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Lynda Jones, Rulon Jones, Scott Sundell, Lila Sundaell Jerry Gilmore and Cathy Gilmore v. Barbara Johnson and David Johnson : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LYNDA JONES, RULON JONES,
SCOTT SUNDELL, LILA SUNDELL,
JERRY GILMORE and CATHY
GILMORE,

Plaintiffs and Appellees,

vs.

BARBARA JOHNSON and DAVID
JOHNSON,

Defendants and Appellants.

No. 20040612-CA

REPLY BRIEF OF APPELLANTS

Appeal From the Third Judicial District Court, Salt Lake County
Case No. 020915089 CN, Honorable Denise P. Lindberg

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ORAL ARGUMENT REQUESTED

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ARGUMENT

I. PLAINTIFFS INCORRECTLY STATE THE FACTS

In the Statement of Facts of Appellees' Brief, plaintiffs state that “the residence constructed by the Defendants is not finished with ‘a masonry exterior with all brick, or brick and stucco, or rock and stucco’ as required by Section 3.1(4) of the CC&Rs.” *See* Brief of the Appellees (Appellees’ Brief) at 5. As set forth in detail below, the evidence before the trial court showed that defendants’ home was indeed constructed of a masonry product composed of materials the same or similar to those that compose traditional stucco. Plaintiffs argue that the defendants’ home was constructed of a material known as Hardi-Plank but fail to mention that Hardi-Plank is indeed a masonry product composed of the same material as stucco.

II. PLAINTIFFS’ ARGUMENT REGARDING RULE 4-501 DOES NOT SUPPORT THE TRIAL COURT’S GRANT OF SUMMARY JUDGMENT

Plaintiffs argue that defendants failed to raise a disputed issue of material fact in the trial court because they did not strictly comply with Utah Rule of Judicial Administration 4-501. This Court, following the holding of the Utah Supreme Court, however, has interpreted that rule loosely and has held that:

even where an opposing memorandum [does] not set forth disputed facts listed in numbered sentences in a separate section as required [by the rule, as long as] the disputed facts [are] clearly provided in the body of the memorandum with applicable record references, . . . failure to comply with the technical requirements of rule 4-501(2)(B) [is] harmless.

Porter Construction v. Fox Construction, Inc., 2004 UT App 354; 101 P.3d 371 (*quoting* *Salt Lake County v. Metro W. Ready Mix, Inc.*, 2004 UT 23, ¶ 23 n.4, 89 P.3d 155).

Although defendants' Memorandum in Opposition to Motion for Summary Judgment ("Opposition Memorandum") does not specifically comply with Rule 4-501, such non-compliance is harmless. As set forth fully below, defendants' Opposition Memorandum and supporting affidavit properly established disputed issues of material fact with respect to ambiguities in the CC&R's. Defendants properly raised and preserved disputed issues of material fact regarding the interpretation of the CC&Rs, the enforceability of the CC&Rs, waiver or abandonment of the CC&Rs and the entity, if any, that existed after expiration of the Architectural Control Committee ("ACC") for approval of construction in the subdivision. Because defendants raised several disputed material facts in their Opposition Memorandum, as well as in the affidavit supporting the Opposition Memorandum, plaintiffs' argument regarding compliance with Rule 4-501 is of no moment and the grant of summary judgment in favor of plaintiffs should accordingly be reversed.

III. DEFENDANTS PROPERLY SUBMITTED EVIDENCE REGARDING THE HARDI-PLANK MATERIAL AND, ADDITIONAL TIME SHOULD HAVE BEEN ALLOWED FOR DISCOVERY IN THAT REGARD

Plaintiffs argue that defendants' assertions regarding the composition of Hardi-Plank material was not properly supported in the Opposition Memorandum and is therefore not properly before this Court. Specifically, plaintiffs argue that defendants' assertions regarding the Hardi-Plank material are "not support by an affidavit or any discovery material." *See Appellees' Brief at 10.*

Plaintiffs' assertion that defendants did not submit affidavits regarding the Hardi-Plank material is simply incorrect. The Affidavit of Barbara Johnson ("Johnson

Affidavit”) establishes, based on Ms. Johnson’s personal knowledge of the product, that the Hardi-Plank material is a masonry product. (R. 130.) This testimony supports defendants’ argument in the Opposition Memorandum that “Defendants’ exterior is comprised of brick and a masonry product.” (R. 101.) In addition, defendants submitted with their Opposition Memorandum pictures and additional information regarding the Hardi-Plank.¹ (R. 107-119.)

Plaintiffs did not make any proper foundational or evidentiary objection to the Johnson affidavit or materials submitted in support of the Opposition Memorandum and have therefore waived any such argument on appeal. *See Hobelman Motors v. Allred*, 685 P.2d 544, 546 (Utah 1984) (If party does not move in a timely fashion to object to affidavits or strike them, the party waives the right to show that they do not comply with Rule 56(e) and the affidavit is deemed admitted.) *Strange v. Ostlund*, 594 P.2d 877, 880 (Utah 1979) (same). The documents submitted by defendants were not stricken from the record and were properly before the trial court and are proper before this Court on appeal.

Plaintiffs’ assertion that defendants’ allegations regarding the Hardi-Plank material are not supported by “discovery material” only underscores that the trial court should have granted defendants’ request pursuant to Rule 56(f) for additional time to conduct discovery. Defendants could have provided additional information regarding the Hardi-Plank material if afforded more time to conduct discovery. The trial court, however, improperly denied them such an opportunity by denying their request pursuant

¹ Plaintiff submitted similar materials regarding Hardi-Plank material in support of their Reply Memorandum in support of Plaintiffs Motion for Summary Judgment (“Reply Memorandum”). (R. 151-52.)

to Rule 56(f). Thus, any failure to properly support their assertions regarding the Hardi-Plank material was due solely to the trial court's refusal to allow defendants additional discovery time pursuant to Rule 56(f).

IV. DEFENDANTS PROPERLY RAISED THE ISSUE OF AMBIGUITY OF THE CC&R'S IN THE TRIAL COURT

While acknowledging that defendants argued the issue of ambiguity in the trial court, plaintiffs nonetheless assert that defendants failed to properly raise the issue of ambiguity of the CC&Rs in the trial court. *See* Brief of Appellees at 11. Plaintiffs further assert that ambiguity regarding the meaning of the word stucco was not preserved below based on the incorrect assertion that defendants' Opposition Memorandum only uses the word "ambiguous" once. *See* Brief of Appellees at 11.

In order for an issue to be properly preserved for appeal, this Court looks to "whether there were disputed issues of material fact or legal argument presented on the issue." *Holman v. Callister, Duncan & Nebeker*, 905 P.2d 895, 898 (Utah Ct. App. 1995). An issue is properly preserved below where the "argument [is] reasonably discernible from the pleadings, affidavits and exhibits. *Id.* Further, all doubts are resolved in favor of the non-moving party. *See id.* Finally, in determining whether an issue was properly raised in the trial court, Utah appellate courts consider whether the trial court addressed the argument below. *See id.* "An argument will be deemed to have been raised before the trial court if the trial court had an opportunity to enter findings of fact and/or conclusions of law." *Id.* (citations omitted).

Plaintiffs' statement of fact in paragraph 8 of their Motion for Summary Judgment cites the CC&Rs and states that:

Because more than five years have passed since the date of the CC&R's, the responsibilities of the Architectural Control Committee have now reverted to the owners of the 26 lots in Phase 2 of the South Jordan Estates. (R. 41.)

In their Opposition Memorandum, defendants dispute plaintiffs' interpretation of the CC&Rs and argue that plaintiffs "are attempting to enforce certain language in an ambiguous document that expired according to its terms, are ambiguous on their face at best and would be impossible to comply in any event." (R. 97) (emphasis added).

A. Defendants Raised and Established an Ambiguity With Respect to the Termination of the Architectural Control Committee, its Successor, if Any, and the Procedure for Submission and Approval of Construction Plans.

Defendants argued in the trial court that the CC&Rs are ambiguous "because the homeowners never attempted to establish an architectural control committee with legally cognizable authority to enforce the guidelines." (R. 100.) Plaintiffs' assertions regarding the CC&Rs are specifically disputed by defendants in paragraphs 2 and 3 of the Opposition Memorandum where defendants demonstrate that the CC&Rs are ambiguous regarding the procedure for submission and approval of construction plans after termination of the ACC:

Plaintiffs interpret the document incorrectly and presume that some successor architectural control committee started to function after the five year period. There was no architectural control committee extant and there was no mechanism to submit any plan save the City of South Jordan. Consequently, the City of South Jordan became the arbiter of the DCC&R's (if they still have viability) because the homeowners never incorporated the architectural control committee

as a functioning unit of a legally cognizable association or other legal entity. (R. 98.)

Simply put, there was no entity or person to submit the plan for approval even assuming that the restrictions were somehow in effect because of the five year automatic limit on the restriction. There was no covenant, condition or restriction that could revert back to the homeowners without some association to accept the reverter. Moreover, the DCC&R's is not a self-authenticating document and defendants move to strike the exhibit for lack of foundation. (R. 99.)

The Johnson Affidavit also supports defendants' argument regarding ambiguity in the CC&Rs as follows:

9. I called South Jordan and explained what I had been told and to find out if I needed to remove the exterior, which had just been previously approved. They assured me there was no problem as Hardi-Plank is a masonry exterior and thus met the requirements for this area of South Jordan. (R. 130.)

....

Defendants' argument in the Opposition Memorandum and factual assertions in the Johnson Affidavit show that the CC&Rs are ambiguous with respect to whether an entity existed after termination of the ACC for approval of construction plans, what individuals made up the entity if it existed whether the entity was comprised of every owner in the subdivision or some smaller sub-group and what was the procedure for submitting and obtaining approval for construction plans. Despite the fact that defendants' Opposition Memorandum does not use the word "ambiguous" any certain number of times is not dispositive of whether the issue was properly preserved for appeal. Defendants raised and argued the issue of ambiguity before the trial court.² Plaintiffs'

² The issue of ambiguity in the CC&Rs regarding the termination of the ACC and the procedure for approval of construction plans after its termination is further addressed

argument that defendants failed to preserve that issue for appeal is without support and the trial court's grant of summary judgment should be reversed.

B. Defendants Properly Demonstrated that the Definition of the Word "Stucco" is Ambiguous.

Plaintiffs further argue that ambiguity of the word stucco was not raised in the trial court. Again, the record does not support plaintiffs' argument. In their Opposition Memorandum, defendants argue that the:

guidelines say the exterior must be masonry with all brick or brick and stucco and rock and stucco. The obvious intent was to avoid aluminum or vinyl siding. [Defendants'] exterior façade is made of brick and a masonry product called "Hardiplank." Hardiplank is a new masonry material that is made of fiber-cement. Its basic composition is cement, ground sand, cellulose fiber and select additives. Hardiplank has a cedarmill or rough sawn finish, factory rimed, resistant to rot and mildew and is a superior product to certain stucco applications which are notorious for rot, mildew and termite infestation. (R. 101.)

The Johnson Affidavit further states that Hardi-Plank is a masonry product. (R. 130.) The composition of the material used on defendants' home and whether it complies with the CC&Rs was clearly raised by defendants in the trial court. Plaintiffs' argument that the issue of the definition of the word "stucco" was not preserved below should be rejected by this Court.

Finally, the trial court specifically acknowledged defendants' argument regarding ambiguity and made explicit findings in that regard. The trial court stated in its ruling:

The Court categorically rejects Defendants' claims that the CC&R provision dealing with home exteriors is ambiguous. It is difficult to

below in response to plaintiffs' additional argument that defendants failed to preserve this issue in the trial court.

fathom more clear and unambiguous language than that which states the exterior finish of homes in the subdivision must be all brick, brick and stucco or rock and stucco. (R. 165.)

Defendants specifically and properly raised the issue of ambiguity of the type of material permitted under the CC&Rs. The trial court considered the issue and specifically addressed it in its findings and ruling. Plaintiffs' argument that issue was not properly preserved on appeal is without merit and the trial court's ruling should be reversed.

Plaintiffs assert that in order to show ambiguity in the CC&R's regarding the meaning of the term stucco, defendants must submit two or more reasonable interpretations of the word. *See* Brief of Appellees at 12. This is an overstatement of the requirements of the law. In order to show ambiguity, a word must be "susceptible to two or more reasonable meanings." *View Condo. Owners Ass'n v. MSICO, L.L.C.*, 2004 UT App. 104, ¶ 19, 90 P.3d 1042 (emphasis added). In any event, defendants did indeed submit two reasonable interpretations of the word.

In this case, defendants argue that the meaning of the word stucco is ambiguous because the CC&Rs do not specifically set forth what type of materials would fall within the definition of that word. Put another way, defendants argue that the word stucco may include materials traditionally considered stucco, as the trial court apparently defined the word, or that the word stucco may include materials composed of the same materials as traditional stucco, but perhaps with a different appearance than traditional stucco. In any event, defendants properly demonstrated that the word stucco is susceptible to two different reasonable interpretations and is therefore ambiguous.

Plaintiffs incorrectly argue that defendants have not offered a reasonable and plain and ordinary definition of the word stucco that would include the Hardiplank material. *See* Brief of Appellees at 13. Defendants' definition of the word stucco comes directly from Webster's Collegiate Dictionary and would include materials such as Hardiplank that are made of made of masonry compounds such as cement and sand. *See* Appellants Brief at 15. Utah courts routinely look to the dictionary definition of a word to determine its plain and ordinary meaning. *See Salem City v. Farnsworth*, 753 P.2d 514, 516 (Utah Ct. App. 1988) (looking to Webster's Third New Int'l Dictionary for the plain meaning of the word "occupy"); *Dawson v. Dawson*, 841 P.2d 749, 751 (Utah Ct. App. 1992) (using American Heritage Dictionary definition of the word "vacant"); *O'Keefe v. Utah State Retirement Bd.*, 956 P.2d 279, 282 (Utah 1998) (defining the word "overtime" pursuant to the definition in Webster's Third New International Dictionary). Plaintiffs' assertion that defendants have failed to offer a plain and reasonable definition of the word "stucco" that would include Hardi-Plank is without merit. Because the definition of the word stucco could be interpreted to include the Hardi-plank material, the word, as it is used in the CC&Rs, is ambiguous and questions of fact remain regarding its meaning. The trial court's grant of summary judgment is accordingly improper and should be reversed.

C. Ambiguity in the CC&Rs is a Question of Fact.

Plaintiffs assert that the initial determination of whether a contract is ambiguous is a question of law. *See* Brief of Appellees at 13. That rule, however, applies only if the terms of the contract are unambiguous, i.e., not capable of more than one reasonable meaning. *See Enerco, Inc. v. SOS Staffing Servs.*, 2002 UT 78, ¶ 10 (Utah 2002). As set

forth in Appellants' Brief and the arguments set forth above, the meaning of the word stucco in the CC&Rs is susceptible to at least two different meanings and is therefore ambiguous. In addition, the terms of the CC&Rs regarding the ACC, its termination and the procedure for review and approval of construction plans after the termination of the ACC may be interpreted in numerous ways. The CC&Rs are ambiguous on their face and questions of fact remain as to the meaning of the terms in the CC&Rs and the parties' intentions regarding those terms. It was therefore improper for the trial court to determine otherwise on summary judgment. Plaintiffs' argument that the determination of ambiguity in a contract is a question of law is inapplicable to this case and the trial court's ruling should accordingly be reversed and remanded for findings regarding the meaning of the ambiguities in the CC&Rs.

D. Defendants Properly Preserved the Issue of Approval Under the CC&Rs and Demonstrated Ambiguity in that Regard.

Plaintiffs summarily conclude that defendants failed to preserve the issue of how an owner in the subdivision would submit and obtain approval after termination of the ACC. The record demonstrates otherwise. Paragraph 3 of defendants' Opposition Memorandum asserts that upon termination of the ACC, no person or entity existed to whom plans for construction could be submitted. (R. 98.) Defendants argued the following to show ambiguity in the CC&Rs:

THE JOHNSONS DID NOT SUBMIT THE PLANS TO THE ARCHITECTURAL
COMMITTEE BECAUSE THERE WAS NO SUCH LEGALLY COGNIZABLE
COMMITTEE CREATED TO SUBMIT THE PLANS FOR APPROVAL

Defendants asserted that the [CC&Rs] and the guideline expired by
their own terms. . . . It is presumed that any reversion of the

guidelines after the expiration of their own terms would revert to some entity created by the homeowners assuming that the [CC&Rs] allow a mechanism for such reverter clause. There is in fact none. The [CC&Rs] were created for the benefit of the developer. Once the developer had completed the development, it was at least required of the homeowners to create some type of homeowners association to establish an architectural committee to have the reversion effective.

Defendants' argument in the trial court regarding approval under the CC&Rs was clearly discernible and the trial court specifically addressed the issue in its ruling stating that:

Essentially, the ACC became a "committee of the whole" of the Lot Owners." . . . The subdivision at issue is only comprised of 26 lots. Therefore, a committee of the whole could have been organized for purpose[s] of this review issue" (R. 164)

Because defendants properly raised the issue of ambiguity regarding submission and approval of construction plans under the CC&Rs after termination of the ACC, and the trial court entered specific findings in that regard, plaintiffs' argument that the issue was not properly preserved below must be rejected.

Plaintiffs further argue that the CC&Rs do not contain ambiguity regarding obtaining approval for construction in the subdivision and state that "the CC&Rs are clear about the procedure for obtaining approvals from the Committee or from the Lot Owners to whom the Committee's responsibilities revert after five years. *See* Brief of the Appellees at 14.

In *Leaver v. Grose*, 563 P.2d 773 (Utah 1977), the Utah Supreme Court addressed the question of ambiguity in restrictive covenants. *Id.* at 774. The restrictive covenants in that case provided that the covenants would be enforced during the initial twenty-five

(25) year period, but the CC&Rs did not contain a provision governing enforcement of the CC&Rs during the period thereafter. *See id.*

The CC&Rs in *Leaver* were “simply silent on the subject” of enforcement after the initial period. *See id.* “Consequently, a question of fact arises as to the intention of the parties, i.e., did the framers of the covenants actually intend to provide for prosecution of violations after the expiration of the twenty-five (25) years and merely left out” clarifying language regarding later enforcement or did they intend that no enforcement would occur after the initial period? *Id.* Based on the ambiguities in the CC&Rs in *Leaver* and the related questions of fact, the court held that the trial court erred in granting summary judgment where an ambiguity existed regarding the “intention of the parties . . . which required the taking of evidence.” *Id.*

In this case, like *Leaver*, the CC&Rs, despite being clear regarding submission and approval of plans to the ACC, are unclear and ambiguous as to the requirements, guidelines and/or procedures governing the process after termination of the ACC. For example, the CC&Rs fail to address the following questions: (1) Were defendants required to submit a separate set of plans to each and every of the twenty-six homeowners in the subdivision (despite the obvious high cost of such a requirement)? (2) Was written approval or denial required from every homeowner within thirty days (despite the unlikeliness that such unanimity could be obtained)? (3) What were defendants’ options if they did not receive written approval or rejection from every owner within thirty days? (4) Were defendants required to submit a set of plans to a smaller sub-group of homeowners? (5) Which owners, if any, comprised the group to whom

plans should be submitted and approved? (6) What procedures, if any, could defendants use to appeal a denial of their construction plans? and (7) Could defendants properly obtain approval from the city in the absence of the existence of any entity after termination of the ACC? These are just a few of the questions that the CC&Rs fail to address. Even the trial court acknowledges the ambiguity in its ruling by stating, without citation to any such requirement in the CC&Rs, that it was defendants' obligation to try to "engage in a dialogue with their neighbors around resolution of the issues" and that "there appears to be some discretion granted to the ACC (or its successor, the committee of the whole of Lot Owners) to grant specific approval for other materials if a proper and timely request is made." (R. 165) (emphasis added). The fact that the trial court is guessing as to the procedure and placing obligations on defendants that do not exist in the CC&R's demonstrates the ambiguity with respect to the approval procedure. The trial court's ruling should accordingly be reversed and remanded for findings regarding the ambiguities in the CC&Rs.

E. The Trial Court Erred in Ruling as a Matter of Law that the CC&Rs Were Not Abandoned.

Plaintiffs argue that the trial court properly ruled that the CC&Rs have not been abandoned. There was simply not enough evidence presented for the trial court to make such a determination. Defendants were prevented, as a result of plaintiffs' failure to comply with Rule 26(f) and the trial court's denial of its request under Rule 56(f), which are discussed more fully below, from conducting any discovery that would have allowed them to demonstrate non-compliance with the covenants constituting abandonment.

Defendants submitted in the Johnson Affidavit information regarding violations of the CC&Rs by other owners that were readily apparent. However, detailed information regarding the construction of other homes in the subdivision, the materials used for such construction, the approval process, if any utilized by other owners for construction of their homes and the specific number of violations could not be ascertained by defendants without discovery on these issues.

In the trial court's Decision and Order Granting Plaintiffs' Motion for Summary Judgment, Denying Defendants' Rule 56(f) motion, the trial court acknowledged that it did not have sufficient information to rule on the issue of waiver or abandonment of the CC&Rs. With respect to defendants' allegations of other violation of the CC&Rs in the subdivision and failure to obtain review and approval for construction, the trial court stated:

The Court notes that some of these allegations in the affidavit do not appear to be statements made of personal knowledge, and therefore would be inadmissible and insufficient to create a material issue of fact in dispute for purpose of resisting the summary judgment motion. (R. 166 n.2)

Rather than allowing defendants additional time to conduct discovery on the issue of waiver and abandonment of the CC&Rs, and obtain admissible evidence in that regard, the trial court simply granted summary judgment without sufficient evidence before it on that issue. The trial court's determination as a matter of law that the CC&Rs were not abandoned, without sufficient evidence supporting such a finding, was error and should accordingly be reversed.

V. DEFENDANTS PROPERLY PRESERVED THEIR ARGUMENT REGARDING INJUNCTIVE RELIEF

Plaintiffs argue that defendants failed to preserve the issue of injunctive relief in the trial court because the words “injunctive” or “balancing” were not used in defendants’ Opposition Memorandum. Whether an issue is preserved for appeal does not, however, depend on the use of any specific words in the trial court. Rather, the inquiry is whether the argument was reasonably discernible from a party’s pleadings and whether the trial court addressed the issue. *See Holman v. Callister, Duncan & Nebeker*, 905 P.2d 895, 898 (Utah Ct. App. 1995).

In their Opposition Memorandum, defendants argue, with support from the Affidavit of Ms. Johnson, that the Hardiplank material is necessary due to Ms. Johnson’s asthma and allergies. Removal of the material and replacement with traditional stucco which is more susceptible to allergens such as mold and mildew would pose a substantial hardship for Ms. Johnson and her health problems. Further, defendants argue that the Hardi-plank material is more expensive than traditional stucco. Thus, it can be inferred that removal and replacement of the entire exterior of defendants’ home would clearly work a financial and health hardship on them. Finally, defendants argue that the CC&Rs should not be enforced. The CC&Rs contain the provision allowing for injunctive relief. Thus, although defendants did not use any specific terminology regarding injunctive relief, the argument was implicit in their Opposition Memorandum and should be considered by this Court on appeal.

A. The Balance of Hardships Weighs in Favor of Defendants and a Question of Fact Exists in that Regard.

Plaintiffs argue that a balancing of injuries does not weigh in favor of defendants. Plaintiffs' argument in this regard demonstrates the existence of disputed facts regarding the relative harm to the parties. For instance, plaintiffs speculate that "it is certainly unlikely that the replacement of the siding would be more burdensome than 'removal of river moorage or the disassembly of a building encroachment.'" Appellees' Brief at 19-20. Defendants, on the other hand, argue that they would face substantial expense in replacing the Hardiplank material. In any event, an issue of fact exists regarding the cost of compliance with the injunction and relative harms related thereto. Summary judgment was therefore inappropriate in this instance and should be reversed.

Plaintiffs further argue that defendants' alleged violation of the CC&Rs was willful. *See* Brief of the Appellees at 20. Defendants dispute that argument with evidence that any violation was not willful due to defendants' initial belief that no CC&Rs existed and due to the city's assurance that the Hardi-Plank material was permitted. Again, an issue of fact exists as to the willfulness of any violation of the CC&Rs.

Finally, plaintiffs argue that defendants presented no evidence that they could be adequately compensated by damages. *See* Brief of the Appellees at 20. It is not, however, incumbent on defendants to prove plaintiffs' damages. Rather, in seeking injunctive relief, plaintiffs must demonstrate that injunctive relief is proper because they cannot be adequately compensated by damages. Plaintiffs, however, submitted no

evidence regarding damages or any evidence that they could not be adequately compensated by monetary damages or some other relief. *Carrier v. Lindquist*, 2001 UT 105, ¶ 25 (Utah 2001) (injunctive relief improper if party can be adequately compensated by damages). The trial court did not balance the relative hardships in granting injunctive relief and did not acknowledge the issues of fact in that regard. In addition, plaintiffs failed to demonstrate the propriety of injunctive relief. The trial court therefore improperly granted the motion for summary judgment and the trial court's ruling should accordingly be reversed and remanded.

VI. THE TRIAL COURT IMPROPERLY DENIED DEFENDANTS' REQUEST UNDER RULE 56(F)

Plaintiffs argue, without citation to any supporting authority, that the trial court properly denied defendants' request under Rule 56(f) because this action is not subject to Rule 26 and defendants therefore could have conducted discovery at any time. Plaintiffs' argument stretches beyond credibility the plain meaning of the rule. Rule 26 does not, as plaintiffs argue, state that any action for injunctive relief under a contract with an unspecified claim for attorneys' fees is exempt from the requirements of the Rule. Rather, the rule states that an action under a contract in which "the amount demanded in the pleadings is \$20,000 or less" is exempt from Rule 26(f).

The Complaint in this action seeks declaratory and injunctive relief and seeks attorneys' fees in an unspecified amount. (R. 1-8.) The Complaint does not demand any damages under \$20,000 as required in order to be exempt from Rule 26(f). This action is therefore subject to the requirements of Rule 26(f). Plaintiffs, however, failed to fulfill

their obligations under Rule 26 to initiate an attorneys' planning meeting and submit a scheduling order to the court regarding discovery. Defendants were therefore deprived of any opportunity to conduct discovery before the ruling on the motion for summary judgment. The trial court accordingly erred in denying defendants' request under Rule 56(f) and the ruling should accordingly be reversed.

Plaintiffs argue that defendants were not timely in their Rule 56(f) request because they failed to take steps to commence discovery. As stated above, Rule 26(f) applies in this instance and defendants were prohibited from conducting any discovery until plaintiffs initiated an attorney planning meeting and submitted a discovery schedule to the court. Plaintiffs cannot argue that defendants were not timely in seeking discovery when it was plaintiffs own delay and failure to comply with Rule 26(f) that prevented defendants from conducting necessary discovery. Plaintiffs' argument that defendants' Rule 56(f) request was dilatory should be rejected by this Court and the denial of the request under Rule 56(f) should be reversed.

Plaintiffs further argue that defendants failed to identify information in the exclusive knowledge and control of plaintiffs. Defendants did, however, identify four areas in which additional discovery was needed, including the validity of the CC&Rs, abandonment of the CC&Rs, impossibility of performance and the issue of estoppel. Each of these areas include information that was either in the possession and control of plaintiffs or that could not have been obtained without additional discovery. Contrary to plaintiffs' assertions, simply walking around the neighborhood and taking pictures, especially where most neighbors in the subdivision were hostile to defendants as a result

of this lawsuit, would not have provided defendants with necessary information regarding the above-listed areas. For example, additional discovery was needed to determine the type of materials used for other homes in the subdivision, compliance by other residents with the CC&Rs, whether any other construction in the subdivision had been submitted for approval by the ACC or some successor entity and the procedure used for submitting and obtaining such approval. All such information could have been obtained only through formal discovery. The trial court accordingly erred in failing to grant defendants' request pursuant to Rule 56(f) and it should be reversed and remanded.

Further, defendants' estoppel claim required proof of the following highly fact intensive elements: "(1) an admission, statement or act inconsistent with the claim afterwards asserted, (2) action by the other party on the faith of such admission, statement or act, and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such admission, statement or act." *Department of Human Servs. ex rel. Parker v. Irizarry*, 945 P.2d 676, 678 (Utah 1997); *Travelers Ins. Co. v. Kearl*, 896 P.2d 644, 648 (Utah Ct. App. 1995). Defendants submitted evidence to the trial court that several owners in the Subdivision stated that no restrictive covenants existed. Additional discovery, however, was needed in order for defendants to prove an estoppel claim. Because the trial court improperly denied defendants' request for additional discovery regarding the fact-intensive estoppel claim, the ruling should accordingly be reversed.

VII. PLAINTIFFS ARE NOT ENTITLED TO AN AWARD OF ATTORNEYS' FEES

Plaintiffs are not entitled to an award of attorneys' fees either in the trial court or on appeal. For the reasons set forth above, the trial court erred in granting summary judgment in favor of plaintiffs and this case should be remanded for further proceedings. Because the prevailing party in this action cannot be determined without a trial on the merits, an award of attorneys' fees at this juncture is inappropriate and plaintiffs' request for fees should accordingly be denied.

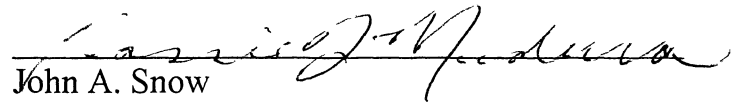
CONCLUSION

Defendants properly raised and preserved several issues of fact in the trial court. Those issues include ambiguity in the CC&Rs regarding termination of the ACC, the successor entity, if any, to the ACC, the process for submission and approval of plans for construction in the subdivision, waiver or abandonment of the CC&Rs and estoppel. Because disputed material facts exist with respect to each of these issues, summary judgment was improper and the trial court's ruling should be reversed. In addition, the trial court's denial of defendants' request under Rule 56(f) was also improper because defendants were denied any opportunity to conduct discovery regarding the issues raised by plaintiffs in their Motion for Summary Judgment. The denial of defendants' request under rule 56(f) should also be reversed and remanded for further proceedings.

DATED this 25 day of October, 2005.

VAN COTT, BAGLEY, CORNWALL &
McCARTHY

By:

A handwritten signature in cursive script, appearing to read "Cassie J. Medura", written over a horizontal line.

John A. Snow

Stephen K. Christiansen

Cassie J. Medura

Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I caused two (2) true and correct copies of the within and foregoing **REPLY BRIEF OF APPELLANTS** to be mailed, postage prepaid, this 25 day of October, 2005, to the following counsel of record:

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