

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

Craig Diggins, Mary Diggins, Art Davis, Nancy Davis,
Mike Cohen, Susan Cohen, Tom Wilt, and Jill Bennis,
Plaintiffs Below, Petitioners

FILED
October 19, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

vs) No. 11-1098 (Hampshire County No. 08-C-63)

The River Ridge Property Owners Association, Inc.,
Clyde H. DeWitt, Jr., Joseph Vacchio, Karen Vacchio,
Edward H. Ballow, Michael L. Beidler, Kelly Williams,
Steve Thompson, Leslie Olson, Susan Wojtowicz,
and Deborah Gallagher,
Defendants Below, Respondents

* * * and * * *

Craig Diggins and Mary Diggins,
Plaintiffs Below, Petitioners

vs) No. 12-0382 (Hampshire County No. 08-C-63)

The River Ridge Property Owners Association, Inc.,
Clyde H. DeWitt, Jr., Joseph Vacchio, Karen Vacchio,
Edward H. Ballow, Michael L. Beidler, Kelly Williams,
Steve Thompson, Leslie Olson, Susan Wojtowicz,
and Deborah Gallagher,
Defendants Below, Respondents

MEMORANDUM DECISION

These are two separate appeals arising from the same underlying litigation. In appellate docket number 11-1098, Petitioners Craig Diggins, Mary Diggins, Art Davis, Nancy Davis, Mike Cohen, Susan Cohen, Tom Wilt, and Jill Bennis filed an interlocutory appeal of four orders issued by the Circuit Court of Hampshire County: a November 1, 2010, partial summary judgment order interpreting a restrictive covenant¹; a January 25, 2011, order denying a motion for reconsideration of that partial summary judgment order; a July 1, 2011, order granting the respondents' motion for contempt; and a separate July 1, 2011, order clarifying the court's rulings. The circuit court entered a final order in the case while docket number 11-1098 was pending on appeal. In appellate docket number 12-0382, Petitioners Craig and Mary Diggins, but not the other plaintiffs below, appeal the circuit court's January 9, 2012, final order granting summary judgment for respondents on all remaining claims and establishing the penalty for the

¹ On July 1, 2011, the circuit court ruled that the November 1, 2010, partial summary judgment order was immediately appealable pursuant to Rule 54(b) of the West Virginia Rules of Civil Procedure.

earlier contempt order. The two appeals are hereby consolidated for purposes of consideration and decision.

The petitioners in 11-1098 were formerly represented by Joseph L. Caltrider and Floyd Boone, but these lawyers were granted leave to withdraw after appellate briefing was completed and no new counsel has entered an appearance. The petitioners in number 12-0382 are represented by Gregory M. Kline. Respondents are the River Ridge Property Owners Association, Inc. (“RRPOA”), Clyde H. DeWitt, Jr., Joseph Vacchio, Karen Vacchio, Edward H. Ballow, Michael L. Beidler, Kelly Williams, Steve Thompson, Leslie Olson, Susan Wojtowicz, and Deborah Gallagher. The individual respondents are, or were, board members, officers, or committee members of the RRPOA. Respondents are represented by Gregory A. Bailey, Christopher P. Stroech, and Patrick J. Nooney.

Petitioners, who are property owners in the River Ridge development, filed a Complaint and Amended Complaint seeking a declaratory judgment of their rights under restrictive covenants that govern all lots in the development; seeking access to records maintained by the RRPOA; alleging that the RRPOA, its board members, officers, and committee members breached their fiduciary duties; alleging civil conspiracy; and asserting a claim for attorney’s fees. The circuit court granted summary judgment for respondents on all counts.

Petitioners raise a total of fifteen assignments of error in their two petitions for appeal, many of which are duplicative. A close examination of petitioners’ arguments reveals three main issues: (1) whether the circuit court erroneously interpreted the restrictive covenants; (2) whether the circuit court erroneously granted summary judgment for respondents on the breach of fiduciary duty and all remaining claims; and (3) whether the circuit court erred in making a finding of contempt and in imposing sanctions for contempt.

“A circuit court’s entry of summary judgment is reviewed *de novo*.” Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Furthermore, “[i]n reviewing the findings of fact and conclusions of law of a circuit court supporting a civil contempt order, we apply a three-pronged standard of review. We review the contempt order under an abuse of discretion standard; the underlying factual findings are reviewed under a clearly erroneous standard; and questions of law and statutory interpretations are subject to a *de novo* review.” Syl. Pt. 1, *Carter v. Carter*, 196 W.Va. 239, 470 S.E.2d 193 (1996).

This Court has considered the parties’ briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law. The Court finds that a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

I. Restrictive Covenants

The lots in River Ridge are subject to the “River Ridge Declaration of Reservations and Restrictive Covenants” (“Covenants”). After obtaining the advice of an attorney, in 2006 the RRPOA notified petitioners that they would be in violation of the Covenants if they had any tents, travel trailers, campers, recreational vehicles, or other camping shelters on their lots during the month of January. The Covenants provide, in pertinent part:

ARTICLE VIII
RESIDENTIAL AND AREA USE

All lots shall be used for residential and recreation purposes only. With the exception of structures existing as of the date thereof, no residence shall be erected, constructed, maintained, used or permitted to remain on any Lot other than one single family dwelling containing not less than 700 square feet of minimum total area, exclusive of porch, decking, basement and garage or outbuilding. (a) All exterior construction must be completed and closed within one (1) year of the commencement date of excavation. All dwellings shall have an enclosed permanent foundation. (b) There shall be no single-wide or double-wide mobile homes (as they are defined by West Virginia Code 37-15-2), house trailers, or buses situate on any Lot as a residence or for the storage of materials therein, temporarily or permanently.

....

ARTICLE XVII
CAMPING

Temporary camping is permitted upon the Lots from February 1 through December 31 annually. Only equipment professionally manufactured for the purpose, such as tents, travel trailers/campers and recreational vehicles, are permitted for use as camping shelters.

Petitioners argued that the Covenants only restrict the activity of people camping on the lots during the month of January, not the mere presence of camping shelters that are not in use. Petitioners sought to rely on the deposition testimony of L. Hunter Wilson, who operated WV Hunter LLC, the company that developed River Ridge. Relying on the statute of frauds, the circuit court excluded consideration of Mr. Wilson's opinion as to the meaning of the Covenants.

On cross-motions for partial summary judgment, by order entered November 1, 2010, the circuit court found that the Covenants do prohibit the presence of camping shelters on the River Ridge lots each year during the month of January. The court noted that Article VIII states that the property in the subdivision is dedicated to "residential and recreational purposes only[.]" and the court found that the word "residence" denotes something permanent and not merely temporary. This same article also requires that all dwellings have enclosed permanent foundations and it expressly prohibits mobile homes, house trailers, and buses. Importantly, Article XVII limits camping to "temporary" camping. The circuit court found that the Camping Covenant is part of a scheme within the restrictive covenants to protect the property values of residences in the subdivision, and that allowing permanent camps to be erected in the subdivision is not in line with temporary camping.

As set forth above, we apply a de novo standard of review to a circuit court's entry of summary judgment. The Covenants are a contract incorporated into the deeds for each lot, and it is the province of the court, not a jury, to interpret a written contract. Syl. Pt. 1, *Orteza v. Monongalia County General Hosp.*, 173 W.Va. 461, 318 S.E.2d 40 (1984) (interpretation of written contract is the province of the court); *Zimmerer v. Romano*, 223 W.Va. 769, 777, 679 S.E.2d 601, 609 (2009) (applying contract standard of review to interpretation of a deed).

We conclude that a plain reading of the language of the Covenants prohibits tents, travel trailers, campers, and recreational vehicles in River Ridge during the month of January each year. Tents, travel trailers, campers, and recreational vehicles are the instrumentalities by which the “temporary camping” referenced in Article XVII is to be accomplished. If these instrumentalities are permitted all year long, camping would not be “temporary” and residences without permanent foundations could exist in the development. Accordingly, we affirm the circuit court’s interpretation of the Camping Covenant. We note that it is undisputed that the Covenants were written and recorded before any lots in River Ridge were sold.

We further conclude that the circuit court properly disregarded Mr. Wilson’s opinion on the meaning of Covenants. Pursuant to the statute of frauds, extrinsic evidence cannot be used to alter or interpret language in a written contract that is otherwise plain and unambiguous on its face. Syl. Pt. 3, *Iafolla v. Douglas Pocahontas Coal Corporation*, 162 W.Va. 489, 250 S.E.2d 128 (1978); Syl. Pt. 1, *Warner v. Haught, Inc.*, 174 W.Va. 722, 329 S.E.2d 88 (1985). Because we have determined that the meaning of the Covenants is plain, we find no basis to permit the use of extrinsic evidence.

II. Summary Judgment for Respondents on Remaining Claims

The petitioners in docket number 12-0382 appeal the circuit court’s January 9, 2012, order granting summary judgment for respondents on all remaining claims. In this 38-page order, the circuit court engaged in a lengthy discussion of the claims and evidence. The circuit court found that petitioners failed to offer proof to support their claim that respondents violated their rights to review the RRPOA’s records. The court found that only one of petitioners’ letters to RRPOA officials had set forth a specific date and time when petitioners wanted to review documents, and then the petitioners demanded terms to which they were not entitled, such as insisting that the documents be moved to a different location and that they be allowed unsupervised access to the documents. The court further found that petitioners’ requests were not in good faith or for a proper purpose: petitioners refused respondents’ offers to meet and discuss the records; petitioners said that reviewing some documents that respondents had offered would be a “waste of time”; and petitioners sent “extremely toxic” letters to other lot owners and to a local real estate agent.

The circuit court also found that no genuine issue of material fact existed for petitioners’ multiple claims that the RRPOA officers, board members, and/or committee members breached their fiduciary duties. Petitioners’ claims included allegations that respondents amended the RRPOA’s By-Laws to remove term limits and to reduce the number of lot owners who must approve changes; approved a budget in 2007 without sending it to the full membership in advance; approved certain expenditures relating to road repair and the purchase of liability insurance for the board; changed a snow removal policy; increased the annual dues; and failed to give sufficient notice of topics that would be discussed at annual meetings. The court found that the issues petitioners raised were discussed and properly decided by a vote of the membership at the annual meetings; were within the scope of the RRPOA board’s authority; and/or caused no harm to petitioners. The court further found that respondents were charged with enforcing the Covenants and were entitled to rely upon the advice of legal counsel when attempting to do so.

The circuit court also rejected petitioners’ civil conspiracy claim. The court found that petitioners were upset about not being afforded information regarding the status of the defense of this lawsuit—but as the opposing parties, respondents did not have to provide petitioners with

such information. Moreover, respondents exchanged private computer messages discussing the litigation, their opinions of petitioners and petitioners' legal arguments, and about providing voluminous discovery to petitioners. The court found that while these communications were "not the most neighborly," they are "certainly not actionable" and respondents were entitled to communicate amongst themselves. The respondents' communications were not sent to all lot owners or otherwise published, and the court was of the opinion that Petitioners Mr. and Mrs. Diggins had set the "threatening, uncivil tone" in this litigation with their own letters and behavior.

Finally, petitioners complained that they were unduly burdened by the volume of records provided by respondents in discovery, but the court found that this was a matter that should have been taken up with the court under the Rules of Civil Procedure instead of being brought as a claim in the Amended Complaint.

Upon a review of the record and the parties' arguments, we conclude that the circuit court correctly granted summary judgment to respondents on these issues.

III. Contempt Sanctions

At a January 13, 2011, hearing on petitioners' motion for reconsideration of the November 1, 2010, partial summary judgment order, respondents' counsel advised the circuit court that some lot owners had not removed their camping trailers and equipment from their lots during January of 2011. The court indicated that a motion for sanctions could be filed. Respondents filed such a motion on February 18, 2011. During an April 25, 2011, hearing that had been noticed for a different issue, the circuit court announced that it had decided the motion for sanctions. Over petitioners' objection, the court ordered that any lot owner who had not removed his/her camping equipment during the month of January of 2011 would have to remove it for a thirty-day period during either June or July of 2011. The court indicated that if any lot owner failed to comply with this ruling, then any party could file another motion with the court, at which time the court would direct removal of the equipment and impose the cost of removal on the offending person. The court's verbal ruling was reflected in written orders entered on July 1, 2011.

Thereafter, in the January 9, 2012, summary judgment order resolving the remaining claims, the court stated that it had "previously found certain lot owners in contempt of the Court's directive to remove trailers from the River Ridge subdivision during the month of January 2010 [sic, should be 2011][.]" The court proceeded to set a contempt penalty of \$7,500 "per offending lot" payable to the circuit clerk within thirty days. The court ordered that if the unspecified "violators" fail to pay this penalty, the circuit clerk shall enter and record a judgment against them.

The petitioners in 11-1098 assert that the circuit court erroneously found contempt and granted injunctive relief by requiring them, as well as lot owners who are not parties in this case, to move their camping equipment without notice that the matter would be taken up at hearing, without taking any evidence, without making any findings of fact, and without requiring bond. The petitioners in 12-0382 further assert that the court erred in its January 9, 2012, summary judgment order by sanctioning unidentified lot owners "per offending lot" without ever holding a hearing, taking evidence, or making specific findings to support a contempt ruling.

Upon a review of the circuit court's orders addressing the issue of contempt sanctions, we find that petitioners' arguments are well-taken. The circuit court did not take evidence on the motion for sanctions and failed to make any findings about who did what to warrant a finding of contempt and the imposition of sanctions. It is impossible to determine exactly who the purported violators are, whether they were on notice that a partial summary judgment order had been entered in the case on the issue of the meaning of the Covenants, whether they knew they were in violation of the Covenants and the partial summary judgment order in January of 2011, and/or whether they complied with the circuit court's order to remove their equipment in June or July of 2011.

For these reasons, we conclude that the circuit court abused its discretion and we vacate the portions of the circuit court's orders regarding any finding of contempt and imposition of sanctions for violations that allegedly occurred in 2011. We remand the contempt and sanctions issue to the circuit court for purposes of holding an evidentiary hearing and making specific findings of fact and conclusions of law. If, after developing a record and making findings of fact and conclusions of law, the circuit court determines that sanctions are warranted, the court may impose them (subject, of course, to further appeal on this issue only). Alternatively, respondents may choose to withdraw their motion for sanctions; if they withdraw the motion, no further hearing is required and the case will be concluded. Nothing herein shall prevent any person or the RRPOA from pursuing legal action for future violations of the Covenants or court order.

IV. Conclusion

For the reasons set forth above, we vacate the portions of the circuit court's orders finding contempt and imposing sanctions for alleged violations in 2011 of the Covenants and court order. We remand the issue to the circuit court for further consideration as set forth herein. We affirm the circuit court's decisions on all other issues. To the extent that petitioners raised any arguments that are not specifically addressed in this memorandum decision, the Court finds no merit to them and rejects the same.

Affirmed in part, vacated in part, remanded with directions.

ISSUED: October 19, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh