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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Richard T. Altman and Sara A. Altman,
Defendants Below, Petitioners

vs.) No. 21-0421 (Ohio County 20-C-206)

Mark R. Beaver, Mary T. Beaver,
Ronald E. Jewell, Kathryn J. Jewell,
Ronnie G. Barker, Deborah A. Barker,
Kimberly A. Decrease, Charles E. Coleman,
Albert J. Holderman III, Nancy J. Holderman,
Thomas E. Ebert, and Bonnie Lou Ebert,
Petitioners Below, Respondents

MEMORANDUM DECISION

Petitioners Richard T. Altman and Sara A. Altman, by counsel Gerald E. Lofstead and Jordan A. Sengewalt, appeal the April 22, 2021, order of the Circuit Court of Ohio County, enjoining petitioners, via preliminary injunction, from further construction activities or storage on their property. Respondents Mark R. Beaver, Mary T. Beaver, Ronald E. Jewell, Kathryn J. Jewell, Ronnie G. Barker, Deborah A. Barker, Kimberly A. Decrease, Charles E. Coleman, Albert J. Holderman III, Nancy J. Holderman, Thomas E. Ebert, and Bonnie Lou Ebert, by counsel H. Brann Altmeyer and Jacob C. Altmeyer, filed a response in support of the circuit court's order. Petitioners filed a reply.

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 and no prejudicial error. For these reasons, a memorandum decision affirming the order of the circuit court is appropriate under Rule 21 of the Rules of Appellate Procedure.

Petitioners and respondents are all lot owners in the Wilkinson Subdivision in Wheeling, West Virginia. The lots in the subdivision are encumbered by the following eleven restrictive covenants that "run with the land":

> (1) All of said lots shall be used for residential purposes only. Only one dwelling shall be erected on each lot.

(2) No dwelling house may be constructed on any of said lots that shall cost less than $27,500.00.
(3) No structure, except an open porch, piazza or stoop, shall be located nearer to the front of any of said lots than designated by the Building Setback Line as shown on said Plat, nor nearer than 10 feet to a side or back property line.
(4) Each respective owner of said lot or lots shall be personally responsible for an approved, hygienic underground sewage disposal system.
(5) No trailer of any kind, portable or permanent shall be permitted to be used as a dwelling on any of said lots.
(6) Private garages and carports may be constructed on said lots, subject to the Setback Lines as shown on said plat.
(7) No basement structures shall be used as temporary or permanent residences on any of said lots.
(8) No old or unlicensed automobiles or trucks or machinery shall be permitted to be parked on or near any of said lots.
(9) No lot shall be used solely for gardening or trucking and no lot shall be used as a dumping ground for rubbish, trash and garbage and no lot shall be permitted to be covered with weeds, brush or high grass.
(10) No beer or intoxicating liquor shall be sold on any of said lots.
(11) All of the lots described on this Plat are subject to the Right of Way of Stone and Shannon Public Road and all of the Setback Property Lines and Rights of Way are set forth on said Plat.

In early 2020, petitioners constructed a 2,700-square-foot building ("the structure") on their lot ("the property"). Respondents have characterized the structure as "a large pole barn or garage structure." Petitioners' primary residence is located a short distance outside the subdivision.

In October of 2020, respondents filed a complaint for injunctive relief against petitioners, claiming that petitioners were using the property for a nonresidential use in violation of the restrictive covenants. Respondents alleged petitioners' behavior would cause respondents to suffer irreparable harm and that an injunction was necessary to prevent such injury. Specifically, respondents sought to compel petitioners to remove the structure from the property and to refrain from making any nonresidential use of the property, including "erecting any structure not primarily intended for occupation [as] a residence."

Thereafter, respondents filed a motion for a preliminary injunction. In the motion, respondents alleged that they would suffer irreparable harm unless petitioners' nonresidential use of the property was enjoined, that respondents had an urgent need for a preliminary injunction, and that respondents would succeed on the merits of their case. Respondents argued that under the "balance of hardship" test set forth in *Jefferson County Board of Education v. Jefferson County Education Association*, 183 W. Va. 15, 393 S.E.2d 653 (1990),[1] they were entitled to a preliminary injunction because greater injury would be inflicted upon them if petitioners were not enjoined from using the property for nonresidential purposes.

[1] The balance of hardship test is discussed in detail *infra*.

Petitioners asked the circuit court to deny the motion. Petitioners asserted that respondent's argument was moot because petitioners had contracted to construct a dwelling to attach to the structure at a cost of $71,084. The proposed dwelling was planned to include one bedroom, one bathroom, and a kitchen, with a total footprint of approximately 384 square feet. Petitioners stated that there was a minimum likelihood of irreparable harm to respondents because the "structure has absolutely no impact on [petitioners]' lives." Petitioners also claimed that under the "balancing of hardship" test, respondents were not entitled to a preliminary injunction.

Respondents contended that despite the proposed construction, the primary purpose of the resulting structure would remain the storage of a large recreational vehicle. Consequently, according to respondents, the resulting structure would still be a violation of the restrictive covenants.

Following a hearing, the circuit court entered an order granting respondents' motion for a preliminary injunction on April 22, 2021. The circuit court found that all four of the factors in the "balance of hardship" test had been satisfied, warranting the requested preliminary injunction. The circuit court found that petitioners would suffer little harm by the issuance of a preliminary injunction but that respondents had lost and would continue to lose property value and quiet use and enjoyment of their property should the injunction not issue. The circuit court further found that the respondent's use of the property violated the restrictive covenants because petitioners were using the property in a manner that was not intended by the drafters of the restrictive covenants. Additionally, the circuit court determined, "[T]he intentions of the original parties in authoring the applicable restrictions was to prevent the kind of use and structure proposed by [petitioners]." The circuit court enjoined petitioners from any further construction activities on the property and from storing any additional items inside the structure. The circuit court stated, "Should the permanent injunction ultimately not be issued, the [petitioners] may resume their development and non-residential use of the [property] and [s]tructure at that time."

Petitioners appeal the circuit court's April 22, 2021, order, contending that the circuit court was wrong in ordering the preliminary injunction. They assert two assignments of error. First, petitioners argue that the circuit court erred in finding that their use of the property violated restrictive covenants encumbering the property. Second, they argue that the circuit court erred in finding that respondents will suffer greater injury than petitioners if petitioners are permitted to continue to develop the property.

We apply the following three-part standard in reviewing an order granting a preliminary injunction:

> In reviewing the exceptions to the findings of fact and conclusions of law supporting the granting of a temporary or preliminary injunction, we will apply a three-pronged deferential standard of review. We review the final order granting the temporary injunction and the ultimate disposition under an abuse of discretion standard, *West v. National Mines Corp.*, 168 W.Va. 578, 590, 285 S.E.2d 670, 678 (1981), we review the circuit court's underlying factual findings under a clearly erroneous standard, and we review questions of law de novo. Syllabus Point 4, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996).

Syl. Pt. 1, *State of West Virginia, By and Through McGraw v. Imperial Marketing*, 196 W. Va. 346, 472 S.E.2d 792 (1996). On review, this Court must "examine the overall circumstances of the case and whether the court has made an attempt to balance the requisite factors." *Camden-Clark Mem'l Hosp. Corp. v. Turner*, 212 W. Va. 752, 756, 575 S.E.2d 362, 366 (2002). In this regard, we have held:

> The granting or refusal of an injunction, whether mandatory or preventive, calls for the exercise of sound judicial discretion, in view of all the circumstances of the particular case; regard being had to the nature of the controversy, the object for which the injunction is being sought, and the comparative hardship or convenience to the respective parties involved in the award or denial of the writ.

Syl. Pt. 4, *State ex rel. Donley v. Baker*, 112 W. Va. 263, 164 S.E. 154 (1932). This "balancing" inquiry requires the application of a four-part "balance of hardship" test.

> Under the balance of hardship test the [circuit] court must consider, in "flexible interplay," the following four factors in determining whether to issue a preliminary injunction: (1) the likelihood of irreparable harm to the plaintiff without the injunction; (2) the likelihood of harm to the defendant with an injunction; (3) the plaintiff's likelihood of success on the merits; and (4) the public interest.

Morrisey v. W. Va. AFL-CIO, 239 W. Va. 633, 638, 804 S.E.2d 883, 888 (2017) (quoting *Jefferson Cnty. Bd. of Educ.*, 183 W. Va. at 24, 393 S.E.2d at 662) (emphasis omitted). On appeal, petitioners argue that each factor of the balance of hardship test weighs in their favor and that, therefore, the circuit court should not have ordered the preliminary injunction.

As to the first element of the balance of hardship test, which petitioners' address in their argument in support of their second assignment of error, petitioners contend that there is no likelihood of irreparable harm to respondents without an injunction. We disagree and find that the first element weighs in favor of respondents.

As we have previously determined, a restrictive covenant requiring that property be used for residential purposes is "intended as a mutual benefit and protection to all parties who might establish private dwellings" on properties encumbered by the restrictive covenant. *Wallace v. St. Clair*, 147 W. Va. 377, 396, 127 S.E.2d 742, 755 (1962). Property owners have a "valuable and substantial right" to have such covenants enforced. *Id.* at 398, 127 S.E.2d at 756. When property is used in contravention of the restrictive covenant, the harm to the affected property owners is "irreparable" in that it causes "a grievous or substantial injury, one not adequately compensable in damages, [] where the compensation cannot safely be measured." *Mullens Realty & Ins. Co. v. Klein*, 85 W. Va. 712, 718, 102 S.E. 677, 678 (1920) (internal citations omitted). In *Wallace*, we explained:

> The right to have [restrictive covenants] enforced, so far as the plaintiff is concerned, is one that is attached to his real estate. It is a part of his real estate, and when the owner of another lot in the subdivision attempts to violate one of these

> restrictions, he is taking from all the other owners part of their estate. He is not merely committing a trespass upon it. He is destroying it[.]

147 W. Va. at 397, 127 S.E.2d at 756 (quoting *Withers v. Ward*, 86 W. Va. 558, 560, 104 S.E. 96, 97 (1920)). Thus, we have long held that "[t]here being no form of action at law appropriate to the protection of possession and enjoyment of property by the owner thereof, . . . injunction is the proper remedy therefor." Syl. Pt. 16, *Coal & Coke Ry. Co. v. Conley*, 67 W. Va. 129, 67 S.E. 613 (1910). "An unlawful and injurious restraint upon the use and enjoyment [of property] in any form, being in law a deprivation of property pro tanto, suffices." *Id.*, 67 W. Va. at 131, 67 S.E. at 614, Syl. Pt. 17, in part.

In this instance, even petitioners do not dispute that their current use of the lot fails to conform with the requirement that the lots in the subdivision be used for residential purposes. Rather, they contend that the lot *will* be used for a residential purpose once they construct the proposed 384-square-foot dwelling on the structure. Presently, respondents claim they are suffering the loss of enjoyment of their property as a result of petitioners' noncompliance with the restrictive covenant requiring that lots be used for residential purposes. If the circuit court determines that the proposed dwelling would not remedy petitioners' noncompliance, respondents would continue to suffer the loss of enjoyment of their property even if the dwelling were constructed, which, as we explained above, would be an irreparable injury. Accordingly, contrary to petitioners' assertion, respondents are likely to suffer irreparable harm without an injunction.

Petitioners also address the second element of the balance of hardship test—the likelihood of harm to the petitioners with an injunction—in their argument in support of their second assignment of error. Petitioners claim that they will be harmed by the injunction because it requires that they remove the structure pending the construction of the proposed dwelling; however, the circuit court, in ordering the preliminary injunction, did not direct that the structure be demolished. To the contrary, the circuit court's decision merely maintains the status quo, prohibiting further construction on the property. In that petitioners have not alleged that they will suffer any other harm as a result of the preliminary injunction, we cannot conclude that there is a likelihood they will be harmed by the preliminary injunction. Consequently, we find that the second element of the balance of hardship test weighs in favor of respondents.

Petitioners discuss the third element of the balance of hardship test—respondents' likelihood of success on the merits—in the argument accompanying their first assignment of error. Petitioners argue that the circuit court erred by implicitly finding that the covenants were not expressed with sufficient clarity and by finding that petitioners planned to use the property for purposes other than residential purposes. Petitioners note that there are no covenants, expressed or implied, requiring that the property be used as a primary residence, and the covenants do not require that a residence have a minimum size. Petitioners contend that the circuit court erred in finding that the intent of the covenants, as implied by the language of the covenants, was to set a minimum size for homes in the subdivision and a maximum size of private garages. Petitioners declare that they are entitled to use their property as a secondary residence and construct a small dwelling on the structure. Based on these arguments, petitioners state that respondents are unlikely to prevail on the merits of their action. Again, we disagree, and we find that the third element of the balance of hardship test weighs in favor of respondents.

We must first address the fact that petitioners' arguments misconstrue the contents of the circuit court's order. The order does not, as petitioners state, make a finding, expressly or impliedly, that the restrictive covenants imply a minimum size for homes or a maximum size for private garages. Similarly, the order does not make any findings, expressly or impliedly, as to whether the restrictive covenants at issue require that properties in the subdivision be used as a primary residence. Accordingly, no error can lie in findings that do not exist.

Regarding the construction of the restrictive covenants, this Court has recognized that while "[t]he general rule is that . . . restrictive covenants are strictly construed[,] . . . [c]ovenants . . . 'cover things forbidden by necessary implication, just as they cover things named with unmistakable exactness.'" *Wallace*, 147 W. Va. at 387, 127 S.E.2d at 750 (quoting *Deitrick v. Leadbetter*, 8 S.E.2d 276, 278 (Va. 1940)). "[W]here the parties have failed to express their meaning with sufficient clarity to enable the court to say that the construction of the deed is plain and admits of no doubt; the rule [of strict construction] will not be applied to defeat the obvious purpose of the [restrictive covenant], or the obvious intention of the parties, even though not precisely expressed . . . ." *Id.* at 388, 127 S.E.2d at 750 (quoting 26 C.J.S. *Deeds* § 163). "The fundamental rule in construing covenants and restrictive agreements is that the intention of the parties governs. That intention is gathered from the entire instrument by which the restriction is created, the surrounding circumstances and the objects which the covenant is designed to accomplish." *Id.* at 390, 127 S.E.2d at 751.

In this case, the restrictive covenants express the intent that the subdivision have the character of a residential neighborhood with one dwelling to be erected on each lot. In *Wallace* we said that

> covenants restricting the erection of any building except for[ ]dwelling house purposes have been held to apply *to the use as well as to the character of the building*; and in strictly residential neighborhoods, where there has always been compliance with the restrictive covenants in the deeds, nullification of the restrictions has been deemed a great injustice to the owners of property.

147 W. Va. at 396, 127 S.E.2d at 755 (emphasis added) (quoting *Wood v. Blancke*, 8 N.W.2d 67, 69 (Mich. 1943)). While an attached garage may be a proper and reasonable appurtenance to a dwelling, where the dwelling is so dwarfed by the garage such that the use and character of the entire structure is that of a garage rather than dwelling, the entire structure would violate a restrictive covenant requiring that the property be used for residential purposes. Based on the limited facts available to us, petitioners' proposed dwelling, which is approximately one-seventh the size of the existing structure, would not likely change the overall use and character of the existing structure. Therefore, for purposes of a preliminary injunction, the circuit court correctly determined that respondents are likely to succeed on the merits of their claim.

Finally, we examine the fourth element of the balance of hardship test: the public interest. In the argument accompanying their second assignment of error, petitioners argued that the preliminary injunction was not warranted because the public interest favors petitioners' free use of the property. We disagree. In *Wallace*, we said:

> While the courts have manifested some disfavor of covenants restricting the use of property, they have generally sustained them where reasonable, not contrary to public policy, not in restraint of trade, and not for the purpose of creating a monopoly. It has been said that building restrictions have never been regarded as impolitic. The restrictions per se are not violative of the public good, inimical to public policy, or subversive of the public interests. So long as the beneficial enjoyment of the estate is not materially impaired and the public good and interests are not violated, such restrictions are valid.

147 W. Va. at 387-88, 127 S.E. at 750 (quoting 14 Am. Jur. *Covenants* § 206). Petitioners have not argued that the restrictive covenants at issue in this case are contrary to public policy, in restraint of trade, for the purpose of creating a monopoly, violative of the public good, inimical to public policy, or subversive of the public interests. Accordingly, petitioners have failed to demonstrate that the restrictive covenants are against the public interest, and consequently, they have failed to establish that the preliminary injunction based on those restrictive covenants is against the public interest. Thus, the final element of the balance of hardship test weighs in favor of respondents.

In that we have determined that each of the four elements of the balance of hardship test weighs in favor of respondents, we do not find that the circuit court abused its discretion by ordering the preliminary injunction.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: May 26, 2022

CONCURRED IN BY:

Chief Justice John A. Hutchison
Justice Elizabeth D. Walker
Justice Tim Armstead
Justice William R. Wooton

NOT PARTICIPATING:

Justice C. Haley Bunn