IN THE COMMONWEALTH COURT OF PENNSYLVANIA

| | | |
|---|---|---|
| Eileen B. Murphy | : | |
| | : | |
| v. | : | |
| | : | |
| John Rossi, et al., | : | No. 1565 C.D. 2009 |
| Appellants | : | |
| | | |
| Eileen B. Murphy | : | |
| | : | |
| v. | : | |
| | : | |
| John Rossi, Shew Management Company, Inc., William Copperthwaite, Leif Erickson, Earl Stoltzfus, Michael O'Neill and Cathy Linck | : | |
| | : | |
| Appeal of : The Greens at Penn Oaks Homeowners Association | : | No. 1656 C.D. 2009 |
| | : | Submitted: January 22, 2010 |

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: May 26, 2010

Before this Court is the appeal of John Rossi (Rossi) and the cross-appeal of Greens at Penn Oaks Homeowners Association (Association) from the Court of Common Pleas of Chester County's (trial court) denial of post-trial relief.[1]

[1] The history of this case involves the participation of two separate common pleas court judges. The Honorable William P. Mahon (Judge Mahon) heard argument and ruled on the motions for summary judgment filed by Rossi, the Association, and Eileen B. Murphy (Murphy). The Honorable Ronald C. Nagle (Judge Nagle) conducted the non-jury trial and heard Rossi's and the Association's motions for post-trial relief.

## I. Amended Complaint.

On July 17, 2006, Murphy and her husband, Charles Murphy[2], filed an amended complaint and alleged:

> 13. Plaintiff Eileen B. Murphy purchased the property at 107 Greenbriar Drive . . . from Patricia and Thomas Brummett, about nine months before May 11, 2004.
> . . . .
> 15. Because the back of the property at 107 Greenbriar Drive has a wonderful view of the golf course at Penn Oaks, the Brummett's paid a $40,000 lot premium for the property.
>
> 16. This $40,000 lot premium was passed on to the Murphys' when they purchased the property from the Brummetts.
> . . . .
> 18. The property at 107 Greenbriar Drive and the property at 109 Greenbriar Drive, as are all residences associated with "The Greens at Penn Oaks," are part of a Planned Community which is subject to a Declaration of Covenants, Conditions, and Easements and Restrictions (hereinafter "Declaration"), with the Declarant being the Penn Oaks Estates, Inc. . . . .
> . . . .
> 22. On Tuesday, May 11, 2004, Charles Murphy and his wife Eileen, came home to find a landscaper finishing installing three large arborvitae trees[3] that were 25 feet tall and, combined, were twenty feet across and twenty feet from the windows of their home . . . .
> . . . .
> 24. Defendant Rossi, without permission from the Penn Oaks Homeowners' Association, placed three large

[2] Charles Murphy was dismissed from the present matter because his wife became the only unit owner of their home located at 107 Greenbriar Drive.

[3] An arborvitae tree is "an ornamental coniferous tree with flat leaves that fit closely like scales . . . [n]ative to: Asia, North America." Encarta World English Dictionary [North American Edition] 2009 Microsoft Corporation.

arborvitae in the common area directly in the view of the golf course from the Murphys' home.
25. Defendant Rossi on his own initiative placed three large arborvitae in the common area directly in the sightline of the golf course from the Murphys' home.
. . . .
35. The placement of the three arborvitae trees was unnecessary because the 2nd hole of the golf course, which was adjacent to 107 and 109 Greenbriar, had been redesigned pursuant to an agreement between Mr. Rossi and the Declarant to accommodate the concerns of Mr. Rossi, regarding golf balls hitting his home, and six Douglas fir trees were planted pursuant to his concerns along the 2nd hole fairway.

36. The planting of any material in the common facilities/common area is subject to the Declaration [of Covenants, Conditions, Easements and Restrictions].
. . . .
48. Mr. Rossi did not have permission of the Homeowners' Association . . . when he planted the arborvitae trees.

49. Mr. Rossi did not have permission of the Declarant . . . when he planted the arborvitae trees.
. . . .

Count I
Breach Of Contract
Plaintiffs v. Defendant John Rossi

. . . .
193. The existence of this Declaration/Contract provides aggrieved owners the right to seek relief through civil litigation, notwithstanding any statutory limitations that may otherwise exist.

194. The Declaration at Article XIII, section 13.B. under this section provides the substantive remedy of an injunction as well as the ability to recover damages.
. . . .

Count II
Breach Of Fiduciary
Plaintiffs v. Defendant John Rossi

. . . .

202. Defendant Rossi used the allegedly "confidential" nature of the settlement agreement between himself and Declarant/Penn Oaks to actively mislead the Murphys and other individuals that he had a right to plant the three arborvitae trees on common ground.

203. Defendant John Rossi has used his position on the Landscape Committee to get favorable treatment from the Homeowners Association if, indeed, the Board of Directors actually approved his landscape modification involving placement of the three arborvitae on the boundary line of the Murphy residence.

. . . .

Count III
Breach of Contract
Plaintiffs v. Defendant The Greens at Penn Oaks Homeowners Association

. . . .

207. The declaration at Article XIII, Section 13.B. provides Plaintiffs, aggrieved owners, the ability to sue any other homeowner or the Association where there is failure to comply with the terms of the Declaration, By-Laws, and regulations adopted pursuant thereto.

208. Under relevant law, the Declaration is a contract which binds all members of the Homeowners Association and/or the Association's Board of directors for failure to enforce its rules

. . . .

Count IV
Breach of Fiduciary Duty
Plaintiffs v. The Greens at Penn Oaks Homeowners Association

. . . .

220. It breaches the fiduciary duty owed by the Board of Directors to a Member to provide false information (or misinformation) to a Member, particularly where by doing so the misrepresentation covers up actions or inactions of the Board in meeting its responsibilities under the Declaration.

. . . .

222. Alternatively, if the Board ratified the action of Mr. Rossi in planting the arborvitae, its actions were done in

> bad faith and in breach of its fiduciary duty to protect the interests of one homeowner to whom it was close (Rossi) and had the position in the Homeowners' Association, as opposed to the Murphys [sic], who were not familiar with the Board and had no position.
> . . . .
>
> Count V
> Statutory Violation Of Section 68 Pa. C.S. Section 5412 By Violating The Fiduciary Duty Owed To Plaintiffs Under Subpart D Of The Uniform Planned Community Act And Also By Violating the Declarations of the Association
>
> . . . .
> 232. Defendant has violated Subpart D in relationship to its fiduciary duties, which appear at 68 Pa C.S. section 5303 . . . .
>
> 233. Defendant has violated its own Declarations as indicated in this Complaint.
>
> 234. Defendant and or its agents have made these violations willfully.

Amended Complaint, July 17, 2006, Paragraphs 13, 15-16, 18, 22, 24-25, 35-36, 48-49, 193-94, 202-03, 207-08, 220, 222, and 232-34 at 4-5, 7-8, 33-35, and 37-39; Reproduced Record (R.R.) at 640a-41a, 643a-44a, 669a-71a, and 673a-75a.

**II. Answer And New Matter.**

On December 14, 2006, Rossi responded and filed new matter:

> 333. As of March, 2004, the developer had the right to plant additional trees on the Common Facilities (common ground) of the Greens at Penn Oaks Homeowners Association.
>
> 334. As of March, 2004, the developer had the right to plant additional trees on the Common Facilities (common ground) between 107 Greenbriar and 109 Greenbriar.
> . . . .

> 338. On March 9, 2004, . . . Rossi applied for permission from the Association to plant three trees between his residence and . . . [Murphys'] residence . . . .
> . . . .
> 346. The Landscape Committee considered Mr. Rossi's request and recommended it be approved by the Board of the Association.
> . . . .
> 349. On April 5, 2004, at a duly convened meeting of the Board of the Association, the Board approved Mr. Rossi's request and granted him permission to install three (3) evergreen trees . . . .
> . . . .
> 364. The April 7, 2004 Letter . . . April 10, 2004 telephone conversation . . . and April 12, 2004 phone conversation . . . provided Mr. Rossi permission by the Board of Director's to plant the three Arborvitae trees . . . .
> . . . .
> 370. At the time that the arborvitae trees were installed, Mr. Rossi was not a member of the Landscape Committee.
> . . . .
> 386. At most, the trees in question minimally obstruct the view of the course from a single window of 107 Greenbriar.
>
> 387. Likewise, the trees in question minimally obstruct the view of the golf course from a single window of 109 Greenbriar.

Answer and New Matter of Defendant John Rossi to Plaintiffs' Amended Complaint, December 14, 2006, Paragraphs 333-34, 338, 346, 349, 364, 370, and 386-87 at 26-28, 30, and 32-33; Original Record (O.R.) at 28.

On January 17, 2007, the Association responded to Murphy's amended complaint and asserted new matter:

> 347. Plaintiffs [Murphys] by and through their predecessors impliedly consented to the placement of the three arborvitae trees.
>
> . . . .
>
> 366. The arborvitae trees were not planted by the Association and/or by anyone on behalf of the Association in connection with the Association's easement to perform maintenance, repairs and/or replacement of the Murphys' townhouse.
>
> . . . .
>
> 372. Plaintiffs' [Murphys'] view was not substantially blocked by the arborvitae trees.
>
> 373. Plaintiffs' [Murphys'] view of the golf course was already partially blocked by other trees lining the golf course prior to the installation of the arborvitae trees.
>
> . . . .
>
> 377. Plaintiffs [Murphys] have no easement for a view of the golf course in their deed.
>
> 378. There is no easement in the Declaration of the Greens at Penn Oaks for a view of the golf course.
>
> . . . .
>
> 382. Plaintiffs [Murphys] knew when they purchased their town home there was litigation between Rossi and Iacobucci and that part of the settlement could involve the placement of some kind of protective barrier in front of Rossi's home.
>
> . . . .
>
> 384. Plaintiffs' [Murphys'] negligence in failing to contact Rossi and/or Iacobucci is the proximate cause of any damage plaintiffs' [Murphys'] claim to have suffered in this lawsuit.

Answer of Defendant Greens at Penn Oaks Homeowners Association to Plaintiffs' Amended Complaint with New Matter, Counterclaim against Plaintiffs and Cross

Claim against John Rossi, January 17, 2007, Paragraphs 347, 366, 372-73, 377-78, 382, and 384 at 29, and 31-33; O.R. at 33.[4]

## III. Judge Nagle's Decision And Verdict.

After a three day non-jury trial, Judge Nagle made the following pertinent findings of fact:

> 1. Plaintiff, Eileen Murphy is the owner of a single-family attached residence located at 107 Greenbriar Drive . . . to which she took title on September 15, 2003 . . . . Defendant, John Rossi, is the owner of a single-family attached residence located at 109 Greenbriar

[4] Rossi, the Association, and Murphy filed motions for summary judgment. Judge Mahon heard oral argument and made the following rulings:

> [U]pon consideration of the Motion for Summary Judgment of defendant John Rossi, and the responses thereto, and after conducting oral argument in this matter, it is hereby Ordered and Decreed that the Motion is GRANTED IN PART and DENIED IN PART. Defendant, John Rossi, is GRANTED summary judgment on Count II of the Amended Complaint. . . . All other relief requested by Defendant Rossi in his motion is Denied. (emphasis added).

Order of Judge William P. Mahon, March 12, 2008, at 1.

Judge Mahon also denied Murphy's motion for summary judgment and ruled on the Association's motion for summary judgment:

> . . . [U]pon consideration of the Motion for Summary Judgment of Defendants Homeowners Association, [William] Copperthwaite, [Leif] Ericksen [sic], [Michael] O'Neill, [Earl] Stoltzfus and [Cathy] Linck to Plaintiffs' Amended Complaint, it is hereby ORDERED and DEGREED that the Motion is GRANTED IN PART and DENIED IN PART. Summary judgment is granted to all Defendants on the claims brought by Charles Murphy. Additionally, summary judgment is granted to Board Member Michael O'Neill on all claims other than those seeking injunctive relief. All other relief requested by Defendants is denied. (footnotes omitted).

Order of Judge William P. Mahon, July 15, 2008, at 1; R.R. at 701a.

Drive . . . which he purchased prior to Murphy's acquisition of her house. The remaining defendants are The Greens at Penn Oaks Homeowner Association, its manager Shew Management Company, Inc., and the individual members of its executive board . . . . All of the Board members are unpaid volunteers and residents of the Penn Oaks community. (emphasis added).

2. The Murphys and Rossi are immediate neighbors in a golf course planned community governed by the Uniform Planned Community Act . . . 68 Pa. C.S.A . . . (the "UPCA") . . . however, because their houses are located on "foot-print" lots and are configured in separate building groups, they are separated from each other by community common area owned and maintained by The Greens at Penn Oaks Homeowners Association of which all homeowners living in the Community are members . . . . There is no easement guaranteeing an unobstructed view of the golf course in the deeds of either Murphy or Rossi, and no such viewshed easement is guaranteed or provided for in the HOA's Declaration of Covenants. However, the HOA's Declaration provides each Unit Owner an easement of enjoyment in and to the Common Facilities (Community Common Area) that is appurtenant to their property . . . . (emphasis added).

3. The HOA of which the litigants are members is governed and subject to a Declaration of Covenants, Conditions, Easements, and Restrictions ("Declaration") . . .

. . . .

5. After acquiring his house, Rossi began to experience significant and repetitive damage to his home . . . resulting from golf ball strikes originating primarily from the teebox on the second hole of the Golf Course . . . . The litigation was resolved in early 2003 by a settlement agreement in which the Iacobucci Defendants . . . agreed to modify the second hole of the Golf Course, moving and changing the angle of the teebox, constructing a new fairway bunker, and realigning the hole . . . . Significant to the settlement was Iacobucci's agreement to pay up to $6,000 to plant at least six (6) Douglas Fir trees along the second fairway at a location agreed upon by Rossi or his

architect, Cavanaugh . . . . Iacobucci denied that he had ever discussed with Rossi, his representatives or anyone else planting the trees required by the Settlement Agreement on the HOA's property, stating he would not have planted the trees on the HOA's common area. The Settlement Agreement is silent as to the location where the trees were to be planted . . . . (emphasis added).

6. . . . HOA Board members and Community residents . . . were not privy to the Rossi/Iacobucci litigation, nor were they conversant with or knowledgeable about the terms of the settlement. After Mr. Rossi was unable to secure Iacobucci's agreement to relocate the Douglas Firs and replant them in the HOA's common area, Rossi approached the HOA Board and its Landscape Committee to secure their approval to place "3 large evergreen trees" in the HOA's common area between his house and the Murphy's . . . . In discussing his application with a Landscape Committee representative, Rossi intimated that he had discussed his proposal with Mrs. Murphy's predecessors in title, Thomas and Patricia Brummett, making them aware of his intention to plant the trees next to their house, which the Brummetts later categorically denied. (emphasis added).

. . . .

9. . . . Neither the HOA nor Rossi attempted to contact them [the Murphys] in writing or by phone concerning Rossi's intention or request to plant additional trees in the HOA's common area between his home and theirs.

10. Rossi's application was never formally considered by the Landscape Committee acting as a whole . . . . Copperthwaite . . . approved Rossi's request that he be permitted to plant the trees in the common area between his and the Murphys' house . . . . Rossi also sought Copperthwaite's permission to substitute Arborvitae for Douglas Firs, which Copperthwaite referred to the Committee chair, who approved the substitution. Neither the HOA Board nor Landscape Committee was requested to approve the latter changes. The Murphys had no knowledge of the foregoing facts, nor were they privy to the Board's minutes and interactions with Rossi until

they instituted the instant litigation . . . . (emphasis added).

11. . . . [T]he Murphys arrived home . . . to find Rossi's landscaper completing his installation of three Arborvitae trees 20 feet in planted height and, in combination, measuring 20 feet in width in the HOA's common area . . . . (emphasis added).

12. . . . The trees were planted without prior notification to the Murphys by either the HOA Board, its individual members, its Landscape Committee, Shew Management, or Rossi. (emphasis added).

13. . . . [Rossi] later retracted the latter contention, as no recommendation had been made by any golf course designers, as he contended, that included the planting of the three trees in the location complained about by the Murphys. At this juncture, the HOA Board members had only hearsay information concerning the settlement . . . . (emphasis added).

14. . . . Edward Shew responded to the Murphys by letter on June 15, 2004 contending that the Board had nothing to do with the planting of three Arborvitae trees which he characterized "as a result of a legal settlement" with Rossi, contrary to the Board's minutes characterizing the situation as governed by "a court order", and suggesting that the Brummetts should have disclosed the situation to them . . . . [T]he Board's April 5, 2004 action approving Rossi's application to do so [planting of the three Arborvitae trees on the HOA's property] was made in ignorance of the terms of the settlement agreement, which Rossi characterized as "confidential" and declined to disclose . . . . (emphasis added).

. . . .

19. . . . The Board's refusal to give the Murphys a hearing is in contravention of the complaint and hearing procedures established in Article XIII, Section 13.E, reproduced verbatim in this Decision . . . . Indeed the Board's failure in this respect formed the authority under this Section permitting the Murphys to bring this lawsuit.

> 20. There is no evidence on this record that the Board or its members, either individually or collectively, conspired with Rossi with respect to his landscape application or the installation of the three Arborvitae trees in the Community's common area.

Decision and Verdict of Judge Nagle, December 22, 2008, Findings of Fact (F.F.) Nos. 1-3, 5-6, 9-14, and 19-20 at 1-2, 4-15, and 20-21.

Judge Nagle concluded:

> 1. The Defendant Association and its Executive Board are subject to the UPCA and the Association's Declaration of Covenants, its Bylaws, and the Policies and Guidelines . . . .
>
> 2. Members of the Association, including Owners of Units in the Community Association are likewise bound by the foregoing documents . . . .
>
> 3. As a Member of the Association, Plaintiff [Murphy] has protected rights in the Community's common elements, also known as common facilities, that may not be infringed, altered or otherwise impacted without her consent adversely to her rights and interests, except in strict accordance with the terms and conditions specified and established in the Association's Declaration of Covenants as discussed in this Decision.
>
> 4. Defendant Board of Directors and its Executive Board failed to act in compliance with the Association's governing documents, as aforesaid, in the manner described in this Decision, and such action was in contravention of Plaintiff's [Murphy's] protected rights in the Community's common area as described in this Decision.
>
> 5. Defendant Rossi violated the Association's governing documents in the manner described in this Decision, and such action was in contravention of the Plaintiff's

> [Murphy's] protected rights in the Community's common area as described in this Decision.
>
> 6. Plaintiff is entitled to the injunctive relief identified and discussed in this Decision.

Decision and Verdict, Conclusions of Law (C.L.) Nos. 1-6 at 38-39.

## III. Appeal of Rossi At 1565 C.D. 2009.

On January 2, 2009, Rossi sought post-trial relief[5] which the trial court denied.

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[5] Rossi alleged nineteen specific errors of law committed by the trial court. Specifically, Rossi alleged:

> 1. The Court erred in finding that Eileen Murphy has any easement, hereditament or other enforceable right that protects the view from her home.
>
> . . . .
>
> 3. The Court erred in finding that any of the easements contained in the Declaration protect Eileen Murphy's view(s) from her home.
>
> . . . .
>
> 6. The Court erred in finding that the Board of the Association did not have the authority to give Rossi permission to plant the arbor-vitae trees.
>
> . . . .
>
> 8. The Court erred in finding that Rossi violated the Declaration.
>
> . . . .
>
> 11. The Court erred in considering the Board's failure to grant Eileen Murphy's request for a hearing.
>
> . . . .
>
> 14. The Court erred in finding that the Board was misled with respect to the meaning of the Settlement Agreement.
>
> . . . .
>
> 18. The Court erred in not adopting the following Request from Rossi's Proposed Findings of Fact . . . .
>
> 19. The Court erred in not adopting the following Requests from Rossi's Proposed Conclusions of Law. . . .

**(Footnote continued on next page…)**

Rossi then appealed to this Court and the trial court ordered Rossi to file a concise statement of matters complained of[6] clarifying the alleged errors committed by the trial court. In response, Rossi alleged:

> 1. The Court erred in finding that Eileen Murphy has any easement, hereditament or other enforceable right that protects her view of the adjacent golf course from her home. As the lower court stated: "[t]here is no easement guaranteeing an unobstructed view of the golf course in the deeds of either Murphy or Rossi, and no such viewshed [sic] easement is guaranteed or provided in the HOA's Declaration of Covenants." (Decision and Verdict, pp. 2-3) (emphasis added).
>
> 2. The Court erred in finding that the arborvitae trees impair any of the rights that are conferred on Eileen Murphy by the Declaration or the Pennsylvania Uniform Planned Community Act.
>
> 3. The Court erred in finding that the Board of the Association did not give Rossi permission to plant the arborvitae trees and that Rossi violated the Declaration.
>
> 4. The Court erred in finding that Eileen Murphy did not have an adequate remedy at law.
>
> 5. The Court erred in finding that Rossi misled the Board with respect to the Settlement Agreement, that the Board could be misled with respect to the meaning of the

**(continued…)**

Defendant John Rossi's Motion for Post Trial Relief, January 2, 2009, Paragraphs 1-20 at 1-5; O.R. at 1.

[6] Pa. R.A.P. 1925(b) provides:

> If the judge entering the order giving rise to the notice of appeal ("judge") desires clarification of the errors complained of on appeal, the judge may enter an order directing the appellant to file of record in the trial court and serve on the judge a concise statement of the errors complained of on appeal ("Statement").

> Settlement Agreement. The Court erred in finding that anything related to the Settlement Agreement had anything to do with John Rossi's right to plant the arborvitae trees or the Board's authority to grant Rossi permission to plant the arborvitae trees.
>
> 6. The Court erred in failing to consider the threat to the personal safety of John Rossi and others, including visitors to his home, in determining whether the arborvitae trees could or should be planted.
> 7. The Court erred in not adopting the following Requests from Rossi's Proposed Findings of Fact . . . .
>
> 8. The Court erred in not adopting the following Requests from Rossi's Proposed Conclusions of Law . . . .

Appellant John Rossi's Statement of Errors Complained of on Appeal, September 18, 2009, Paragraphs 1-8 at 1-4; O.R. at 112.

The able trial court issued a supplemental opinion pursuant to Pa. R.A.P 1925(a) and stated that "the issues raised in Appellants [Rossi and the Association] Concise Statements are fully addressed in this court's Decision and Verdict . . . ." Trial Court Opinion, October 20, 2009, at 2. However, the trial emphasized that "Appellants [Rossi and the Association] misstate both my findings of fact and legal conclusions regarding Murphy's protected rights in the Community's common area . . . [a]s stated [by the trial court] . . . there is no easement . . . guaranteeing Murphy an unobstructed view of the golf course . . . ." Trial Court's Rule 1925(a) Opinion at 2.

Before this Court, Rossi asks:

> Whether the Trial Court erred in finding that that an easement for ingress, egress and regress over the

> common facilities of a Planned Community was impaired, when the only impairment is a partial obstruction to the view of an adjacent property?
>
> . . . .
>
> Whether the Trial Court erred in concluding a unit owners Association could not approve improvements to its common facilities proposed by a Unit Owner, when the Governing Documents of the Association only prohibit a unit owner from altering the Common Facilities without written permission and place no restrictions on the Association's authority under Section 5302(a)(7) of the Pennsylvania [Uniform] Planned Community Act to cause the improvements to be made to the Common Facilities?[7]

Statement of the Questions Involved, Brief for Appellant at 4.

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[7] Rossi also raised the following in his Statement of Questions Involved:

> 1. Whether the Trial Court erred in granting judgment in breach of contract against a Unit Owner for proposing the planting of three trees to the association without informing his neighbor when the Governing Documents place this responsibility on the Association?
>
> . . . .
>
> 3. Whether the Trial Court erred in granted [sic] judgment in breach of contract because plaintiff's view of an adjacent property was obstructed, when the Trial Court found that plaintiff's [Murphy's] only evidence of damages was a lot premium paid by a former owner and determined that "[t]here is no proof of a record that any premium was paid specifically by anyone for an unobstructed view"?
>
> . . . .
>
> 5. Whether the Trial Court erred in "likening" a breach of a contract to the breach of a restricted covenant and awarded a mandatory injunction without a finding of bad faith or evidence of damages when the "restriction" at issue was not a restrictive covenant because it did not limit or restrict any rights in property?

Statement of the Questions Involved, Brief for Appellant at 4.

These issues were not raised in Rossi's motion for post-trial relief and in his concise statement of matters complained of. Pa. R.A.P. 302(a) provides that "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." These issues were not preserved.

These issues were raised and argued before the trial court and ably disposed of in the opinions of the Honorable Ronald C. Nagle, Judge of the Court of Common Pleas of Chester County. Therefore, this Court shall affirm on the basis of Judge Nagle's Rule 1925(a) opinion (first issue) and Judge Nagle's Decision and Verdict (second issue). Charles I. Murphy, et al. v. John Rossi, et al., (No. 2006-0307-CA-1565 CD-2009 and 6156-CD-2009 filed October 20, 2009; and Charles I. Murphy, et al. v. John Rossi, et al., (No. 2006-03707-CA), filed December 22, 2008.

## IV. Appeal Of the Association At 1656 C.D. 2009.

The Association states in its cross-appeal that "Green at Penn Oaks Homeowner's Association . . . concurs in the suggested disposition of the issues raised in John Rossi's Brief." Brief in Support of Cross-Appeal at 1.[8] Here the Association not only failed to raise a new issue in its cross-appeal, it did not include a statement of questions involved pursuant to Pa. R.A. P. 2116(a). Therefore, the Association also raises the same (Rossi's) issues before this Court

[8] The Association alleged in its concise statement of matters complained of that the trial court erred when:

> 1. there was no evidence of actual impairment to plaintiff's right of ingress, egress or regress over the common areas;
> 2. the right of enjoyment in the common facilities does not include a right to a view, which must be expressly granted;
> 3. the right to a view is not recognized hereditament without an express grant; and
> 4. plaintiff's consent was not sought to improve the property of the Association because no granted easement was impaired as required by the Declaration of the Association.

Concise Statement Of The Errors Complained Of On Appeal By The Greens At Penn Oaks Homeowners Association Pursuant to Pa. R.A.P. 1925(b), Paragraphs 1-4 at 1-2; O.R. at 110-11.

which were ably disposed of by the trial court. This Court shall also affirm on the basis of the trial court's opinions cited earlier.

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BERNARD L. McGINLEY, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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**O R D E R**

AND NOW, this 26th day of May, 2010, the order of the Court of Chester County in the above captioned matters are affirmed.

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BERNARD L. McGINLEY, Judge

**IN THE COMMONWEALTH COURT OF PENNSYLVANIA**

| | | |
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| Appeal of: The Greens at Penn Oaks Homeowners Association | : | No. 1656 C.D. 2009 |
| | : | Submitted: January 22, 2010 |

**BEFORE: HONORABLE BERNARD L. McGINLEY, Judge**
**HONORABLE P. KEVIN BROBSON, Judge**
**HONORABLE JIM FLAHERTY, Senior Judge**

**OPINION NOT REPORTED**

**CONCURRING OPINION BY JUDGE BROBSON** **FILED:** May 26, 2010

I join in the Majority Opinion's decision to affirm the trial court based on the reasoning set forth in the trial court's Decision and Verdict and its Opinion issued pursuant to Rule 1925(a) of the Pennsylvania Rules of Civil Procedure.

I write separately to note that, notwithstanding the myriad of issues that Appellants John Rossi (Rossi) and The Greens at Penn Oaks Homeowners Association (Association) (collectively, Appellants) attempt to place before this Court, this case appears to be centered on the interpretation of certain provisions of

the document that created The Greens at Penn Oaks a Planned Community—"Declaration of Covenants, Conditions, Easements and Restrictions of The Greens at Penn Oaks a Planned Community" (Declaration) (R. 707a-63a).[1] The central question is whether Rossi's planting of three—what can be fairly characterized as large[2]—arborvitae trees in a "Common Facilit[y]," as defined in the Declaration (R. 713a-14a), violated the terms of the Declaration. The Common Facility in question is an area of land that lies between Rossi's home and the neighboring home of Appellee Eileen B. Murphy (Murphy). There are several provisions of the Declaration that support the trial court's conclusion that the planting of the trees violated the Declaration.

> First, Section 6.F of the Declaration provides:
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> > Owner's Easement of Enjoyment. Every owner shall have the right of ingress, egress and regress over *and the right of enjoyment in and to the Common Facilities*, which right shall be appurtenant to each Dwelling or Unit and shall pass with title to every Dwelling or Unit subject, nonetheless, to [certain provisions].

(Emphasis added.) Despite Appellants' claim to the contrary, and as the trial court found below, this easement of enjoyment is more than merely a "right of ingress, egress and regress" over Common Facilities. It includes an express "right of enjoyment in and to the Common Facilities" that is in addition to and independent of a "right of ingress, egress and regress."

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[1] Under the Uniform Planned Communities Act, the recording of a declaration creates a planned community. 68 Pa. C.S. § 5201.

[2] Photographs of the Murphy property before and after the planting of the three trees are part of the record. (R. 995a, 997-98a.)

Article VI of the Declaration goes on to provide at Section 6.I:

> Alterations by Owner. *No Owner may make any changes, additions, improvements or alterations of any kind or do any work to any of the Community Facilities.*[3] . . . No Owners shall impair any easement or hereditament therein without the unanimous consent of the Owners affected thereby and the approval of the Board of Directors.

(R. 723a (emphasis added).) Focusing on the latter part of this section, and relying on its narrow interpretation of Section 6.F that would confer only upon an owner a right of "ingress, egress and regress" over Common Facilities, Appellants argue that they had no obligation to secure Murphy's consent to plant the trees in the Common Facility between the Rossi and Murphy homes. Because Appellants' construction of Section 6.F is flawed, the trial court correctly rejected this argument.

But even if Appellants' construction of Section 6.F were correct, Rossi's act of planting the trees in the Common Facility still violated the first portion of Section 6.I, which *categorically* bars Rossi, as an "Owner," from making "any changes, additions, improvements or alterations of any kind or do[ing] any work to" the Common Facility between his home and the Murphy home. This bar is also set forth twice in Article XII of the Declaration. Section 12.A.viii provides: "No *Owner* or occupant may obstruct the Community Facilities *in any way*." (R. 745a (emphasis added).) Section 12.A.xxi provides: "No *Owner* shall alter *in any way* any of the Community Facilities." (R. 747a (emphasis added).)

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[3] "Community Facilities" is defined in the Declaration to include "Common Areas" and "Common Facilities," which the Declaration treats as synonyms. (R. 713a-14a.)

In their briefs on appeal, Appellants do not cite a single provision of the Declaration that confers on an "Owner" the authority, *inter alia*, to alter a Common Facility, whether unilaterally or with the approval of the Association's Board of Directors. The express prohibitions in the Declaration to such an act, however, are clear and support the trial court's disposition of the case.

P. KEVIN BROBSON, Judge