

2008

HOA Homeowners Association v. Brown : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

**THE HOA HOMEOWNERS'
ASSOCIATION, a Utah non-profit
corporation,**

Plaintiff-Appellee,

v.

LISA M. BROWN,

Defendant-Appellant.

**REPLY BRIEF OF APPELLANT
LISA M. BROWN**

Case No. 20080836-CA

Appeal from the Third Judicial District Court, Summit County, State of Utah
Honorable Robert K. Hilder, Case No. 070500211

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Defendant-Appellant Lisa M. Brown (“Ms. Brown” or “Appellant”) respectfully submits this Reply Brief of Appellant.

INTRODUCTION

The Brief of Appellee South Ridge Homeowners’ Association (the “HOA” or “Appellee”) fails to justify the trial court’s illogical interpretation of the Covenants, Conditions and Restrictions (the “CC&Rs”) governing the subdivision in which Ms. Brown’s home is located. The trial court’s interpretation ignores a fundamental rule of construction applicable to restrictive covenants, conflicts with the plain meaning of the CC&Rs, and is not supported by the CC&Rs as a whole. As a result, the summary judgment entered against Ms. Brown should be reversed.

Because no evidence in the record shows that Ms. Brown ever rented her Jeremy Ranch home for a period of less than a week at a time, the primary question in this appeal is whether weekly rentals violate Article X, Section 2(a) (the “rental provision”) of the CC&Rs. The answer to this question is an unequivocal “no.” Despite the interpretation advanced by the HOA and adopted by the trial court, no reasonable person could read the provision prohibiting “time shares, nightly rentals, and similar uses” as prohibiting *weekly* rentals. If the drafters of the CC&Rs truly intended to prohibit weekly rentals – or any rental other than “nightly” rentals, for that matter – they easily could have done so, and they could have done so in a manner that put the subdivision homeowners on fair notice of exactly what type of conduct was proscribed. Because the drafters did not do so, Ms. Brown did not violate the CC&Rs, and the trial court’s entry of summary

judgment in favor of the HOA must be reversed. In the alternative, the rental provision is at least ambiguous, and the case should be remanded for further proceedings.

The trial court also erred by entering a permanent injunction against Ms. Brown. As the trial court itself acknowledged, the HOA failed to establish there was *any threat* of a continuing violation, rendering the permanent injunction unnecessary and inappropriate. In addition, the scope of the injunction is overbroad and invasive, improperly requiring Ms. Brown to provide private information to the HOA any time she has visitors in the home – whether they be friends or family – including the names of every visitor and the length of their intended stay at the home. If the injunction is to remain in place, it should be tailored to target only the alleged violations, not Ms. Brown’s undisputed right to have family and friends stay at her home whenever she sees fit.

Finally, if this Court reverses the summary judgment ruling, then the award of costs and attorney fees to the HOA must also be reversed.

ARGUMENT

I. THE HOA INACCURATELY PORTRAYS MS. BROWN’S INTERPRETATION OF THE RENTAL PROVISION

Initially, it is important to point out that the HOA misconstrues, and thus misrepresents, the interpretation of the rental provision offered by Ms. Brown. The HOA claims that, under Ms. Brown’s interpretation, “[t]he only prohibition . . . is on stays of one night,” such that any rental of two or more nights would be allowed. Appellee’s Br. at 12. This statement is incorrect. While Ms. Brown’s interpretation would prohibit

single-night rentals, her interpretation would *also* prohibit any multi-night rentals of less than a week. The language is clear – “nightly” rentals are prohibited; weekly rentals are not. Thus, the HOA’s inaccurate characterization of Ms. Brown’s interpretation should be rejected.

II. THE TRIAL COURT’S INTERPRETATION OF THE RENTAL PROVISION IS INCORRECT

According to the HOA, Ms. Brown focuses inappropriately on the term “nightly,” to the exclusion of the other terms in the rental provision and in the CC&Rs as a whole. However, as discussed further below, Ms. Brown’s interpretation properly recognizes the rule requiring strict construction of restrictive covenants, comports with the plain and ordinary meaning of the rental provision, and is supported by the CC&Rs as a whole. In the alternative, even if Ms. Brown’s interpretation is not correct as a matter of law, it is *at least* as tenable as the interpretation advanced by the HOA. As such, the rental provision is ambiguous, see Plateau Mining Co. v. Utah Div. of State Lands & Forestry, 802 P.2d 720, 725 (Utah 1990), and the trial court’s ruling to the contrary was in error. In either case, the judgment of the trial court must be reversed.

A. The HOA Improperly Disregards the Applicable Rule of Strict Construction, Which Operates in Ms. Brown’s Favor

Fundamentally, the HOA essentially ignores the principle of construction favoring the free use of property, which has repeatedly been recognized and applied by Utah courts. The HOA’s only reference to this rule of construction – which the HOA does not refer to as such – is in a footnote, where the HOA attempts to distinguish the cases and then simply asserts that the cases do not mandate interpretation of the provision in Ms.

Brown's favor. Regardless of the different issues addressed in these cases, however, the proposition stands: covenants restricting property use should be construed against the party seeking to enforce them. "[R]estrictive covenants are *not* favored in the law and are strictly construed in favor of the *free and unrestricted* use of property." Dansie v. Hi-Country Estates Homeowners' Ass'n, 1999 UT 62, ¶ 14, 987 P.2d 30 (quotations and citations omitted) (emphases added); St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194, 198 (Utah 1991) ("Where expressly stated, restrictive covenants are not favored in the law and are strictly construed in favor of free and unrestricted use of property."); Swenson v. Erickson, 2006 UT App 34, ¶ 8, 131 P.3d 267 (same). In fact, even in states where the rule of strict construction has been relaxed, the outcomes have been favorable to Ms. Brown. *See, e.g., Lowden*, 909 A.2d at 266-67 (explaining loosened rule of "reasonably strict" construction, and applying rule to conclude that short-term rentals were not prohibited by covenant calling for single family residential use). This well established rule of construction clearly is applicable in this case, and it clearly supports Ms. Brown's interpretation of the rental provision.

B. Ms. Brown's Interpretation of the Rental Provision Is Based Upon the Plain Language of the CC&Rs

The HOA claims that Ms. Brown improperly focuses on the dictionary definition of the term "nightly," suggesting that utilizing dictionary definitions removes the words from their context and subjects them to "technical refinement," rather than relying upon the plain and ordinary meaning of the words. *See Appellee's Br.* at 12 (quoting Freeman v. Gee, 423 P.2d 155, 163 (Utah 1967)). To the contrary, standard dictionary definitions

are a primary source – if not the best source – of popular meaning. See Warburton v. Virginia Beach Fed. Sav. & Loan Ass’n, 899 P.2d 779, 782-83 (Utah Ct. App. 1995) (“The ordinary meaning of contract terms is often best determined through standard, non-legal dictionaries.”); see also In re J.D.M., 810 P.2d 494, 497 (Utah Ct. App. 1991) (“[W]hen determining the plain and ordinary meaning of statutory terms we turn to the dictionary for guidance.”); accord Lorillard Tobacco Co. v. Am. Legacy Found., 903 A.2d 728, 738 (Del. Super. Ct. 2006) (“Under well-settled case law, Delaware courts look to dictionaries for assistance in determining the plain meaning of terms which are not defined in a contract. This is because dictionaries are the customary reference source that a reasonable person in the position of a party to a contract would use to ascertain the ordinary meaning of words not defined in the contract.”); El Rincon Supportive Servs. Org., Inc. v. First Nonprofit Mut. Ins. Co., 803 N.E.2d 532, 536 (Ill. Ct. App. 2004) (“An undefined [contract] term is given its plain and ordinary meaning, which can be obtained from a dictionary.”) (alteration in original).

Utah courts routinely refer to dictionary definitions to determine the plain meaning covenants and contracts. For example, in a case relied upon by the HOA, the Utah Court of Appeals turned to a standard dictionary definition of the word “a” to conclude that the term in that instance meant “one.” See Holladay Duplex Mgmt. Co., LLC, v. Howells, 2002 UT App 125, ¶ 7, 47 P.3d 104 (affirming district court’s holding that restrictive covenant was unambiguous and allowed construction of only one single-family home per lot). The case law is replete with similar examples. See, e.g., Salt Lake County Bd. of Equalization v. Tax Comm’n, 2004 UT App 472, ¶ 16, 106 P.3d 182 (concluding, based

upon dictionary definitions, that plain meaning of “‘concession’ is a grant of property or a franchise by a government entity to be used for a specific purpose.”); *State v. Paul*, 860 P.2d 992, 993-94 (Utah Ct. App. 1993) (looking to dictionary definitions of the word “throw” to determine that the plain and ordinary meaning of the term does not include “spitting”); *Dawson v. Dawson*, 841 P.2d 749, 751 (Utah Ct. App. 1992) (affirming trial court’s entry of summary judgment for insurer because land in question was “vacant” under general dictionary definition of term).

In this case, the dictionary definition confirms that Ms. Brown’s interpretation of the rental provision is correct – the plain and ordinary meaning of the term “nightly” is “by night” or “every night.” See *Merriam Webster Online Dictionary*, definition of “nightly,” available at <http://www.merriam-webster.com/dictionary/nightly>>nightly. The term “weekly” has a distinct meaning – “every week” or “by the week”¹ – and simply cannot be replaced by or confused with the term “nightly.” If the drafters of the CC&Rs had intended to preclude anything other than “nightly rentals,” such as weekly or monthly rentals, they could easily have said so. Cf. *Innerlight, Inc. v. The Matrix Group, LLC*, 2009 UT 31, ¶ 15, 214 P.3d 854 (“If the parties intended the condition precedent . . . to apply to the entire Contract, they could have easily included language to that effect. We cannot conclude that the parties intended to condition the enforceability of the entire agreement on [the condition precedent] when the plain language of the Contract indicates no such intent.”). Because

¹ See *id.*, definition of “weekly,” available at <http://www.merriam-webster.com/dictionary/weekly>>weekly.

Ms. Brown's interpretation is correct and comports with the plain and ordinary meaning of the language, the trial court's ruling that the rental provision prohibits all rentals of less than thirty (30) days was error.

Unlike Ms. Brown's interpretation of the rental provision, the HOA's interpretation conflicts with the plain and ordinary meaning of the language. The HOA asserts that the meaning of the rental provision is necessarily "to prohibit short term, transient rentals." [Appellee's Br. at 11]. Unfortunately, this interpretation of the CC&Rs is no clearer than the language of the provision itself. That is, even if the provision were deemed to preclude "short term" rentals, the meaning of "short term" is far less clear than the meaning of the term "nightly." As stated by one court:

[T]he Lowden's argument is that § 8.1 just prohibits "short-term rentals." Nevertheless, there is *utterly nothing* in the language of the Declaration which provides any basis for drafting a distinction between long-term rentals and short-term rentals. Moreover, *at what point does the rental of a home move from short-term to long-term: a week? a month? a season? three months? six months? one year? or several years?*

Lowden v. Bosley, 909 A.2d 261, 268 (Md. Ct. App. 2006) (emphases added) (affirming trial court's ruling that short-term rental of subdivision homes was not precluded by restriction to "single family residential purposes only"). In short, the impact of the HOA's interpretation is to alter and expand the plain language of the rental provision, which clearly is not permitted under the well established rules of covenant interpretation.

In fact, altering the plain meaning of the rental provision by reference to extrinsic evidence is precisely what the trial court did. The HOA argues the trial court's reliance upon a county business licensing ordinance was proper in this regard. In particular, the

HOA contends that, as a resident of Summit County, Ms. Brown “is bound by” the ordinance, which defines “nightly lodging facility” as “any place or portion thereof that is rented or otherwise made available to person for transient lodging purposes for a period of less than thirty days” *See* Addendum to Appellant’s Br., Ex. B. This argument has two serious flaws. First, the ordinance is extrinsic evidence that should not have been considered by the court absent a determination of ambiguity. *See, e.g., City of Bowie v. Mie Props., Inc.*, 922 A.2d 509 (Md. Ct. App. 2007) (“Extrinsic evidence is only utilized when the intent of the parties and the purpose of a restrictive covenant cannot be divined from the actual language of the covenant in question.”). The district court in this case specifically determined the rental provision was unambiguous, but it nevertheless went on to consider the ordinance in determining the meaning of the provision. Second, the ordinance at issue is directed at an entirely different subject, i.e., the regulation of business in the county, as opposed to restrictions on the use of property, and thus has no bearing on the meaning of the CC&Rs. *Cf. Ewing v. Watson*, 790 N.Y.S.2d 40, 43 (N.Y. App. Div. 2005) (“‘The use made of land under a zoning ordinance and the use of the same land under an easement or restrictive covenant are, as a general rule, separate and distinct matters, the ordinance being a matter of legislative enactment and the easement or covenant a matter of private agreement.’”) (citation omitted). Reference to the ordinance should not be permitted in this instance.

C. The Language of the CC&Rs as a Whole Supports Ms. Brown's Interpretation

The HOA contends that Ms. Brown's interpretation of the rental provision should be rejected because it conflicts with the CC&Rs as a whole, including the language immediately surrounding the "nightly rental" provision, the separate provision expressly permitting rentals "from time to time," *see* Addendum to Appellant's Br., Ex. A, Art. X, § 16, and the overall intent of the CC&Rs to maintain a single-family, residential character. The HOA's arguments fail to carry the day.

According to the HOA, the placement of the term "nightly rental" between the terms "timeshare" and "similar use" supports its interpretation, because "timeshares are typically sold in one-week increments," and because "similar uses" therefore must encompass weekly rentals. Appellee's Br. at 12. This argument is not supportable. First, the HOA cites no authority for its assertion that timeshares are generally sold in one-week increments. Second, even if a week were the most typical interval of ownership sold as timeshares, it certainly is not the only interval for which a timeshare may be sold. In fact, as cited by one court, the definition in Black's Law Dictionary suggests that timeshares in intervals other than a week are common:

"Timesharing" is defined as a '[f]orm of shared property ownership, commonly in vacation or recreation condominium property, wherein rights vest in several owners to use property *for specified period[s] each year* (e.g., *two weeks* each year).'

Aggressive Mktg. Servs., Inc. v. Crosswinds, Inc., No. 179981, 1996 WL 33349395, *2, n.2 (Mich. Ct. App. Nov. 22, 1996) (unpublished) (quoting BLACK'S LAW DICTIONARY (6th ed.) at 1483) (emphases added). Further, the CC&Rs do not prohibit any particular

duration or type of timeshare, but instead prohibit all timeshares. If the drafters wanted to preclude only timeshare intervals of one week, but not of any other duration, presumably they would have so indicated. Therefore, the placement of “nightly rental” next to the term “timeshare” does not operate to expand the term “nightly rental” to encompass “weekly rental,” nor does it justify expanding the term “similar uses” to include such a meaning.

A 1999 Michigan Supreme Court case, in which the court ruled that timesharing violated a covenant restricting use to residential purposes only, but that short-term rentals did not, supports this argument. *See O’Connor v. Resort Custom Builders, Inc.*, 591 N.W.2d 216, 221 (Mich. 1999). The defendants had argued that the plaintiffs waived the right to enforce the residential use restriction as against timesharing, because they had typically *allowed* short-term property rentals. Rejecting this argument, the court stated that permitting short-term rentals was “different in character [from] and does not amount to a waiver of enforcement against interval ownership.” *Id.* Because timesharing is distinct in character from “short-term” rentals, the HOA’s comparison of the concepts is inapt.

As mentioned, a term prohibiting weekly rentals cannot simply be lumped into the “similar use” language of the rental provision. In connection with its argument in this regard, the HOA attempts to defeat Ms. Brown’s application of the *esjudem generis* principle of construction, asserting that “‘similar use’ is its own, distinct restriction that must be given effect,” and that the restriction must be construed according to the specific enumerations surrounding the term. Appellee’s Br. at 13. Again, the HOA’s argument is

misplaced. Construing the term “similar use” according to the more specific terms that surround it, i.e., “timeshare” and “nightly rental” simply does not lead to the conclusion that weekly rentals are prohibited, and the HOA’s assertion to that effect is conclusory at best. The HOA essentially claims that, because timeshares are typically sold in one-week increments, weekly rentals are a “similar use.” However, as discussed above, the CC&Rs do not indicate any particular time measurement for the timeshares that are prohibited, and the HOA has no support for its contention that one-week increments are the most common in any event. Looking to the term “nightly rental” does not advance the HOA’s argument, because “nightly” is a term used in contrast to terms such as “weekly,” “monthly,” and “annually” and, as such, does not support the expansion of the term “similar use” to encompass such rentals.

The HOA also claims Brown’s interpretation of the rental provision is inconsistent with the provisions of the CC&Rs calling for “quiet residential conditions favorable to family living,” Exhibit E to Appellant’s Br. at 15, Art. X, and the provision specifically allowing “certain rentals [and] leases.” *Id.* at 18, Art X, § 16. The HOA claims these provisions demonstrate the drafters’ intent to prohibit short term rentals, which the HOA defines as any rental of less than thirty (30) days. This argument should be rejected for at least three reasons.

First, extensive case law confirms that “short term” rentals are consistent with restrictive covenants calling for single-family, residential use, and that such rentals do not constitute a business or commercial use. For example, in Ross v. Bennett, 203 P.3d 383 (Wash. Ct. App. 2009), *petition for rev. denied*, 210 P.3d 1018 (Wash. July 7, 2009), the

appellate court reversed the trial court's entry of an injunction prohibiting a property owner from conducting short term rentals. *See id.* at 384. The operative provision in *Ross* stated that “[a]ll parcels within said property shall be used for residence purposes only and only one single family residence may be erected on such parcel.” *Id.* (quoting covenant provision). Interpreting this covenant, the court concluded that short-term vacation rentals are a residential use of property, and whether the owner derives rental income from short or long-term rentals “in no way detracts from the residential characteristics of the use by the tenant.” *Id.* at 388. “Renting the [] home to people who use it for the purposes of eating, sleeping, and other residential purposes is consistent with the plain language of the [covenant]. The transitory or temporary nature of such use by vacation renters does not defeat the residential status.” *Id.*

A recent New Mexico case reached a similar result. As in *Ross*, the plaintiff in the case claimed the defendant's short-term rentals of his vacation cabin violated the covenants limiting use to dwelling purposes and precluding business and commercial uses. *See Mason Family Trust v. Devaney*, 207 P.3d 1176, 1176 (N.M. Ct. App. 2009).

The court disagreed, stating

While Devaney's renting of the property as a dwelling on a short-term basis may have constituted an economic endeavor on Devaney's part, to construe that activity as one forbidden by the language of the deed restrictions is unreasonable and strained. Strictly and reasonably construed, the deed restrictions do not forbid short-term rental for dwelling purposes.

Id. at 1178.

Reaching the same conclusion, the Maryland Court of Appeals in 2006 explained its ruling in language particularly applicable to this case:

In sum, § 8.1's provision allowing a lot to be "used for single family residential purposes," particularly when coupled the Declaration's express allowance of "tenants," *plainly permits a rental* to a single family residing in the home, *whether the rental is for a "short" term or a "long" term*. If the framers of the Declaration had intended to prohibit rentals shorter than a certain period, they would have said so

Lowden v. Bosley, 909 A.2d 261, 267 (Md. Ct App. 2006) (emphases added) (affirming trial court's judgment that short-term vacation rentals were permissible).

Numerous other cases, including those cited in Ms. Brown's Opening Brief, have reached the same conclusion. *See, e.g., Scott v. Walker*, 645 S.E.2d 278, 283 (Va. 2007) (holding that nightly and weekly rentals did not violate the covenant requiring use only for residential purposes); Mullen v. Silvercreek Condominium Owner's Assoc., Inc., 195 S.W.3d 484, 487-88 (Mo. App. 2006) (holding that provisions restricting use to "single family residential use" did not prevent owners from renting their units on a daily or nightly term); Yogman v. Parrott, 937 P.2d 1019, 1023 (Or. 1997) (concluding that short-term rentals were permitted under covenant requiring residential use). Thus, Ms. Brown's interpretation of the rental provision corresponds with the CC&Rs as a whole, and does not undermine the drafters' intent to maintain the neighborhood's residential character.

With the exceptions that the covenants in the case did not include a provision specifically prohibiting "nightly rentals" and did not include a provision expressly allowing an owner "to rent or lease said owner's residential building from time to time," the Idaho Supreme Court case of Pinehaven Planning Board v. Brooks, 70 P.3d 664 (Idaho 2003), is also on all fours with this case. In Pinehaven, the covenants precluded

“commercial or industrial ventures or business of any type” and permitted only “one (1) single family dwelling” per lot. *See id.* at 665. The planning board of the community filed suit against an individual owner, arguing that the defendants’ “daily and weekly rental” of their property was prohibited by these covenants. Although the trial court agreed with the board, the Supreme Court reversed, observing that,

whether short or long-term, [the defendants’ rental of their single-family residence] does not fit within these prohibitions. The only building on the Brooks’ property remains a single-family dwelling and renting this dwelling to people who use it for the purposes of eating, sleeping, and other residential purposes does not violate the prohibition on commercial and business activity as such terms are commonly understood.

Id. at 668. Accordingly, the court concluded as follows:

This Court determines, as a matter of law, the Covenants are unambiguous and *clearly allow the rental of residential property for profit*. Further, even if this Court determined the Covenants were ambiguous, [due to the rule of strict construction,] the ambiguity would still be resolved in the [defendants’] favor.

Id. at 667 (emphasis added). This is exactly the conclusion the Utah Court of Appeals should reach here.

Second, the provision of the CC&Rs that expressly *permits* rentals supports Ms. Brown’s interpretation, and the HOA’s argument to the contrary is like trying to fit a square peg into a round hole. The only argument the HOA asserts in this regard is that, in contrast to a rental, a “lease” is “typically long term and provides the tenant an interest in the estate.” Appellee’s Br. at 13. However, the case cited by the HOA to support this proposition says nothing about leases being long term, and in fact says nothing about the duration of leases at all. *See Keller v. Southwood North Med. Pavilion, Inc.*, 959 P.2d

102, 107 (Utah 1998). Moreover, the cited portion of the case compares the interest granted by a lease to the interest granted by a license, and does not discuss the concepts of rent or rentals at all. *See id.* The case involved the trial court's determination that the defendant had violated the forcible entry statute, *see Utah Code Ann. § 78-36-1 et seq.*, and its imposition of treble damages as a result. The Supreme Court reversed this determination, concluding that because the "lease" agreement at issue did not convey a leasehold interest but instead a license, the plaintiff was not entitled to relief under the statute. *See id.* at 107-08. Thus, the case is inapposite and does not support The HOA's argument.

Further, even if the distinction between leases and rentals to which The HOA refers is valid – which is unlikely given that the dictionary definition of "lease" does not specify any particular time period for which a leasehold interest may be granted² – the structure of the provision does not support this interpretation. Indeed, the provision in question simply permits the owners to "rent or lease," without making any distinction between the terms, and without specifying any required intervals or time periods for renting or leasing one's property. If anything, the provision allowing rentals from time to time simply explicates the rental provision – rentals are allowed, but only if they are for intervals of a week or more, and in such cases the rentals will not amount to a business or commercial use of the property.

² For example, the Merriam-Webster Dictionary defines the term lease as "a contract by which one conveys real estate, equipment, or facilities for a specified term and for a specified rent." *See* definition of "lease," available at <http://www.merriam-webster.com/dictionary/lease>.

Third, the cases cited by the HOA are inapposite. Both cases involved the operation of bed and breakfast operations in the properties involved, as opposed to the occasional weekly rentals in this case. For example, the first case relied upon by the HOA held that a covenant providing for “private residential dwellings” prohibited the use the property as a bed and breakfast. *See Houck v. Rivers*, 450 S.E.2d 106, 109 (S.C. Ct. App. 1994). However, operating a business out of a home is clearly not the same as renting occasionally renting the property for durations of a week or more. *See, e.g., Yogman*, 937 P.2d at 1022 (indicating that short-term rentals did not have profit as their primary aim, unlike bed and breakfast).

The second case relied upon by the HOA actually supports Ms. Brown’s position. *See Robins v. Walter*, 670 So.2d 971 (Fla. Ct. App. Dist. 1 1995). While the case did hold that the defendants’ operation of a bed and breakfast on their property was a violation of the covenants at issue, the court specifically distinguished between rentals of residential property and the operation of a bed and breakfast, which the court dubbed “an ongoing business or commercial use of property which would violate the intent of the [] covenant.” *Id.* at 974.

Because Ms. Brown’s interpretation of the rental provision is fully supported by the CC&Rs as a whole, the trial court’s summary judgment should be reversed. Alternatively, the rental provision is at least ambiguous, and it should be interpreted strictly to promote the free use of property.

III. THE PERMANENT INJUNCTION SHOULD BE VACATED

A. There is No Threat of Any Ongoing Violation to Justify Permanent Injunctive Relief

In response to Ms. Brown's argument that the permanent injunction was improper due to a lack of any continuing harm, the HOA claims injunctive relief is essentially automatic in cases involving restrictive covenants, and Ms. Brown's conduct since the entry of the injunction demonstrates the risk of continuing harm.

First, although the standard for proving damages or injury appears to be relaxed in cases involving restrictive covenants, the Utah case upon which the HOA relies for this proposition merely makes the point in dicta. *See Fink v. Miller*, 896 P.2d 469, 655 n.8 (Utah Ct. App. 1995) (affirming trial court's determination that restrictive covenant was unenforceable because abandoned).³ Further, injunctive relief is improper where the covenants at issue are vague and fail to provide adequate notice of what conduct is proscribed. *See* 43A CORPUS JURIS SECUNDUM INJUNCTIONS § 176 (updated June 2009). The HOA's argument also ignores the trial court's deliberate striking from the proposed order of the language indicating there was a threat of continuing violations, without which the entry of a permanent injunction is inappropriate. *See U.S. v. Oregon State Med. Soc'y*, 343 U.S. 326, 333 (1952); *Mitchell v. Hertzke*, 234 F.2d 183, 186-87 (10th Cir. 1956) ("[A]n injunction will not issue merely to punish past violations but only to

³ The South Carolina case cited by the HOA for this proposition, *Houck v. Rivers*, 450 S.E.2d 106 (S.C. Ct. App. 1994), is equally questionable. Although the HOA acknowledges that the case was overruled, it fails to note that the point on which the case was overruled is relevant. Specifically, the case was overruled to the extent it indicated injunctive relief was mandatory upon a showing of a violation of a restrictive covenant. *See Buffington v. T.O.E. Enters.*, 680 S.E.2d 289, 291 (S.C. 2009).

stop existing violations or to prevent future infractions.”). Indeed, one of the cases cited by the HOA specifically references the necessity of a showing of a threat of continuing harm. *See Carrier v. Lindquist*, 2001 UT 105, ¶ 26, 37 P.3d 1112.

Second, the HOA’s allegation that recent conduct by Ms. Brown demonstrates the risk of continuing harm is incorrect. There been no determination by the trial court as to whether any violation actually occurred, and information regarding such *alleged* violations is not part of the record on appeal.⁴ As such, the conduct is not before the Court, and there is no trial court decision to review.

B. The Injunction Is Overbroad and Impinges Upon Ms. Brown’s Undisputed Right to Allow Friends and Family to Use the Home

The HOA claims the injunction properly balances the parties’ interests, and that it has no adequate remedy at law. However, as explained in Ms. Brown’s Opening Brief, the injunction requires Ms. Brown to provide one-week, advance written notice of any and all visitors to the home. It does not confine the notice requirement to renters, which are the only type of visitors the HOA has a right or need to know about. Moreover, because the notice requirement applies to family and friends who may visit Ms. Brown’s home, the injunction improperly impinges on Ms. Brown’s right to permit such visitors to stay at her home whenever she sees fit. Accordingly, if the injunction is left in place, it should be narrowed to focus only on the conduct that allegedly violated the CC&Rs, i.e., rentals of the home for periods of less than thirty (30) days.

⁴ The only reference in the record to Ms. Brown’s alleged violations is just that – the HOA’s allegations that Ms. Brown violated the injunction. *See* R. at 129-31. In fact, Ms. Brown has *not* rented her property since long before the injunction was entered, and has only allowed friends and family to stay in the home since that time.

As to the HOA's claim that it has no adequate remedy at law, this is simply not true. The HOA can amend the CC&Rs at any time to clarify that rentals for any period of less than thirty (30) days are not allowed and that advance notice must be provided for any rental of more than thirty (30) days.

The permanent injunction entered against Ms. Brown was improperly granted because, as the trial court specifically found, there is no threat of ongoing violations. If the injunction remains in place, however, it should be confined to the actual conduct alleged to be in violation of the CC&Rs.

IV. THE TRIAL COURT'S AWARD OF ATTORNEY FEES SHOULD BE REVERSED, AND THE HOA IS NOT ENTITLED TO ATTORNEY FEES ON APPEAL

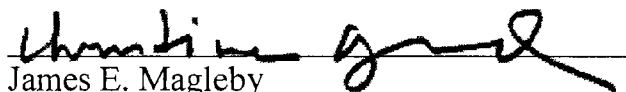
If the trial court's entry of summary judgment is reversed, then the award of attorney fees to the HOA must also be reversed, and the HOA would not be entitled to its costs or attorney fees for this appeal.

CONCLUSION

As set forth above and in the opening brief, Ms. Brown respectfully asks the Court to reverse the trial court's entry summary judgment and its award of costs and attorney fees. Ms. Brown also asks that the permanent injunction be vacated or narrowed.

RESPECTFULLY SUBMITTED this 19th day of October, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of October, 2009, I caused to be mailed, by United States first-class mail, two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANT LISA M. BROWN** to the following:

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