

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA23-561

Filed 17 September 2024

Catawba County, No. 19CVD1047

TIM TADLOCK, and wife, KARIN TADLOCK, Plaintiffs,

v.

MARK MORETZ, and wife, JOAN MORETZ, Defendants.

Appeal by plaintiffs from judgment entered 17 February 2023 by Judge David W. Aycock in District Court, Catawba County. Heard in the Court of Appeals 14 November 2023.

Sigmon, Clark, Mackie, Hanvey & Ferrell, P.A., by Jason White, for plaintiffs-appellants.

Patrick, Harper & Dixon, L.L.P., by David W. Hood, for defendants-appellees.

STROUD, Judge.

Plaintiffs appeal from a judgment denying their request for a permanent injunction based on alleged violations of restrictive covenants upon Plaintiffs' and Defendants' property. As Plaintiffs have failed to establish standing to enforce the equitable servitude, we affirm the trial court's judgment.

I. Background

Plaintiffs and Defendants each have a primary residence in Catawba County, North Carolina subject to restrictive covenants. The lots owned by Plaintiffs and Defendants are subject to two different sets of covenants which are not identical and contain different requirements, but both sets of covenants generally deal with the use and subdivision of the land. Plaintiffs own Lot 170 of the “Crescent Land & Timber Subdivision, as shown on [a] map recorded in Book 15, Page 187, Catawba County Registry.” This map was recorded in 1975 and titled “Crescent Land & Timber Corp. Lake Norman Map of Recreation Lots Section 32 Lots 159-170 and 174-177.”

Defendants own Lots 193 and 194, with Lot 193 shown on “Plat Book 18, Page 342” of the Catawba County Registry and Lot 194 “as shown on a plat of survey thereof prepared for Crescent Land & Timber Corporation . . . recorded in Book 18 at Page 358 in the office of the Register of Deeds for Catawba County.” Plaintiffs’ “deed history” “shows that their lot was subdivided on a plat recorded in 1975.” Plaintiffs’ lot was originally owned by Duke Power, who conveyed it to Crescent Land & Timber, and Crescent Land & Timber created the plats including Lot 170 in 1975. This 1975 plat was subject to restrictive covenants “applicable to Plaintiffs’ lot in . . . the deed from Crescent Land & Timber Corp. to Jack Williams and Norris E. Boggs” “who were Plaintiffs’ predecessors in owning title to Lot 170.”

The 1975 plat “which established the Lot currently owned by Plaintiffs was silent as to the portion of real property which ultimately came to be the Lots owned by Defendants.” Plaintiffs purchased Lot 170 as shown on the 1975 Plat in 2017.

Defendants own Lots 193 and 194, which were established in a plat recorded in 1983. “The plat that subdivided the real property currently owned by Defendants was not recorded until 1983[.]” The restrictive covenants applicable to Lot 193 were included in the “deed from Crescent Land & Timber Corp. to Effie L. Meletis” and the covenants applicable to Lot 194 were included in the “deed from Crescent Land & Timber Corp. to Defendant Mark Moretz.” “Defendants acquired their interest in their property in 1985[.]”

On 12 April 2019, Plaintiffs filed a complaint against Defendants for violating the restrictive covenants by “hav[ing] a long term tenant occupying a residence and operating a business upon” the property, having trucks and trailers on the property, and violating other zoning or governmental regulations. Plaintiffs requested the trial court enter a “permanent injunction enjoining . . . Defendants from the above said violations and ordering . . . Defendants come into compliance[.]” Defendants filed their answer on 30 July 2019 admitting restrictions “in the chain of title to . . . Plaintiffs’ property and in the chain of title to . . . Defendants’ property,” but denying “that the restrictions are the same.” Defendants also included a motion for failure to state a claim and motion to dismiss for Plaintiffs’ lack of standing. On 11 September 2020, Plaintiffs filed a motion for summary judgment and on 23 October 2020 Defendants filed a motion for summary judgment; the trial court denied each motion. The matter came on for trial on 11 October 2022, and the trial court ultimately ruled Plaintiffs did not have standing to enforce the covenants in Defendants’ deed.

Plaintiffs appeal.

II. Standard of Review

In a non-jury trial, the standard of review is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. . . . The trial court's conclusions of law drawn from the findings of fact are reviewable *de novo*.

Buyse v. Jones, 256 N.C. App. 429, 433, 808 S.E.2d 334, 337 (2017) (citations and quotation marks omitted). However, “[u]nchallenged findings of fact are presumed correct and are binding on appeal.” *In re Schiphof*, 192 N.C. App. 696, 700, 666 S.E.2d 497, 500 (2008) (citation omitted). Thus, we will review the trial court's conclusions of law *de novo*, and as Plaintiffs do not challenge any findings of fact, they are binding on appeal. *See id.*

III. Standing to Enforce Restrictive Covenants

As an initial note, Plaintiffs' brief is unclear as to whether they believe the restrictive covenants can be enforced directly or as an equitable servitude. First, Plaintiffs state they “established all requirements to address Defendants' violations of the restrictive covenants directly and as an equitable servitude” but later concede “Plaintiffs therefore did not succeed to an interest in real property owned by Crescent Land and Timber at the time the restriction was created. Plaintiffs' standing, however, is derived from their ability to enforce the covenants applicable to Defendants' property as equitable servitudes.” Nowhere in Plaintiffs' limited

argument that “a party other than the originally covenanting parties can enforce violations of restrictive covenants” do Plaintiffs contend they are such a party. Thus, to the extent Plaintiffs’ appeal relies on enforcing the restrictive covenants directly, this argument is abandoned as they do not directly address the issue, and we only review whether Plaintiffs can enforce the covenants as an equitable servitude. *See* N.C. R. App. P. 28(a) (“Issues not presented and discussed in a party’s brief are deemed abandoned.”).

A. Equitable Servitude

Plaintiffs argue they “established their right to enforce the restrictive covenants as an equitable servitude” since “a party can enforce restrictive covenants applicable to the property of another despite the lack of horizontal or vertical privity with the originally covenanting parties.”

A party seeking to enforce a restrictive covenant must have standing to enforce the covenant, either in law or in equity. *See McCrann v. Pinehurst, LLC*, 225 N.C. App. 368, 372, 737 S.E.2d 771, 775 (2013) (“Because we conclude that plaintiffs do not have standing to maintain the underlying action, we affirm the trial court’s order.”); *see also Runyon v. Paley*, 331 N.C. 293, 299, 416 S.E.2d 177, 182-83 (1992) (“[A] real covenant may be enforced at law or in equity by the owner of the dominant estate against the owner of the servient estate, whether the owners are the original covenanting parties or successors in interest.”).

A restrictive covenant is a real covenant that runs with the

land of the dominant and servient estates only if (1) the subject of the covenant touches and concerns the land, (2) there is privity of estate between the party enforcing the covenant and the party against whom the covenant is being enforced, and (3) the original covenanting parties intended the benefits and burdens of the covenant to run with the land.

Runyon, 331 N.C. at 299-300, 416 S.E.2d at 183 (citation omitted). However, “a party unable to enforce a restrictive covenant as a real covenant running with the land may nevertheless be able to enforce the covenant as an equitable servitude.” *Id.* at 309, 416 S.E.2d at 188.

In order to enforce a restrictive covenant on the theory of equitable servitude, it must be shown (1) that the covenant touches and concerns the land, and (2) that the original covenanting parties intended the covenant to bind the person against whom enforcement is sought and to benefit the person seeking to enforce the covenant.

Id. at 310, 416 S.E.2d at 189. As noted above, Plaintiffs ultimately contend their standing “is derived from their ability to enforce the covenants applicable to Defendants’ property as equitable servitudes” as they do not have vertical privity. Thus, we will only review whether Plaintiffs can enforce this covenant as an equitable servitude.

a. Touch and Concern the Land

While Plaintiffs’ brief devotes little discussion to the “touch and concern” requirement, we will still briefly address it. “[T]he touch and concern requirement is not capable of being reduced to an absolute test or precise definition.” *Id.* at 300, 416

S.E.2d at 183. “For a covenant to touch and concern the land, it is not necessary that the covenant have a physical effect on the land. It is sufficient that the covenant have some economic impact on the parties’ ownership rights[.]” *Id.* (citation omitted).

Here, Plaintiffs contend the covenants at issue restrict Defendants’ use of the land by limiting it to “residential or resort residential purposes[;]” allowing “[n]ot more than one single family residential dwelling” on the lot; forbidding “business, commercial or industrial uses, except” the covenants “shall not preclude Grantee’s use for either long term residential leasing or short term resort rental[;]” and prohibiting subdividing lots “into two or more parcels[.]” These restrictions show a burden to Defendants’ land, as they limit how Defendants may use the property. *See id.* at 301, 416 S.E.2d at 183 (“[A] restriction limiting the use of land clearly touches and concerns the estate burdened with the covenant because it restricts the owner’s use and enjoyment of the property and thus affects the value of the property.” (citation omitted)). However, Plaintiffs must also show the “covenant somehow affects the dominant estate by, for example, increasing the value of the dominant estate.” *Id.* Just as in *Runyon*, the covenants here touch and concern the land “[c]onsidering the close proximity of the lands involved here and the relatively secluded nature of the area where the properties are located[.]” *Id.* at 301, 416 S.E.2d at 184.

b. Intent of the Parties

Most of the parties’ arguments focus on the intent requirement, as Plaintiffs

contend “the original covenanting parties intended the covenants to bind Defendants and to Benefit Plaintiffs” and Defendants contend “Plaintiffs cannot show intent to bind Defendants and burden Plaintiffs.”

“If the party seeking enforcement was not an original party to the covenant, he must show that the covenanting parties intended that he be able to enforce the restriction.” *Id.* at 311, 416 S.E.2d at 190. While

[i]t is presumed in North Carolina that covenants may be enforced only between the original covenanting parties[,] . . . this presumption may be overcome by evidence that (1) the covenanting parties intended that the covenant personally benefit the party seeking enforcement, or (2) the covenanting parties intended that the covenant benefit property in which the party seeking enforcement holds a present interest.

Id. A party can show the latter by “evidence of a common scheme of development, of succession of interest to benefitted property retained by the covenantee, or of an express statement of intent to benefit property owned by the party seeking enforcement.” *Id.* at 311-12, 416 S.E.2d at 190 (citations omitted). “The test for determining whether a general plan of development exists is whether substantially common restrictions apply to all similarly situated lots.” *Dill v. Loiseau*, 263 N.C. App. 468, 471, 823 S.E.2d 642, 645 (2019) (citation and quotation marks omitted).

The covenants applicable to Lot 170 are contained in the deed from Crescent Land & Timber to Jack Williams and Norris Boggs, and are as follows:

1. That said lot shall be used only for single family recreation and/or single family residence purposes;

2. That not more than one private single family residential dwelling, together with accessory buildings and facilities normally incident to a private single family residential home site shall be constructed upon said lot;

. . . .

4. Subdivision of the land conveyed by this deed into two or more lots is expressly prohibited except where:

A. Every lot resulting from such subdivision shall contain at least 30,000 square feet in area; and

B. Every lot resulting from such subdivision, if any part of any boundary line of that lot is within one hundred fifty (150') feet distance from one of the Catawba River lakes, shall have a lake or water front width of seventy-five (75') feet or more. The lake or water front width shall be measured on a straight line between the two points at which the side lines of said lot intersect with Duke Power Company's lake property[.]

The covenants in the deed for Defendants' Lots 193 and 194 are exactly the same, and provide as follows:

1. Said lot shall be used only for residential or resort residential purposes;

2. Not more than one single family residential dwelling, together with accessory buildings and facilities normally incident to a single family residential home site shall be constructed upon said lot;

3. Said lot shall not be used for business, commercial or industrial uses, except this provision shall not preclude Grantee's use for either long term residential leasing or short term resort rental;

4. Subdivision of said lot into two or more parcels is prohibited, except Grantee may convey land to the owner or owners of adjoining property provided the lot then

remaining shall not be reduced in area below ninety percent (90%) of the total area contained in said lot as herby conveyed[.]

The trial court made multiple findings addressing the intent element, stating:

26. The deed language in Plaintiffs' chain of title to Lot 170 differs from the deed language in Defendants' chain of title to Lots 193 and 194 in multiple ways with respect to the applicable paragraphs.

27. First, in the language preceding those paragraphs, an additional clause is present in Defendants' deed chain which reads "said reservations and restrictions may be modified or abrogated at any time by and with the mutual written consent of the Grantor or its successors and the then current owner or owners of the lot herein conveyed."

28. Second, Paragraph 1 of Defendants' deeds sets forth that "said lot shall be used only for residential or resort residential purposes." Such language is absent from Plaintiffs' deed chain.

29. Third, Paragraph 3 of Defendants' deeds sets forth additional language allowing for the use of "either long term residential leasing or short term resort rental" that is absent from Plaintiffs' deed.

30. Fourth, Paragraph 4 between the Plaintiffs' deed and the Defendants' deed differs in the entirety.

As Plaintiffs do not challenge any of the trial court's findings, they are binding on appeal. *See In re Schiphof*, 192 N.C. App. at 700, 666 S.E.2d at 500.

Plaintiffs cite two cases supporting their argument all lots were part of a general plan of development, *Rice v. Coholan*, 205 N.C. App. 103, 695 S.E.2d 484, *disc. rev. denied*, 364 N.C. 435, 702 S.E.2d 304 (2010), and *Dill*, 263 N.C. App. 468, 823 S.E.2d 642.

In *Rice*, a couple bought a plot of land and subdivided the property into “two blocks of nine lots each.” *Rice*, 205 N.C. App. at 104, 695 S.E.2d at 486. *Rice* does not contain a detailed discussion on the “General Plan of Development” requirement, merely stating

the development in the case before us involves fourteen of eighteen lots in Jefferson Park being restricted, *inter alia*, to use for residential purposes. These fourteen lots were also subject to a prohibition against subdivision, combined with restrictions governing the location, number, and architecture of any buildings constructed on the lots. In light of these facts, we find that there are substantially common restrictions applicable to all lots of like character. Further, the properties were sold in accordance with a map dated 31 July 1946 and titled: “A Subdivision Plan Of A Part Of Jefferson Park Charlotte, N.C.” We therefore hold that the trial court correctly concluded that there was a general plan of development for the lots in Jefferson Park and that the owners of lots encumbered by the restrictive covenants could enforce those covenants against owners of similarly restricted lots.

Id. at 114, 695 S.E.2d at 491-92 (brackets omitted). But in the background section, there is some discussion of the actual covenants; all covenants prohibited any house to be built within 100 feet from the center line of the street or 25 feet of a side line. *Id.* at 104-05, 695 S.E.2d at 486-87. Each lot could only be used for “residential purposes” and homes should only be 2 ½ stories in height. *Id.* However, this Court’s discussion does not compare or contrast these restrictions in detail, merely giving a general description of the covenants and mostly focusing on the number of encumbered lots and the date the map was created. *Id.* at 114, 695 S.E.2d at 491-92.

In *Dill*, at issue were seven lots, purchased by the same owner on the same date, and “[l]ots 1-5 were subdivided for sale, Lot 6 contained [the owner’s] home, and Lot 7 consisted of a larger tract of undeveloped land.” *Dill*, 263 N.C. App. at 469, 823 S.E.2d at 644. Between 1953-1956, the owner sold lots 1-5, all subject to identical covenants. *Id.* Years later, Lot 7, which “was not encumbered by any restrictive covenants prohibiting subdivision at the time” the original plat was recorded, was subdivided into three lots but the deeds for the three lots contained the same covenants as Lots 1-5 upon conveyance. *Id.* at 469-70, 823 S.E.2d at 644. A subsequent owner of the majority of Lot 1 and the entirety of Lot 2 challenged the validity of the covenants, stating there was no general plan of development. *Id.* at 470, 823 S.E.2d at 644. This Court held the trial court did not err in concluding there was a general plan of development since

Lots 1-5 were all conveyed by [the original owner] subject to identical restrictive covenants prohibiting subdivision. As in *Rice*, [the original owner] retained ownership of the lots that were not initially subject to any restrictive covenants. Furthermore, when Lot 7 was later sold as three smaller parcels, those parcels were all conveyed subject to the same restrictive covenant prohibiting subdivision as Lots 1-5.

Id. at 472, 823 S.E.2d at 645-46. First, unlike the present case, the seven lots in *Dill* were all purchased at the same time, the time of the original conveyance in 1953. *Id.* at 472, 823 S.E.2d at 645. Further, this Court’s opinion merely stated the covenants were “identical” without engaging in any further analysis, whereas the issue in this

case centers on the language of the covenants, as they are not identical. *Id.*

We first note the timing of the restrictive covenants. Plaintiffs' lot is a "subdivided parcel from a plat that was recorded in 1975." This 1975 plat "was entitled 'Crescent Land & Timber Corp. Lake Norman Map of Recreation Lots Section 32 Lots 159-170 and 174-177.'" However, "[t]he plat from 1975 which established the Lot currently owned by Plaintiffs was silent as to the portion of real property which ultimately came to be the Lots owned by Defendants." In comparison, "[t]he plat that subdivided the real property currently owned by Defendants was not recorded until 1983[.]" Plaintiffs use *Dill* and *Rice* to contend the restrictive covenants need not be "created contemporaneously to be enforced as an equitable servitude[.]" But while the lots in *Dill* and *Rice* were conveyed subject to the covenants at different times, all the lots were identified in the same plat. *See Dill*, 263 N.C. App. at 472, 823 S.E.2d at 645 ("In the present case, the Melton Map was recorded in 1953 and consisted of seven lots in total. Lots 1-5 were all conveyed between 1953 and 1956 and were each subject to identical restrictive covenants prohibiting subdivision. Lot 6, which contained Mrs. Melton's home, was not subject to any restrictive covenants either at the time the Melton Map was recorded or when Mrs. Melton sold the property in 1963. Lot 7, which consisted of a large undeveloped tract of land, was similarly unencumbered by covenants at the time Lots 1-5 were conveyed. However, Lot 7 was later subdivided into three small parcels and sold between 1960 and 1964 subject to the same restrictions prohibiting subdivision as Lots 1-5."); *see also Rice*, 205 N.C.

App. at 114, 695 S.E.2d at 492 (“Further, the properties were sold in accordance with a map dated 31 July 1946 and titled: ‘A Subdivision Plan Of A Part Of Jefferson Park Charlotte, N.C[.]’”). Here, as noted above, the original plat recorded by Crescent Land & Timber in 1975 specifically included Plaintiffs’ lot, but “was silent as to the portion of real property which ultimately came to be the Lots owned by Defendants.” Had Defendants’ Lots 193 and 194 been included in the 1975 plat along with Plaintiffs’ Lot 170, this case would be more similar to *Dill* and *Rice*. Since the two maps in *Dill* and *Rice* identified all the lots in the initial map or plan of development, this case is distinguishable. *See Dill*, 263 N.C. App. at 472, 823 S.E.2d at 645; *see also Rice*, 205 N.C. App. at 114, 695 S.E.2d at 492.

Next, as the trial court noted in Finding 27, the deed for Lots 193 and 194 includes a paragraph before the covenants that states “said reservations and restrictions may be modified or abrogated at any time by and with the mutual written consent of the Grantor or its successors and the then current owner or owners of the lot herein conveyed.” This paragraph was not included in Plaintiffs’ deed, which was recorded in 1975, years before Defendants’ deed was recorded in 1983. As Defendants’ deed includes a provision providing for abrogation of the restrictive covenants, and this provision is not included in Plaintiffs’ deed, this indicates the restrictive covenants are not subject to “substantially common restrictions” sufficient for a general plan of development. *Dill*, 263 N.C. App. at 471, 823 S.E.2d at 645 (citation and quotation marks omitted).

Finally, we consider the similarities and differences in the actual covenants at issue, as “[t]he test for determining whether a general plan of development exists is whether substantially common restrictions apply to all similarly situated lots.” *Id.* Plaintiffs acknowledge the differences in the covenants for Plaintiffs’ and Defendants’ lots but contend “[s]light differences in the language of the covenants applicable to the parties’ properties do not exhibit a lack of common scheme of development by Crescent Land & Timber.” The covenants need not be identical to show intent of a general plan of development, but they must be “substantially common[.]” *Id.* Thus, we will look to the language of the covenants, specifically focusing on those covenants the trial court discussed in its judgment.

First, the trial court noted the covenants applicable to Plaintiffs’ lot had 19 separate paragraphs, but the covenants applicable to Defendants’ lots have 12 separate paragraphs. Then, the trial court focused on three paragraphs of the covenants to conclude they were not substantially similar. In paragraph one, “Defendants’ deeds set forth that ‘said lot shall be used only for residential or resort residential purposes.’ Such language is absent from Plaintiffs’ deed chain.” Specifically, the covenants as to Lot 170 indicate the lots can be used for “single family recreation and/or single family residence purposes” and the covenants as to Lots 193 and 194 can be used for “residential or resort residential purposes.” These covenants differ as to whether they are limited to single family uses but also to whether the purpose is “recreation” or “residence” purposes in Lot 170 or “residential or resort

residential” in Lots 193 and 194. Next, the trial court found as to paragraph 3, “Defendants’ deeds sets forth additional language allowing for the use of ‘either long term residential leasing or short term resort rental’ that is absent from Plaintiffs’ deed.” The covenant as to Lot 170 stated “[s]aid lot shall not be used for business, commercial, industrial, condominium, apartment, or other multi-family residential uses” and as to Lots 193 and 194 “[s]aid lot shall not be used for business, commercial or industrial uses, except this provision shall not preclude Grantee’s use for either long term residential leasing or short term resort rental.” While both covenants regulate the use of each lot, the trial court correctly noted Defendants’ deed specifically allows for “long term residential leasing or short term resort rental” but Plaintiffs’ deed does not. Defendants thus have more freedom to use their property in a manner Plaintiffs do not. Finally, the trial court discussed paragraphs 4 in each respective deed, noting it had the most significant differences, stating “Paragraph 4 between the Plaintiffs’ deed and the Defendants’ deeds differs in the entirety.” “Paragraph 4 of Defendants’ deeds prohibits in part the subdivision of the subject Lot into two or more parcels, with a limited exception to convey land to the owners of adjacent parcels.” Specifically, paragraph 4 as to Lot 170 states:

4. Subdivision of the land conveyed by this deed into two or more lots is expressly prohibited except where:

A. Every lot resulting from such subdivision shall contain at least 30,000 square feet in area; and

B. Every lot resulting from such subdivision, if any

part of any boundary line of that lot is within one hundred fifty (150') feet distance from one of the Catawba River lakes, shall have a lake or water front width of seventy-five (75') feet or more. The lake or water front width shall be measured on a straight line between the two points at which the side lines of said lot intersect with Duke Power Company's lake property[.]

Paragraph 4 as to Lots 193 and 194 states:

4. Subdivision of said lot into two or more parcels is prohibited, except Grantee may convey land to the owner or owners of adjoining property provided the lot then remaining shall not be reduced in area below ninety percent (90%) of the total area contained in said lot as hereby conveyed[.]

Thus, the trial court correctly noted paragraph 4 is completely different in each deed. While the wording noted by the trial court in paragraphs 1 and 3 may seem like slight differences to Plaintiffs, they notably allow Defendants' lot to have a broader range of use of the property than Plaintiffs. Further, paragraph 4 cannot be deemed a slight difference as the restrictions are completely different as to subdivision of the property.

Thus, considering the timing of the covenants, the initial paragraph allowing Defendants and the original covenantor to abrogate or modify the covenants between only the two parties, and the substantial differences in the covenants themselves, the trial court did not err in concluding there was no intent of a general plan of development, and Plaintiffs thus do not have standing to enforce the covenants as an equitable servitude. This conclusion is limited to whether Plaintiffs in this case have

standing to enforce the covenants against Defendants. We do not address the enforceability of the covenants by a party with standing, but for the reasons stated above, Plaintiffs do not have standing to enforce these covenants.

IV. Conclusion

Plaintiffs have failed to demonstrate the trial court erred in concluding that they “failed to establish the requisite privity to enforce a covenant running with the land, and neither have they shown the required intent of the original covenanting parties necessary to enforce an Equitable Servitude” as there was no intent of a general plan of development. Plaintiffs thus do not have standing to enforce the covenants as an equitable servitude and we affirm the trial court’s judgment denying Plaintiffs’ request for a permanent injunction.

AFFIRMED.

Chief Judge DILLON and Judge ZACHARY concur.

Report per Rule 30(e).