2007

Papanikolas Brothers Enterprises, LC; White Investment Co., Inc. v. Wendy's Old Fashioned Hamburgers of New Young, Inc. : Brief of Appellee

Utah Supreme Court

Michael Z. Hayes; Todd J. Godfrey; Mazuran & Hayes; Attorneys for Plaintiffs/Appellants.
Ronald G. Russell; Parr, Waddoups, Brown, Gee & Loveless; Attorneys for Defendant/Appellee.

IN THE UTAH SUPREME COURT

PAPANIKOLAS BROTHERS ENTERPRISES, LC; and WHITE INVESTMENT CO., INC., Plaintiffs/Appellants, v. WENDY'S OLD FASHIONED HAMBURGERS OF NEW YORK, INC., Defendant/Appellee.	Case No. 20070580

APPELLEE'S BRIEF

Appeal from Decision of the Utah Court of Appeals Affirming Portions of Final Judgment of the Third Judicial District Court in and for Salt Lake County, State of Utah - Honorable J. Dennis Frederick

Michael Z. Hayes (1432)
Todd J. Godfrey (6094)
MAZURAN & HAYES, P.C.
2118 East 3900 South, Suite 300
Salt Lake City, Utah 84124
Telephone: (801) 272-8998
Facsimile: (801) 272-1551

Attorneys for Plaintiffs/Appellants

Ronald G. Russell (4134)
Matthew J. Ball (9414)
PARR WADDOUPS BROWN GEE & LOVELESS, P.C.
185 South State Street, Suite 1300
Salt Lake City, Utah 84111
Telephone: (801) 532-7840
Facsimile: (801) 532-7750

Attorneys for Defendant/Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF JURISDICTION

The Utah Supreme Court has jurisdiction of this matter pursuant to Utah Code Ann. § 78-2-2(3)(a) (2007).

ISSUE PRESENTED

Whether the Court of Appeals erred in affirming the trial court's imposition of an injunction against Appellants' interference with the maintenance of Wendy's' drive-through facilities.

The Court of Appeals' decision is reviewed for correctness, focusing on whether that court correctly reviewed the trial court's decision under the appropriate standard of review. In the context of a summary judgment motion, which presents a question of law, the Court employs a correctness standard and views the facts and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party. *See Pratt v. Nelson*, 2007 UT 41, ¶ 12, 164 P.3d 366 (citing *Dowling v. Bullen*, 2004 UT 50, ¶ 7, 94 P.3d 915).

STATEMENT OF THE CASE

Nature of the Case

Plaintiffs/Appellants Papanikolas Brothers Enterprises, LC and White Investment Co., Inc. (collectively, "Appellants") own the Canyon Rim Shopping Center (the "Shopping Center") located at approximately 3300 East 3300 South in Salt Lake City, Utah. Defendant/Appellant Wendy's Old Fashioned Hamburgers of New York, Inc. ("Wendy's") owns and operates a restaurant on a parcel within the Shopping Center (the "Wendy's

Property"). This case concerns the location of a drive-through lane and related facilities (the "Drive-Through Facilities") constructed in 1982 and associated with the Wendy's Property.

Course of Proceedings

This action was originally filed by Metropolitan Square Associates ("Metropolitan Square") on July 30, 2004. [R. at 1.] Metropolitan Square's Complaint alleged that the Drive-Through Facilities constituted a trespass with respect to the Shopping Center and a breach of contract with respect to the Declaration of Restrictions and Grant of Easements (the "Declaration") governing the Shopping Center. [R. at 2-4.] Metropolitan Square sought an injunction requiring Wendy's to remove the Drive-Through Facilities and unspecified monetary damages. [R. at 4.] In its Answer, Wendy's denied Metropolitan Square's allegations. Wendy's also and asserted counterclaims for: (1) a declaratory judgment to the effect that Wendy's is entitled to maintain the Drive-Through Facilities in their present location; (2) recognition of a prescriptive easement in Wendy's favor pursuant to which Wendy's is entitled to maintain and use the Drive-Through Facilities in their present location; and (3) an injunction barring Metropolitan Square from interfering with Wendy's' right to use and maintain the Drive-Through Facilities. [R. at 15-60.]

Following some discovery, Metropolitan Square filed an Amended Complaint, which substituted Appellants as plaintiffs and added allegations to the effect that Wendy's' menu-board signs (the "Menu-Board Signs") also constitute a breach of the Declaration. [R. at 78-87, 102-03.]

Wendy's filed a motion for summary judgment on September 30, 2005. [R. at 114-16.] After full briefing and oral argument, the trial court entered a Minute Entry on December 12, 2005 granting Wendy's' motion. [R. at 307-10.] The trial court subsequently entered Findings of Fact and Conclusions of Law and a Final Judgment dismissing all claims asserted in Appellant's Amended Complaint. [R. at 375-83; 384-87.] The trial court's Final Judgment stated that the Drive-Through Facilities and Menu-Board Signs are permitted by the Declaration and may remain in place, enjoined Appellants from interfering with Wendy's use and maintenance of the Drive-Through Facilities and Menu-Board Signs, and awarded Wendy's its costs and attorneys' fees in the amount of $19,516.50. [R. at 384-87.]

Appellants appealed the trial court's Final Judgment. [R. at 397-99.] The Utah Court of Appeals issued an opinion following full briefing and oral argument. [2007 UT App 211.] The Court of Appeals affirmed the trial court's Final Judgment in part and reversed and remanded in part. Specifically, the Court of Appeals affirmed the trial court's determination that Appellants' trespass claim was time barred, and affirmed the trial court's decision to enjoin Appellants from interfering with the Drive-Through Facilities. [*Id.*, at ¶¶ 27-30.] In addition, the Court of Appeals reversed the trial court's grant of summary judgment in Wendy's' favor on Appellants' breach of contract claim with respect to the Menu-Board Signs. [*Id.*, at ¶ 18.] The Court of Appeals also vacated the trial court's award of attorneys fees and costs and remanded the issue to the trial court. [*Id.*, at ¶ 33.]

Appellants filed their petition for a Writ of Certiorari on July 23, 2007. The Court granted the writ on October 23, 2007 as to the issue set forth above.

Statement of Facts

The Wendy's Property is located within the Shopping Center owned by Appellants. [R. at 376.] Both the Wendy's Property and the Shopping Center are included in the property described in the Declaration, recorded in the Salt Lake County Recorder's office on September 24, 1982 as entry No. 3714292, in Book 5410, at Page 823. [R. at 376.] The Declaration identifies three distinct parcels of property within the property described therein. [R. at 376.] The Wendy's Property is located within what the Declaration refers to as "Parcel Three." [R. at 376.] Plaintiff/Appellant White Investment, Inc. owns parcels one and two, and American Stores Properties, Inc. ("ASPI") leases Parcel One from White Investment, Inc. [R. at 30-32.]

The Wendy's property was developed as a Burger King restaurant by The Boyer Company in or about 1982. [R. at 376.] At that time, a drive-through lane was constructed on the north side of the Wendy's Property. [R. at 377.] The drive-through lane is bounded on the north by a narrow, landscaped island edged with concrete curbing, and on the south by the restaurant (the drive-through lane and related island are referred to herein as the "Drive-Through Facilities"). [R. at 377.] The Drive-Through Facilities extend from the northwest corner of the restaurant located on the Wendy's Property to the northeast onto what is defined by the Declaration as the "Common Area." [R. at 377.] Exhibit "A" to the Declaration is a sketch of the Shopping Center labeled "Proposed Site Plan" (the "Plot Plan"). [R. at 52.] The Plot Plan shows the Drive-Through Facilities as two curved lines running from the northwest corner of the restaurant located on the Wendy's Property to the

northeast. [R. at 377.] Although the Plot Plan does not purport to be a survey, the physical relationship between the restaurant building and drive-through lane as shown on the Plot Plan is generally consistent in scale with the actual location of the restaurant located on the Wendy's Property and the Drive-Through Facilities. [R. at 120.] From the time they were constructed in or about 1982 through the present, the Drive-Through Facilities have remained in continuous use in the same location and configuration. [R. at 378.]

With respect to Parcel Three, the Declaration provides that

> No building featuring drive-in, drive-up or drive-through traffic shall be located on Parcel Three, except as shown on the Plot Plan, without the prior written consent of the Owner of Parcel Two and ASPI, including consent to the location of the drive-in, drive-up or drive-through lanes of such facility. Such consent will not be unreasonably withheld provided that the location of such lanes and the use thereof do not impede or inhibit access to and from the conduct of business from the buildings in the Shopping Center or access to and from the adjacent streets.

[R. at 38.] With respect to "Common Area," the Declaration provides in relevant part as follows:

> Common Area shall be used only for vehicular access, circulation and parking, pedestrian traffic and the comfort and convenience of the Owners (i.e., the owners of the property to which the Declaration pertains), tenants, customers, invitees, licensees, agents and employees of the Owners and business occupants of the buildings constructed in the Shopping Center (i.e., the owners of the property to which the Declaration pertains), and for the servicing and supplying of such businesses, except as otherwise provided herein . . . . No building, barricade or structure may be placed, erected or constructed within the Common Area on any parcel except loading and delivery docks and covered areas attached to such docks, trash enclosures, outside storage areas . . . pylon (to the extent not herein prohibited) and directional signs, bumper guards or curbs, paving, landscaping and landscape planters, lighting standards, driveways, sidewalks, walkways, parking stalls, columns or pillars supporting roof overhangs, and any other improvements as may be required

> under applicable laws, rules, ordinances and regulations of any governmental body having jurisdiction over the Shopping Center . . . . The parking and vehicular traffic patterns for the areas of the Shopping Center which are designated "Common Area Only" on the Plot Plan [attached to the Declaration as Exhibit "A"] shall be designed, installed and maintained as shown on the Plot Plan.

[R. at 32-33; 377-78.] Relatedly, with respect to passage over the Common Area, the Declaration states that

> Each Owner, as grantor with respect to each parcel owned by such Owner, hereby grants to each of the other Owners, as grantees, for the benefit of each of such other Owners and their respective tenants, employees, agents, customers and invitees of such tenants, and for the benefit of each parcel owned by such grantee, a non-exclusive easement appurtenant to each parcel owned by each grantee for ingress and egress by vehicular and pedestrian traffic and for vehicular parking upon, over and across the Common Area within each parcel or parcels owned by the grantor.

[R. at 34-35.]

SUMMARY OF ARGUMENTS

Appellants contend first that the Court of Appeals' decision should be reversed because it conflicts with this Court's decision in *Nyman v. Anchor Development, L.L.C.*, 2003 UT 27, 73 P.3d 357. There is no conflict because this case is factually different from *Nyman* in two important respects. First, unlike the garage at issue in *Nyman*, the Drive-Through Facilities are expressly permitted by the Declaration. Wendy's has a contractual right to maintain the Drive-Through Facilities. Second, while the garage at issue in*Nyman* permanently occupied the defendant's property and could only be used by the plaintiff, the Drive-Through Facilities are open to all patrons of the Shopping Center and serve to separate

travel and parking areas as provided by the Declaration. These facts demonstrate that *Nyman* is inapplicable to this case.

Appellants also argue that the trial court could not enjoin their removal of the Drive-Through Facilities without first passing on the merits of Wendy's' claim that the Drive-Through Facilities are expressly authorized by the Declaration. The trial court's injunction was proper because the Drive-Through Facilities are located in accordance with the Declaration and Appellants failed to demonstrate the existence of a genuine issue of material fact on this point. Further, contrary to Appellants' assertion, the trial court did consider the merits of Wendy's' claim that the Drive-Through Facilities are expressly authorized by the Declaration. Finally, all claims asserted in this case were before the trial court on Wendy's' motion for summary judgment and it made no difference whether the trial court granted Wendy's' request for an injunction or denied Appellants' request for an injunction. This Court should, therefore, affirm the Court of Appeals' decision.

ARGUMENT

The Court of Appeals affirmed the trial court's determination that Appellants' trespass and breach of contract claims are time-barred. That ruling is not at issue in this appeal. Based on its determination that the relevant statutes of limitation had run on Appellants' claims, the Court of Appeals also correctly held that Appellants' demand for an injunction requiring the removal of the Drive-Through Facilities was untimely. Only this decision is before the Court. *See* Order (granting Petition for Writ of Certiorari), dated October 23, 2007.

Appellants raise two arguments in support of their contention that the Court of Appeals improperly affirmed the trial court's issuance of an injunction. First, Appellants contend that the Court of Appeals' decision should be reversed because it conflicts with this Court's decision in *Nyman v. Anchor Development, L.L.C.*, 2003 UT 27, 73 P.3d 357. Second, Appellants argue that the trial court and the Court of Appeals improperly granted Wendy's' request for injunctive relief before making "any determination on the merits that would support the injunction." *See* Brief of Plaintiffs/Appellants, at p. 8. Neither of Appellants' arguments withstands scrutiny. This Court should, therefore, affirm the Court of Appeals' decision with respect to the injunctive relief granted by the trial court.

I. THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH *NYMAN*

In *Nyman v. Anchor Development, L.L.C.*, this Court held that a prescriptive right to use real property cannot arise out of the maintenance of permanent improvements on land owned by another. *See id.*, at ¶¶ 17-18. Appellants interpret *Nyman* far too broadly to mean that a person can never exclusively possess real property they do not own. *See* Brief of Plaintiffs/Appellants at pp. 11-12 ("[A]s a result of the decision of the Court of Appeals, [Appellants] are the owners of property from which they are completely excluded, and Wendy's is in exclusive possession of property it does not own. This result is in direct conflict with the decision of this Court in *Nyman*."). As a result of their over-expansive interpretation, Appellants contend that the Court of Appeals erred by forbidding them to remove the Drive-Through Facilities. The facts and legal issues in the instant case, however,

are entirely different from those in *Nyman* in that Wendy's has an express easement to maintain the Drive-Through Facilities, and the Drive-Through Facilities do not result in exclusive possession. Consequently, *Nyman* is inapposite.

A. Wendy's Has the Right to Maintain the Drive-Through Facilities under the Shopping Center Declaration

The most glaring flaw in Appellants' argument is its failure to account for Wendy's' contractual right and express easement to maintain the Drive-Through Facilities. Those rights arise out of the Declaration, which contains covenants, conditions and restrictions binding on all of the owners of the Shopping Center parcels. With respect to drive-through facilities generally, the Declaration provides in relevant part that "[n]o building featuring drive-in, drive-up or drive-through traffic shall be located on Parcel Three, except as shown on the Plot Plan . . . ." [R. at 38; 377.] Thus, so long as the Plot Plan shows a "building featuring . . . drive-through traffic" on Parcel Three, the Declaration expressly authorizes such facilities. This conclusion is supported by the fact that the Declaration clearly contemplates and expressly permits improvements such as the Drive-Through Facilities:

> No building, barricade or structure may be placed, erected or constructed within the Common Area on any parcel except . . . directional signs, bumper guards or curbs, paving, landscaping and landscape planters, lighting standards, driveways . . . as may be required under applicable laws, rules, ordinances and regulations of any governmental body having jurisdiction over the Shopping Center . . . . The parking and vehicular traffic patterns for the areas of the Shopping Center which are designated "Common Area Only" on the Plot Plan shall be designed, installed and maintained as shown on the Plot Plan.

[R. at 33.]

The Plot Plan attached to the Declaration does indeed show a building featuring a drive-through lane on Parcel Three. [R. at 52.] Parcel Three is located in the lower right area of the Plot Plan. [R. at 52.] The Wendy's Property appears in the lower left area of Parcel Three as a rectangle. [R. at 52.] The Plot Plan shows the Drive-Through Facilities as two curved lines running from the northwest corner of the rectangle to the northeast onto the Common Area of the Shopping Center. [R. at 52.] Not surprisingly, therefore, the trial court expressly found that "[t]he Drive Through Facilities extend from the northwest corner of the restaurant located on the Wendy's Property to the northeast onto what is defined by the Declaration as the 'Common Area' of the Shopping Center,"[1] [R. at 377] and held that the Declaration expressly permits the Drive-Through Facilities [R. at 380].

The Declaration contains clear and explicit language by which the owners covenant that permitted Common Area facilities, including "drive-in, drive-up or drive-through lanes," [R. at 38], and related features such as "signs, bumper guards or curbs, paving, landscaping and landscape planters, lighting standards, driveways, sidewalks [and] walkways," [R. at 32-33; 377-78], may be located within the Common Area. The Declaration further provides an express cross-easement for the use of such facilities. [R. at 34-35.]

The existence of these express covenants and easement for the Drive-Through Facilities renders *Nyman* completely inapplicable to this case. Unlike the plaintiff in *Nyman*, Wendy's need not and does not rely on a prescriptive right to maintain the Drive-Through

---

[1]The Court of Appeals did not disturb the trial court's factual finding on this point.

Facilities. Rather, much like any tenant who enjoys exclusive possession of land owned by another pursuant to a lease contract, Wendy's relies on the covenants and easements in the Declaration as the basis for its right to maintain the Drive-Through Facilities. If the plaintiff in *Nyman* had express covenant and easement rights to maintain his garage on the defendant's property, the plaintiff's resort to the prescriptive easement theory rejected by the Court would have been wholly unnecessary. Indeed, the case would likely never have arisen. In any event, *Nyman* is not implicated by this case, and the holding of *Nyman* is not controlling. The Court of Appeals correctly disregarded Appellants' *Nyman* argument, and this Court should too.

B. The Drive-Through Facilities are Unlike the Garage at Issue in *Nyman*.

Nyman is also inapposite because the improvements at issue in that case were significantly different, in both form and function, from the Drive-Through Facilities. *Nyman* involved an encroaching garage building that exclusively occupied a portion of the property and could be used only by the plaintiff. *See Nyman*, 2003 UT 27, at ¶ 5. By contrast, the Drive-Through Facilities are open to all of the patrons of the Shopping Center and serve to separate travel and parking areas as provided by the Declaration. As reflected by the Plot Plan, photographs, and a survey map of the Shopping Center, the Drive-Through Facilities occupy "Common Area" within the Shopping Center that is adjacent to an asphalt parking lot. [R. at 52, 197, 209, and 248.] The Drive-Through Facilities are some distance from Wendy's' nearest neighbor and are low-lying and unobtrusive. Thus, while the garage at

issue in *Nyman* may have had a measurable, negative impact on the defendant's property, to the extent that the Drive-Through Facilities affect Appellant's property at all, they do so only in a positive way.

In any event, as noted previously, the Drive-Through Facilities are expressly authorized and clearly provided for by the Declaration. With respect to the Drive-Through Facilities, the Declaration provides that:

> Common Area shall be used only for vehicular access, circulation and parking, pedestrian traffic and the comfort and convenience of the Owners (i.e., the owners of the property to which the Declaration pertains), tenants, customers, invitees, licensees, agents and employees of the Owners and business occupants of the buildings constructed in the Shopping Center . . . . No building, barricade or structure may be placed, erected or constructed within the Common Area on any parcel except loading and delivery docks and covered areas attached to such docks, trash enclosures, outside storage areas . . . pylon (to the extent not herein prohibited) and directional signs, bumper guards or curbs, paving, landscaping and landscape planters, lighting standards, driveways, sidewalks, walkways, parking stalls, columns or pillars supporting roof overhangs, and any other improvements as may be required under applicable laws, rules, ordinances and regulations of any governmental body having jurisdiction over the Shopping Center . . . . The parking and vehicular traffic patterns for the areas of the Shopping Center which are designated "Common Area Only" on the Plot Plan [attached to the Declaration as Exhibit "A"] shall be designed, installed and maintained as shown on the Plot Plan.

[R. at 32-33 (emphasis added).] Again, no agreement authorized the garage at issue in *Nyman*, much less an agreement as clearly contemplative of the Drive-Through Facilities as the Declaration. This fact, as well as the fact that the garage at issue in *Nyman* and the Drive-Through Facilities at issue here are materially different in form and function, demonstrate that the Court of Appeals' decision in this case is not in conflict with *Nyman*.

As the conflict Appellants perceive simply does not exist, *Nyman* provides no basis for reversing the Court of Appeals' decision.

II. THE COURT OF APPEALS PROPERLY AFFIRMED THE TRIAL COURT'S GRANT OF INJUNCTIVE RELIEF

Appellants argue that the trial court could not enjoin Appellants' removal of the Drive-Through Facilities without first passing on the merits of Wendy's' claim that the Drive-Through Facilities are expressly authorized by the Declaration. *See* Brief of Plaintiffs/Appellants at pp. 13-15. Appellants' argument has two prongs, neither of which has merit.

A. No Issue of Fact Precluded Summary Judgment.

The first prong of Appellants' argument is that summary judgment was inappropriate because there is "a genuine dispute of fact as the [*sic*] whether or not the Drive Through Facilities of Wendy's are consistent with the Declaration." Brief of Plaintiffs/Appellants at p. 13. Put another way, Appellants contend that whether the Drive-Through Facilities are located where the Declaration allows them to be located is disputed. Because there is a dispute, Appellants claim, it was improper for the trial court to grant summary judgment and enjoin the removal of the Drive-Through Facilities. In reality, there is no dispute and summary judgment was appropriate, as the Court of Appeals recognized.[2]

---

[2]Summary judgment was appropriate without regard to the existence of a factual dispute about the location of the Drive-Through Facilities because such a dispute was not material to the trial court's determination that the statutes of limitation had run on Appellants' breach of contract and trespass claims. Courts recognize numerous situations in which the passage of time results in a non-owner's exclusive right to use another party's property. *See, e.g., Hirshfield v. Schwartz*, 110 Cal. Rptr.2d 861, 871-73 (Cal. Ct. App. 2001) (affirming trial court's creation of an equitable right

While the Court of Appeals declined to address the issue, the trial court correctly determined that the Drive-Through Facilities are indeed located in accordance with the Declaration. The Declaration is a contract like any other. As such, so long as the Declaration is unambiguous, the interpretation of the Declaration is a matter of law. *See Grynberg v. Questar Pipeline Co.*, 2003 UT 8, ¶ 36, 70 P.3d 1. A contract is ambiguous "if it is 'unclear, it omits terms, or the terms used to express the intentions of the parties may be understood to have two or more plausible meanings.'" *Quaid v. United States Healthcare, Inc.*, 2007 UT 27, ¶ 10, 158 P.3d 525 (quoting *Saleh v. Farmers Ins. Exch.*, 2006 UT 20, ¶ 15, 133 P.3d 428).

The Declaration is unambiguous with respect to the location of the Drive-Through Facilities because the Plot Plan clearly shows their position. Indeed, Wendy's and Appellants agreed that the Plot Plan represents the Drive-Through Facilities with two curved lines extending from the northwest corner of the rectangle representing the Wendy's restaurant. [R. at 120, 279.] Inasmuch as the Plot Plan includes only one pair of curved lines to represent the Drive-Through Facilities, the Plot Plan is not susceptible to more than one meaning. Further, because the Plot Plan is clearly not drawn to scale, includes no dimensions, and purports to be nothing more than a sketch of the Shopping Center, the parties to the Declaration must have intended to permit construction of the Drive-Through Facilities where they in fact constructed them. Had the parties to the Declaration wanted to specify the location of the Drive-Through Facilities with greater precision than they chose

---

to occupy property owned by others); *Noronha v. Stewart*, 245 Cal. Rptr. 94, 96-97 (Cal. Ct. App. 1988) (reversing trial court's determination that defendants did not have an irrevocable license to maintain a wall on plaintiffs' property).

to, they could have done so. That they did not demonstrates their intent to provide for construction of the Drive-Through Facilities where the Plot Plan generally shows them to be. Any purported ambiguity regarding the intended location of the Drive-Through Facilities was completely removed when the Drive-Through Facilities were constructed in 1982.

Appellants attempted to create a factual dispute with the expert testimony of Mark Babbitt. Mr. Babbitt purported to approximate a scale for the Plot Plan of one inch being equal to 125 feet. [R. at 279.] Using his estimate, Mr. Babbitt compared the Plot Plan with a recent, to-scale survey map of the Shopping Center. Mr. Babbitt contended that his methodology shows that the Drive-Through Facilities are between two and approximately ten feet from the locations specified by the Plot Plan. [R. at 280-81 ("The North edge of the access for the drive thru window in [the Plot Plan] angles to the Southwest and is from 2 feet to over 10 feet closer to Wendy's north property line than the access shown on Wendy's survey.").] A litigant cannot, however, prevent the entry of summary judgment merely by asserting that an issue of material fact exists. Rather, there must be a genuine dispute. *See* Utah R. Civ. P. 56(c). In this case there was not. Since the Plot Plan is not a to-scale survey, all Mr. Babbitt demonstrated is that the Drive-Through Facilities are, where the parties to the Declaration constructed them, as depicted on the Plot Plan.

The parties to the Declaration obviously eschewed precision when it came to depicting the location where they constructed the Drive-Through Facilities. The parties were content to simply sketch two curved lines extending from the rectangle representing the Wendy's restaurant. In consequence, the trial court correctly determined that there was no genuine

dispute that the Drive-Through Facilities are located consistent with the Plot Plan. Summary judgment in Wendy's' favor was thus appropriate and the Court should affirm the Court of Appeals.

B. The Court of Appeals Properly Affirmed the Trial Court's Denial of Appellants' Demand for Injunctive Relief.

Appellants' also assail the Court of Appeals' affirmation of the trial court's issuance of an injunction by arguing that it was improper to enjoin removal of the Drive-Through Facilities before "any judgment on the merits of [Wendy's'] breach of contract claim." Brief of Plaintiffs/Appellants at p. 14. Appellants are mistaken about the nature of the trial court's disposition of this case in two respects.

Appellants' first mistake is in believing that the trial court failed to pass on the merits of Wendy's' claims before enjoining interference with the Drive-Through Facilities. *Id.* In fact, the trial court fully considered the location of the Drive-Through Facilities and entered appropriate Findings of Fact and Conclusions of Law. The trial court concluded in relevant part as follows:

> 9. Although the Declaration generally forbids the construction of improvements on common areas, it expressly authorizes Drive Through Facilities located on Parcel three as shown on the Plot Plan.
>
> 10. The Drive Through Facilities are consequently excepted from the Declaration's general prohibition of improvements on the Common Area and are, in fact, expressly permitted.
>
> 11. Because the Drive Through Facilities are expressly permitted by the Declaration, Wendy's' is entitled to a declaratory judgment decreeing that the Drive Through Facilities may remain in use in their present location and configuration.

[R. at 380.] Clearly, the trial court interpreted the Declaration and, based on the undisputed fact that the Drive-Through Facilities are located consistent with the Plot Plan, properly issued an injunction.

Appellants' second mistake is their assertion that "the only injunction at issue before the trial court or the Court of Appeals was the injunction issued by the trial court on Wendy's request." Brief of Plaintiffs/Appellants at p. 14. This was not the case. Wendy's moved for summary judgment "on all causes of action asserted in [Appellants'] Amended Complaint, and all causes of action asserted in Wendy's Counterclaim." [R. at 114-15.] While Wendy's Counterclaim certainly included a request for injunctive relief, Appellants' Amended Complaint did too. Indeed, the First Cause of Action set forth in Appellants' Amended Complaint demanded "an order . . . requiring Wendy's to vacate the property and to restore the property to its condition prior to the construction of the drive-through facilities." [R. at 81.] Thus, Appellants' request for an injunction requiring removal of the Drive-Through Facilities was squarely before the trial court on Wendy's' motion for summary judgment.

The Court of Appeals did not, as Appellants suggest, improperly allow Wendy's to use the statutes of limitation applicable to Appellants' breach of contract and trespass claims as a sword, rather than as a shield. *See* Brief of Plaintiffs/Appellants at pp. 14-15. Rather, the trial court and Court of Appeals both correctly ruled that Appellants' contract and trespass claims are time-barred. In consequence, the Court of Appeals explained, Appellants' request for injunctive relief is also untimely. *See* 2007 UT App 211, ¶¶ 27-30 (citing *Field-*

Escandon v. DeMann, 251 Cal. Rptr. 49, 52-53 (Cal. Ct. App. 1988) and *Troeger v. Fink*, 332 P.2d 779, 782-83 (Cal. Ct. App. 1958) for the proposition that requests for injunctive relief for the removal of permanent trespasses are barred by the statute of limitation applicable to trespass claims). Significantly, Appellants do not contest the Court of Appeals' determination that their request for injunctive relief is time-barred.

This Court should affirm the Court of Appeals' decision without regard to the precise basis for the injunctive relief granted below. *See Afridi v. State Farm Mut. Auto. Ins. Co.*, 2005 UT 53, ¶ 5, 122 P.3d 596 (quoting *Higgins v. Salt Lake County*, 855 P.2d 231, 235 (Utah 1993) ("'We may affirm a grant of summary judgment on any ground available to the [district] court, even if it is one not relied on below.'")) This is so because it makes no practical difference whether the lower courts ruled that Wendy's is entitled to an injunction or that Appellants are not entitled to an injunction. Wendy's sought an injunction "restraining [Appellants] from taking any action to inhibit or preclude Wendy's from using and maintaining [the Drive-Through Facilities]." [R. at 23.] Appellants demanded an order requiring the elimination of the Drive-Through Facilities. [R. at 81.] Given that these requests are obviously diametrical opposites, granting Wendy's' request and denying Appellants' demand produce precisely the same result: the Drive-Through Facilities remain in their present location. As the Court of Appeals correctly concluded that Appellants' right to challenge the location of the Drive-Through Facilities expired many years ago, Appellants are altogether without a legal right to remove the Drive-Through Facilities. The lower courts correctly enjoined them from

doing so without regard to whose claim for injunctive relief was granted and whose was denied.

CONCLUSION

The Court should affirm the Court of Appeals' decision with respect to injunctive relief for all of the foregoing reasons.

DATED this 7th day of January, 2008.

PARR WADDOUPS BROWN GEE & LOVELESS, P.C.

By: _____
Ronald G. Russell
Matthew J. Ball
Attorneys for Defendant/Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of January, 2008, true and correct copies of the foregoing **APPELLEE'S BRIEF** were served via United States Mail, first-class postage prepaid, on the following:

Michael Z. Hayes (1432)
Todd J. Godfrey (6094)
MAZURAN & HAYES, P.C.
2118 East 3900 South, Suite 300
Salt Lake City, Utah 84124