

IN THE SUPREME COURT OF OHIO

DAVID BILLITER, ET AL,)	SUPREME COURT CASE NO.
)	2017-1608
)	
DEFENDANTS/APPELLANTS)	
)	ON APPEAL FROM THE FIFTH
-VS.-)	DISTRICT COURT OF APPEALS
)	
HEATHER LAKE ASSOCIATION)	CASE NO. 2017 CA 00031
)	
PLAINTIFF/APPELLEE)	

APPELLEE'S MEMORANDUM IN RESPONSE TO APPELLANT'S MEMORANDUM IN
SUPPORT OF JURISDICTION

DAVE LACKEY (0055936)
SCHERNER, SYBERT & RHOAD LLC
Attorney for Defendants/Appellants
153 S. Liberty St.
Powell, Ohio 43065
(614) 785-1700/Fax (614) 785-0700
Dave@dlackey.com

ROBERT E. KMIECIK (0022545)
GARRETT B. HUMES (0089326)
KAMAN & CUSIMANO LLC
Attorneys for Plaintiff/Appellee
8101 N. High St., Suite 370
Columbus, Ohio 43235
(614) 882-3100/Fax (614) 882-3800
RKmiecik@kamancus.com
GHumes@kamancus.com

RESPONSE TO MEMORANDUM IN SUPPORT OF JURISDICTION

Now comes Plaintiff-Appellee, Heather Lake Association (“Association”), by and through undersigned counsel, and respectfully submits this Response to Defendants-Appellants’ Memorandum in Support of Jurisdiction. The Supreme Court should not exercise jurisdiction over this case as Defendants-Appellants (“Appellants”) present issues that are well settle under Ohio law and these issues are not of public or great general importance.

EXPLANATION OF WHY THIS CASE FAILS TO PRESENT AN ISSUE OF PUBLIC OR GREAT GENERAL IMPORTANCE

Appellants argue that the Association’s parking restrictions and regulations are ambiguous and provided no notice to purchasers, as well as alleging important public policy implications. Specifically, Appellants assert that The Declaration of Covenants, Easements, Restrictions and Assessment Lien for Heather Lake Association (“Declaration”) provides no notice to purchasers of the applicable parking regulations, and the Declaration does not provide guiding principles that limit the Association’s authority to create parking regulations. These contentions are simply false and defy Ohio statutory and case law. Both the Trial Court and the Appellate Court found Appellants’ assertions to be contrary to settled law.

Appellants’ propositions of law, that purchasers are not bound by unrecorded restrictions when they have no notice of such restrictions and that provisions that enable future regulation must contain limitations, are on their face reasonable, but are not relevant to this case. The Appellant Court correctly found that Association’s Declaration provided notice to Appellants about the Association’s ability to institute parking regulations and that the parking regulations are a part of a general planned community scheme which Appellants had notice of when purchasing their home. As such, the Supreme Court should deny jurisdiction in this case.

STATEMENT OF THE CASE AND FACTS

Association is a nonprofit corporation organized and existing under the laws of the State of Ohio to provide a corporate entity for the operation of 69 lots/homes at the Heather Lake community, located in Lancaster, County of Fairfield, and State of Ohio. *See* Association's Motion for Summary Judgement, Exhibit 1, filed 9/1/2016. The Declaration is recorded at Volume 651, Page 729, *et seq.*, of the Fairfield County Records and the Bylaws are recorded at OR Book 1680, Page 4326 *et seq.*, of the Fairfield County Records. *See id.* at Exhibits 2 and 3.

Appellants are the title owners of Lot number 37 of Heather Lake, Section 2. Appellants are members of the Association and are subject to Association's Declaration, Bylaws and Regulations. *See* Amended Answer, Paragraph 3, filed 2/1/2016.

Declaration Article I, Section 2(e) provides:

Vehicles. The Board may promulgate regulations restricting the parking of automobiles, inoperable vehicles, trucks, boats and recreational vehicles on the Lots and Common Areas and, to the extent not prohibited by law, the streets within the subdivision, and may enforce such regulations or restrictions by levying fines or enforcement charges, having such vehicles towed away, or taking such other actions as it, in its sole discretion, deems appropriate. See Association's Motion For Summary Judgment at Exhibit 2, page 4, filed 9/1/2016.

Based on the authority granted to Association's Board of Directors, the Board adopted The Design Review Manual for Single Family Residential Development ("Regulations"). On May 12, 2001, a month and a half prior to Appellants' purchase of their lot, the Board adopted the revised "Vehicle Restrictions" which state in pertinent part:

No commercial vehicles may be parked, stored or temporarily kept on any Lot or Reserve, except when there temporarily to service existing improvements or to be used in connection with the construction of improvements in Heather Lake.... Notwithstanding the foregoing, the Board of Trustees shall have the right, in its sole discretion, to determine whether or not a particular vehicle type, or any particular vehicle, is authorized.... See Association's Motion for Summary Judgment at Exhibit 4.

Appellants violated the reasonable parking regulations for years by parking recreational vehicles, camper trailers, jet skis, and commercial vehicles on their Lot. Appellants have failed to comply with Association's regulations, despite numerous demands requesting their compliance.

See Association's Motion for Summary Judgment at Exhibits 1, 5-12.

After it became apparent Appellants would not voluntarily comply with Association's reasonable parking regulations, Association was compelled to seek court order compelling Appellants' to adhere to the regulations. Association filed a Complaint in the Fairfield County Court of Common Pleas seeking a preliminary and permanent injunction as well as an award of attorney's fees against Appellants. Association prevailed in the Trial Court and obtained both an injunctive order prohibiting the commercial vehicle from being parked on the lot and a monetary judgment for attorney's fees and court costs. Appellants subsequently appealed the Trial Court's judgment to the Fifth District Court of Appeals for Fairfield County. The Appellate Court affirmed the Trial Court's judgment. Now, Appellants seek review by the Supreme Court.

ARGUMENTS OPPOSING APPELLANTS' PROPOSITIONS OF LAW

FIRST PROPOSITION OF LAW: Appellants had notice of the restrictions on the use of their property prior to their purchase of the property.

Appellants argue that unrecorded restrictions do not bind bona fide purchasers when they do not have notice of the restrictions on the property they purchase. While this is an accurate statement of law, it does not apply to the circumstances of this case. Appellants had notice of the Board's authority to create parking regulations limiting the use of the property they purchased, and are thus bound by both the deed restrictions and regulations.

In Ohio, there is statutory authority supporting a community association's right board to promulgate regulations not contained in the declaration. Ohio Revised Code 5312.06(D) states:

*An owners association, through its board of directors, may do any of the following:
... Adopt and enforce rules that regulate the maintenance, repair, replacement, modification, and appearance of common elements, and any other rules as the declaration provides. (Emphasis added)*

In addition to ORC 5312.06(D), Ohio courts have recognized that when recorded restrictions authorize the creation of community rules, regulations, or design guidelines, owners and potential purchasers have notice that the rules, regulations, and guidelines may be promulgated and amended from time to time. In *Morgan Woods Homeowners' Ass'n v. Willis*, the association had previously created design guidelines which were violated when the defendant constructed a fence on their property. *Morgan Woods*' Declaration gave the architectural control committee the power to "from time to time establish architectural building and improvement standards for all improvements." *Morgan Woods Homeowners' Ass'n v. Willis*, 5th Dist. No. 11CA57, 2012-Ohio-233, ¶ 43. Similar to the case at hand, the *Morgan Woods* guidelines regulating fences were not recorded with the association's declaration, but were adopted by a committee given the power to create such regulations through the declaration. In that case, the appellate court affirmed the trial court's decision that the regulations were enforceable and that the defendant was in violation of the regulations despite the fact that the specific restrictions were not recorded because the defendant was put on notice of such restrictions through the recorded declaration. *Id.* At 51.

This concept was also discussed in *Acacia on the Green Condo. Ass'n v. Gottlieb*, 8th Dist. No. 92145, 2009-Ohio-4878, ¶ 36 (Sept. 17, 2009), where the 8th District appellate court stated "[t]he bylaws contained a specific provision allowing the association to create additional rules and regulations. [Defendant] was on notice that such rules may have existed and had a duty to inquire into their contents."

In this case, Association's Declaration provided record notice to Appellants that the Board had the authority to create regulations limiting the parking of vehicles on their lot. Association

adopted the parking regulations in May of 2001, about a month prior to Appellants' purchase of their Lot. As in *Gottlieb*, the Appellants had a duty to investigate the rules and regulations which they were to become bound by, but failed to do so.

Additionally, Association attempted to settle the matter amicably by sending multiple notices to Appellants for over a year prior to filing the lawsuit in this case. Association's Motion for Summary Judgment at Exhibits 1, 4-13. Despite the repeated notices, Appellants refused to comply with the parking regulations lawfully promulgated by Association's Board. The argument that Appellants did not have notice of the regulations prohibiting them from parking a commercial vehicle on their lot is contrary to the evidence submitted to the Trial Court in this case.

SECOND PROPOSITION OF LAW: The provisions enabling Association to promulgate parking restrictions, and the restrictions themselves, are a part of the general planned community scheme as stated in the recorded deed restrictions.

Appellants argue that the Declaration provision enabling the Board to promulgate parking restrictions is ambiguous and gives the Board too much power without any guidelines. However, the Board does not have unlimited discretion to create parking regulations because it is restrained by the general scheme of Association as a whole.

In *Carranor Woods Property Owners' Ass'n v. Driscoll*, 106 Ohio App. 95, 153 N.E.2d 681 (6th Dist. 1957), the court created a standard for declaration provisions that grant future discretion to boards, stating,

In order that a restrictive covenant requiring the submission to and approval of the grantor of plans for the erection of a dwelling may be valid and enforceable, such covenant must be used (1) in connection with some general plan or scheme of which the grantee has notice... (Emphasis added)

This standard has been reiterated in Ohio case law numerous times. "Although the law generally disfavors restricting the use of land, that presumption is overcome when there is a general scheme

or plan in place for the land and the purchaser has notice of that plan.” *Gottlieb supra* at ¶34 (citing *Bailey Dev. Corp. v. MacKinnon-Parker, Inc.*, 60 Ohio App.2d 307, 310 (6th Dist. 1977)). “A plan designed to maintain the harmony and aesthetic balance of a community will often be upheld where the restrictions are reasonable.” *Rockwood Homeowners Ass’n v. Marchus*, 11th Dist. No. 2006-L-130, 2007-Ohio-3012, ¶ 12 (June 15, 2007); *see also Beckett Ridge Association-I v. Agne*, 26 Ohio App. 3d 74,76 (12th Dist. 1985); *Prestwick Landowners’ Assn. v. Underhill*, 69 Ohio App. 2d 45 (9th Dist. 1980).

Although Appellants argue the contrary, the parking regulations are a part of a general plan of which they had notice. Association’s Declaration explicitly states that it is creating such a plan for the entire Heather Lake community in Declaration Background paragraph C.

The Declaration desires to create a plan of restrictions, easements, and covenants with respect to the Lots described herein, and establish liens upon Lots described herein, which shall be binding upon and inure to the benefit of the Declarant, the Association, and all future owners and occupants of the Lots.

Thus, Association’s Declaration expressly establishes a general plan for the development and use of the entire property, including the individual lots, and the general rule requiring a narrow interpretation of the deed restrictions is inappropriate.

Appellants purchased a lot in a deed-restricted community, with notice that Association’s Declaration established a general plan for the community and gave the Board authority to create parking regulations. The provision enabling the regulations, and the regulations themselves, are unambiguous and are part of the general plan for the Heather Lake community. Appellants purchased their Lot with notice of the Board’s authority to create parking regulations through the recorded Declaration, and had a duty to investigate the contents of the parking regulations. Rather than attempt to learn the regulations, Appellants ignored and continuously violated them despite several written notices of their infringement.

CONCLUSION

The Supreme Court should decline jurisdiction in this matter. Appellants' propositions of law are generally accurate, however they are inapplicable to this case. The facts and circumstances show that Appellants had notice of the parking regulations and such regulations are a part of a general plan or scheme for the Heather Lake community. Both the Trial Court and the Appellate Court reached this conclusion, and refused to find in Appellants' favor. Association, therefore, respectfully urges the Court to decline jurisdiction over this appeal.

KAMAN & CUSIMANO, LLC.

/S/ GARRETT B. HUMES

ROBERT E. KMIECIK (#0022545)
GARRETT B. HUMES (#0089326)
Attorneys for Plaintiff-Appellee, Heather Lake
Association
8101 North High Street, Suite 370
Columbus, OH 43235
614-882-3100/Fax 614-882-3800
ghumes@kamancus.com

CERTIFICATE OF SERVICE

A copy of the foregoing Appellee's Memorandum in Response to Appellants' Memorandum in Support of Jurisdiction has been served upon the following parties, by ordinary U.S. mail and/or Court's electronic service, this 22nd day of November, 2017:

Dave Lackey
Scherner & Sybert, LLC
153 S. Liberty Street
Powell, OH 43065
dave@dlackey.com

KAMAN & CUSIMANO, LLC.

/S/ GARRETT B. HUMES

ROBERT E. KMIECIK (#0022545)
GARRETT B. HUMES (#0089326)
Attorneys for Plaintiff-Appellee, Heather Lake
Association