented in the last two assignments, we shall provide the law and our analysis regarding all assignments of error after outlining the parties' arguments on all issues.

{¶27} Appellant's first and second assignments of error provide:

{¶28} "THE TRIAL COURT ERRED BY OVERRULING APPELLANT'S OBJECTION TO THE MAGISTRATE'S DETERMINATION THAT A 'NEW CAR DEALERSHIP' IS PERMITTED UNDER THE RESTRICTIVE COVENANTS SOLELY BECAUSE THE 'SALE OF AUTOMOBILES' IS NOT SPECIFICALLY LISTED AS A RESTRICTED USE."

{¶29} "THE TRIAL COURT ERRED BY OVERRULING APPELLANT'S OBJECTION TO THE MAGISTRATE'S FAILURE TO GIVE EFFECT TO THE RESTRICTIVE COVENANTS BY DECLARING THAT THE PROPERTY MAY BE USED FOR ACTIVITIES WHICH ARE PROHIBITED IN WHOLE OR IN PART BY THE RESTRICTIVE COVENANTS."

{¶30} For purposes of appeal, appellant has decided not to dispute the determination of restriction (a), regarding a tire, battery and automobile accessory store. Apparently, he believes that countering the argument that "store" only refers to a free-standing enterprise, as opposed to a parts department, is too time-consuming. Appellant still believes that the new car dealership would violate restriction (d), which provides that the property shall not be used in whole or in part for an automobile or truck washing facility, since appellees concede that they have a car washing bay. However, appellant focuses his argument on restriction (b) and states that the car washing issue depends on the result reached regarding restriction (b). Restriction (b) provides:

{¶31} "the Property shall not be used, in whole or in part, for any or all of the following uses or purposes: \* \* \* Automobile and/or truck facility such as used for paint shops, garages (whether for body or mechanical repair), or the dispensing of petroleum products;"

{¶32} Appellee has admitted from the beginning that a service department for performing mechanical repairs on automobiles is inherent in a new car dealership. Hence, appellant urges that such actions by the dealership cannot be performed on the property. Appellant notes that appellee can sell cars on the property, he just cannot maintain on the property a facility for performing mechanical repairs, for dispensing petroleum products (such as oil involved in oil changes), or for washing cars. Appellant urges that merely because a business's primary function, selling cars, is not prohibited, does not permit that business to use the property in part as a facility that is specifically prohibited by a restriction.

{¶33} Appellee states that since a car lot is not specifically prohibited, the only conclusion to draw is that a car lot is permitted. Appellee notes that when a grantor seeks to restrict development through covenants, the covenants must be unambiguous. If they are not unambiguous, then they must be interpreted in favor of free use of the land and against the restriction. Notably, appellee does not respond to the emphasis appellant places on the introductory sentence before the restrictions are listed, which states that the property shall not be used in whole *or in part* for any of the following purposes. Rather, appellee states that the word facility is ambiguous as it is interchangeable with store, which he believes implies a free-standing business rather than a room in a business with a permissible primary purpose. Appellee concludes that a business whose primary purpose is car sales is not restricted despite the fact that a new car dealership inherently contains a service department and an area for washing cars. The third-party defendant also filed a brief supporting appellee's arguments.

{¶34} As aforementioned, we shall set forth all arguments prior to disposing any individual issues, which all rely on the same body of law.

ASSIGNMENTS OF ERROR NUMBERS THREE AND FOUR

{¶35} Appellant's third and fourth assignments of error provide:

{¶36} "THE TRIAL COURT ERRED BY OVERRULING APPELLANT'S OBJECTION TO THE MAGISTRATE'S CONSIDERATION OF TESTIMONY IN CONSTRUING UNAMBIGUOUS RESTRICTIVE COVENANTS."

{¶37} "THE TRIAL COURT ERRED TO APEPLLANT'S PREJUDICE BY OVERRULING APPELLANT'S OBJECTION TO THE MAGISTRATE'S FINDING

THAT APPELLANT UNSUCCESSFULLY ATTEMPTED TO NEGOTIATE A SPECIFIC RESTRICTION AGAINST AUTOMOBILE DEALERSHIP.”

{¶38} This argument deals with the magistrate’s statements that it appeared appellant had unsuccessfully negotiated a restriction against car lots. Appellee had submitted an e-mail as an exhibit at Mr. Cocca’s deposition. The email from Mr. Cocca to someone at the grantor’s office said:

{¶39} “I would assume you would have deed restrictions such as the ones I have agreed to in the prior agreement to limit the use to exclude non-desirable neighbors, car lots, etc. I would like to have those in place for the week end closing.”

{¶40} Since the covenants eventually granted to appellant did not specifically refer to car lots, the magistrate inferred that Mr. Cocca’s request for a car lot restriction was rejected. Appellant notes, however, the e-mail’s reference to restrictions such as the ones agreed to in the past, which he claims were the same as the current ones and which he assumed would apply to car lots such as this.

{¶41} Appellant argues that the magistrate misapplied the rules of construction of written instruments when he simultaneously stated that the restrictions are unambiguous and considered parol evidence. Appellant notes that intentions not expressed in an unambiguous covenant are deemed to have no existence. He points out that the court cannot use extrinsic evidence to create an ambiguity where none existed. Thus, appellant concludes that it was improper to look at evidence involving the negotiation process of the grantor and appellant. Appellant also states that even if the magistrate could look at this evidence of intent, the magistrate, in deciding a summary judgment motion, improperly made factual assumptions as to what was negotiated and what was rejected.

{¶42} Appellee merely cites to the evidence listed in Civ.R. 56(C) and states that the magistrate was obligated to consider the referenced depositions and affidavits under that rule and to construe the evidence in the light most favorable to the nonmovant.

#### LAW

{¶43} In construing any written instrument, the primary objective is to ascertain the party’s intent. *Aultman Hosp. Assn. v. Hosp. Care Corp.* (1989), 46 Ohio St.3d 51, 53. The first step is to determine whether the disputed language of the instrument can

be characterized as plain and unambiguous. The language is unambiguous if from reading only the four corners of the instrument, such language is clear, definite and subject to only one interpretation. The language is ambiguous if it is unclear, indefinite and reasonably subject to dual interpretations or is of such doubtful meaning that reasonable minds could disagree as to its meaning.

{¶44} When the language of the written instrument is clear and unambiguous, the interpretation of the instrument is a matter of law, and the court must determine the intent of the parties through only the language employed. *Davis v. Loopco Indus., Inc.* (1993), 66 Ohio St.3d 64, 66 (if a contract is clear and unambiguous, then its interpretation is a matter of law and there is no issue of fact to be determined). In such case, the court cannot resort to extrinsic or parol evidence. In other words, when a written instrument is unambiguous, intentions not expressed by writing in the contract are deemed to have no existence and cannot be shown by parol evidence. *TRINOVA Corp. v. Pilkington Bros., P.L.C.* (1994), 70 Ohio St.3d 271, 275.

{¶45} In a general written instrument case, where the language is ambiguous, there arises a factual question whereby the court can view extrinsic or parol evidence to ascertain the intent behind the language. *Davis*, 66 Ohio St.3d at 66. Where the court finds ambiguity and is permitted to resort to extrinsic evidence to determine intent, the court cannot typically grant summary judgment where the parties claim opposing intents because there would remain a genuine issue of material fact to be litigated. Rather, intent would be a fact for determination by the trier of fact at trial.

{¶46} As for interpreting restrictive covenants, not all of the same rules apply. As in the typical case of interpreting instruments, if the language of the covenant is clear and unambiguous, it must be applied as written. However, the test is different when the language of the covenant is ambiguous and unclear. Resort to parol or extrinsic evidence is not required in order to resolve the ambiguity. Rather, the ambiguity is automatically read in favor of the party who argues for free use of his land. This is similar to the rule involving certain aspects of insurance contracts. See, e.g., *United States Fidelity Guaranty Co. v. Lightning Rod Mut. Ins. Co.* (1997), 80 Ohio St.3d 584, 586 (summary judgment is entered for the insured in cases where the language of a policy exclusion is ambiguous).

{¶47} “Where the words of a restriction contained in a deed of conveyance are equally capable of two or more different constructions, that construction will be adopted which least restricts the free use of the land.” *Loblaw, Inc. v. Warren Plaza, Inc.* (1955), 163 Ohio St. 581 592, citing *Frederick v. Hay* (1922), 104 Ohio St. 292, 297-298. “Where the right to enforce a restriction contained in the conveyance as to the use of the property conveyed is doubtful, all doubt should be resolved in favor of the free use thereof for lawful purposes by the owner of the fee.” *Id.*, quoting *Hunt v. Held*, 90 Ohio St. 280, 282-283. This is because restrictions on the use of property are not favored by the law, and thus, such restrictions are strictly construed against limitations upon use. *Driscoll v. Austintown Assoc.* (1975), 42 Ohio St.2d 263, 276-277, quoting *Loblaw*, 163 Ohio St. at 592 (restriction limiting the use of the land to residential purposes does not bar multi-family dwelling).

{¶48} From the language of these cases then, it can be seen that ambiguity in a restrictive covenant does not require the court to determine intent or find a genuine issue for trial, but rather requires the court to grant judgment in favor of the one arguing against application of the restriction. If the restrictive language in question is indefinite and capable of contradictory interpretations, then the language must be construed so as to least restrict the free use of the land. *Houk v. Ross* (1973), 33 Ohio St.3d 77, 90-91 (in view of this long-standing rule of construction, the court is bound to interpret the restriction in question in that manner which least restricts the free use of the land and grant summary judgment for the one arguing against application of the restriction where the disputed language is ambiguous).

{¶49} Thus, appellant correctly argues that it is contradictory for the magistrate to state that the language is unambiguous and still view extrinsic evidence to support its decision. And, even if the language is ambiguous, the magistrate should not view extrinsic evidence and weigh factual allegations. In a typical written instrument case, ambiguous language and opposing claims of intent would be a question for trial. In a restrictive covenant case, the ambiguous language requires a legal finding against the restriction, regardless of parol evidence of intent. See *Driscoll; Houk; Loblaw; Frederick*. Still, the magistrate’s consideration of extrinsic evidence does not mean that summary judgment was improperly entered, especially considering that we review the grant of summary judgment de novo.

{¶50} The remaining and dispositive issue here is whether restrictive covenant (b) clearly and unambiguously prevents appellee's new car dealership from operating a service department, which performs mechanical repairs and washes cars. Or, whether use of the term facility or other language makes that restriction ambiguous and thus requires the court to automatically construe the language in favor of allowing the free use of the land to build a new car dealership.

{¶51} Once again, the necessary portion of the restriction to be considered is:

{¶52} "the Property shall not be used, in whole or in part, for any or all of the following uses or purposes: \* \* \*

{¶53} "(b) Automobile and/or truck facility such as used for paint shops, garages (whether for body or mechanical repair) \* \* \*."

{¶54} The question is merely whether this language clearly prohibits a new car dealership from having a service department. Yes, car lots are not specifically prohibited. But, the issue is not whether the car lot per se is prohibited. Rather, the issue is whether the service department (and car washing facility) are prohibited.

{¶55} The restriction prohibits the property in whole or in part from being used for an automobile facility such as a garage for mechanical repair. There is no exception for those businesses whose primary purpose is non-restricted. In other words, there is no exemption for those businesses that only have a mechanical repair garage as a claimed ancillary portion of their operation.

{¶56} Appellee states that use of the term facility implies a stand-alone business, not mere space within a dealership. However, this is contrary to the common definition of the word facility and ignores the "in whole or in part" prefacing language of the covenant.

{¶57} Facility is defined as: "Something that is built or installed to perform some particular function, but it also means something that promotes the ease of any action or course of conduct." Black's Law Dictionary (6th Ed. 1990) 591. Facility is similarly defined as: "something that makes an action, operation, or course of conduct easier" or "something that is built, installed, or established to serve a particular purpose." Merriam-Webster's (10th Ed. 2000) 415.

{¶58} Thus, the common definition is not limited to something built to stand on its own. Use of the word installed means that a facility can be part of an existing

business. Thus, under the ordinary meaning of the word facility, both a stand-alone automobile repair shop and an automobile repair department within a different business are prohibited.

{¶59} We find that the language is clear, unambiguous and definite. From the plain language of the restrictive covenant, no portion of the property shall be used as a garage for mechanical repair of automobiles or for dispensing of petroleum products or as a car washing facility. It is appellee who is trying to rewrite the restriction, not appellant.

{¶60} For the foregoing reasons, the judgment of the trial court is hereby reversed.

Donofrio, P.J., concurs.

Waite, J., concurs.