IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2011-CA-01865-COA

JOEL MISITA **APPELLANT**

v.

ROY A. (AL) CONN AND MITZI P. CONN **APPELLEES**

DATE OF JUDGMENT:	10/25/2011
TRIAL JUDGE:	HON. E. VINCENT DAVIS
COURT FROM WHICH APPEALED:	ADAMS COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	R. KENT HUDSON
ATTORNEY FOR APPELLEES:	KATIE W. FREIBERGER
NATURE OF THE CASE:	CIVIL - REAL PROPERTY
TRIAL COURT DISPOSITION:	RESTRICTIVE COVENANT IN WARRANTY DEED ENFORCED
DISPOSITION:	AFFIRMED IN PART; REVERSED AND RENDERED IN PART-05/28/2013
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE LEE, C.J., ISHEE AND ROBERTS, JJ.

ISHEE, J., FOR THE COURT:

¶1. In 2007, Joel Misita purchased approximately 3.226 acres of land (the three acres) in Natchez, Mississippi, from Kevin and Rebecca Wilson. The three acres were properly conveyed by a warranty deed containing a covenant prohibiting the building of any structures on the property. The Wilsons and Misita were neighbors with the three acres adjoining their properties. The Wilsons later sold their land to Roy A. Conn (Al) and his wife, Mitzi Conn. Shortly thereafter, Misita placed a movable advertisement sign for his business on the three acres. The Conns objected to the placement of the sign, and sought enforcement of the warranty deed's covenant in the Adams County Chancery Court in May 2011. In October

2011, after a trial on the merits, the chancery court ruled in favor of the Conns and ordered the structure to be removed from the three acres. On appeal, Misita asserts the covenant is ambiguous and unenforceable. We reverse and render the chancery court's determination that the sign constitutes a structure. We affirm the chancery court's determination that the covenant is a permissible real covenant running with the land.

STATEMENT OF FACTS

¶2. In 2007, Misita and the Wilsons were neighbors in Elgin & Grove Plantation, a community in Adams County, Mississippi. Prior to the sale of the three acres, the Wilsons' property consisted of approximately thirty acres with a single residence. Misita's land consisted of approximately seven acres with several structures positioned on the property. The main home on Misita's land is an unusually tall three-story structure that houses Misita's wood and metalworking business on the bottom floor and his residence on the top two floors. The main house measures over sixty-two feet tall. Also present on the property are multiple outbuildings, including a large woodworking facility, several large trailers, a small cabin on a hill, and various sheds.

¶3. In November 2007, Kevin commissioned Misita to build a copper vent hood for the Wilsons' house. Misita agreed to construct the hood for the Wilsons and pay them ten dollars in exchange for the three acres. Kevin agreed to Misita's proposal. However, according to Misita, Kevin looked up at Misita's towering home and commented that the land would only be conveyed on the premise that no structures may be built on the three acres. Misita testified that he replied: "Fine." On November 16, 2007, after the copper hood was delivered and Misita had given the Wilsons ten dollars in cash, the Wilsons executed a

warranty deed conveying the three acres to Misita with the following covenant: "No structures are to be erected on the property."

¶4. In June 2008, the Wilsons sold the property and the residence to the Conns. About two years later, Misita decided to build a large movable sign on wheels to advertise his business. The sign is triangular in shape measuring eighteen feet long on all sides and is approximately fifteen feet tall. It contains a floor, a metal roof, and a door. Misita stores various examples of his work inside, and designed the sign to show to potential clients his work, as well as advertise his business to passersby on the highway. It is connected to pipes that are sunk into the ground and secured by concrete; however, the sign is movable. It is positioned on a trailer and has wheels so that Misita can take the sign to trade shows or to clients' homes. Initially Misita was granted a trailer license with the sign. Currently, Misita must obtain a special permit in order to transport the sign.

¶5. Prior to placing the sign on the three acres, Misita discussed the sign's placement with the Conns. The Conns considered Misita's proposition as a request to eliminate the covenant, and ultimately decided that enforcement of the covenant was in their best interest. The Conns communicated this decision to Misita by a written letter dated April 12, 2010, that was mailed by certified mail with a return receipt requested. Therein, they acknowledged Misita's proposition and their decision. They also stated that they had relied on the covenant in their decision to purchase their property from the Wilsons. They advised Misita that they would seek enforcement to the covenant should Misita continue with his plan to place the sign on the three acres.

¶6. Misita soon placed the sign on the three acres, and the Conns subsequently filed suit

on May 4, 2011. The chancery court conducted a hearing on the Conns' complaint on September 27, 2011. On October 25, 2011, the chancery court issued extensive findings of fact and conclusions of law, and determined that the covenant prohibited Misita's placement of the sign on the three acres. Misita quickly filed a motion for reconsideration, which was denied. He now appeals the chancery court's judgment.

DISCUSSION

¶7. The Mississippi Supreme Court has stated the following with regard to issues involving the interpretation of contracts:

> Such issues are questions of law reviewed by our appellate courts under a de novo standard of review. We first look to the express wording of the contract itself, looking at the contract as a whole, to the exclusion of extrinsic or parol evidence. If the parties' intent is unclear, the court will utilize the applicable "canons" of contract construction. Finally, if the meaning remains ambiguous, only then may the court consider extrinsic evidence.

Cherokee Ins. Co. v. Babin, 37 So. 3d 45, 48 (¶8) (Miss. 2010) (internal citations omitted). The supreme court has further held that "it is not the function of the courts to make contracts for parties, but rather to give effect to them as written . . . [and] to adhere to the principle so deeply embedded in our jurisprudence that the plain and unambiguous language of a contract should be construed as written." *Vulcan Materials Co. v. Miller*, 691 So. 2d 908, 912 (Miss. 1997) (citations omitted).

¶8. In his first issue on appeal, Misita claims the chancery court erred in finding that the covenant in question was a real covenant that runs with the land instead of a personal covenant. In order for a covenant to be real, the evidence must show the following:

(1) [T]he covenanting parties intended to create such a covenant;

(2) [P]rivity of estate exists between the person claiming the right to enforce the covenant and the person to whom the burden of the covenant is to be imposed; and

(3) [T]he covenant "touches and concerns" the land[.]

Id. at 914.

¶9. Accordingly, we now analyze the intent of the parties while first addressing any possible ambiguities with regard to the covenant's language. The covenant states: "No structures are to be erected on the property." The parties differ in their determination of the original intent of the term "structure." The chancery court cited *Conservatorship of Estate of Moor v. State*, 46 So. 3d 849 (Miss. Ct. App. 2010), in correctly stating: "[T]he mere fact that parties dispute what falls under the definition of a term to the contract does not make the term ambiguous as a matter of law. If the words are not defined in the deed, the court gives them their commonly accepted meaning."

¶10. According to Random House Webster's Unabridged Dictionary 1887 (2nd ed. 2001), the definition of a structure, when used as a noun, is "something built or constructed, as a building, bridge, or dam." We, therefore, determine that this commonly accepted meaning of the term "structure" was the intention of the original parties when placing the word in the covenant.

¶11. The sign clearly does not fall within the purview of a bridge or a dam. However, a building is defined as "a relatively permanent enclosed construction over a plot of land, having a roof and usually windows and often more than one level, used for any of a wide variety of activities . . . ." Random House Webster's Unabridged Dictionary 274 (2nd ed. 2001). While the sign embodies some of the characteristics of a building, such as a roof and

being enclosed, it is not relatively permanent. It is not permanently affixed to the land since it has wheels and can be pulled behind an automobile. Misita purposefully built the sign with wheels so he could transport it to trade shows and clients' homes as an example of his work.

¶12. Random House Webster's Unabridged Dictionary 2109 (2d ed. 2001) defines a vehicle as "any means in or by which someone travels or something is carried or conveyed; a means of conveyance or transport." Misita built the sign for the purpose of conveying a prime example of his work to potential clients. The sign was not intended to be nor is it a permanent or relatively permanent building situated on the three acres. The sign is akin to the commonly accepted definition of a vehicle, not a building. Therefore, we find that the sign in question does not fall within the purview of the commonly accepted meaning of "structure."

¶13. Finding no ambiguity in the covenant's language, we move on to the parties' intent to enter into the covenant. Prior to drafting the deed, Kevin told Misita, while viewing Misita's large house and numerous outbuildings, that he did not want any structures built on the property, to which Misita responded: "Fine." Misita acknowledges that he understood Kevin's aversion to Misita's numerous buildings on his property and agreed to refrain from erecting such structures on the three acres. The intent of the parties is clear.

¶14. Next, it is without question that there was privity of estate between the Conns and Misita. Privity of estate exists when there is a "successive relationship to the same [r]ights of property." *Clement v. R.L. Burns Corp.*, 373 So. 2d 790, 794 (Miss. 1979) (citation omitted). "Privity implies succession. He who is in privity stands in the shoes or sits in the seat of the owner from whom he derives his title, and thus takes it charged with the burden

attending it." *Id*. (citation omitted).

¶15. In *Journeay v. Berry*, 953 So. 2d 1145, 1155 (¶25) (Miss. Ct. App. 2007), we held that owners of lots in a residential development were in privity of estate with the developers after they purchased the lots and agreed to be bound by the restrictive covenants contained in the lot deeds. Even before Misita was granted the deed for the three acres, he was made aware of the covenant. Hence, like in *Journeay*, Misita was advised of the covenant and, upon receipt of the deed, had actual notice of the covenant. The covenant was not hidden or located on a separate piece of paper from the rest of the deed. Rather, it was present on the first page of the one-and-a-half-page deed in a paragraph beginning with: "NOTWITHSTANDING THE WARRANTY HEREIN CONTAINED, this conveyance is subject to the following." The covenant in question was listed as the fifth and final covenant.

¶16. When the Conns bought their property from the Wilsons, the privity of enforcing the covenant transferred to them by virtue of the purchase of the land. The Wilsons merely passed the power of enforcing the covenant to the Conns since the Conns became the successors in relationship to the same property right. The Conns testified that they relied upon the covenant in deciding to purchase the property from the Wilsons. They were assured by the Wilsons that the covenant would prevent Misita from "junking up" the three acres as they opined he had done on the rest of his property. The authority of the covenant was transferred to the Conns by virtue of the purchase of the property, and, therefore, clearly establishes privity of estate between the Conns and Misita.

¶17. Finally, in order for a covenant to "touch and concern the land," it "must be so related to the land as to enhance its value and confer a benefit upon it, or, conversely, impose a

burden on it." *Journeay*, 953 So. 2d at 1155 (¶26) (citation omitted). It is without question that the covenant touches and concerns the three acres in that it burdens the property by prohibiting structures from being erected. Misita himself argues that the covenant is a burden and, arguably, will always be a burden on the land. As such, the evidence supports the determination that the covenant in question was, in fact, intended to be a real covenant to run with the land.

¶18. In his second argument on appeal, Misita asserts that the covenant is unenforceable because it is unreasonably restrictive due to the indefinite nature of the covenant. However, we have upheld indefinite restrictive covenants in the past. In *Stokes v. La Cav Improvement Co.*, 654 So. 2d 524, 529 (Miss. 1995), the supreme court upheld a covenant prohibiting the construction of a boathouse, storage shed, or other like outbuilding on a lot in residential community. Likewise, in *Gast v. Ederer*, 600 So. 2d 204, 207-08 (Miss. 1992), the supreme court upheld the destruction of a boathouse as violating a covenant stating: "No building shall be erected, altered, placed or permitted to remain on any lot other than one detached single family dwelling not to exceed two stories in height and a private garage for not more than two cars." Likewise, here, we find that the covenant existed only for the three acres in question and did not, in any way, restrict Misita from placing structures on the other seven acres of his land that did not adjoin the Conns' property. We find this acceptable, and this issue is without merit.

¶19. **THE JUDGMENT OF THE ADAMS COUNTY CHANCERY COURT IS AFFIRMED IN PART AND REVERSED AND RENDERED IN PART. ALL COSTS OF THIS APPEAL ARE DIVIDED EQUALLY BETWEEN THE APPELLANT AND THE APPELLEES.**

LEE, C.J., IRVING, P.J., ROBERTS AND FAIR, JJ., CONCUR. CARLTON, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION, JOINED BY GRIFFIS, P.J., BARNES AND JAMES, JJ. MAXWELL, J., NOT PARTICIPATING.

CARLTON, J., CONCURRING IN PART AND DISSENTING IN PART:

¶20. I respectfully concur in part and dissent in part from the majority's opinion. I concur with the majority's decision to affirm the chancery court's determination that the covenant is a permissible real covenant running with the land. However, I dissent from the majority's determination that the sign fails to constitute a structure.

¶21. I submit that the warranty deed in this case is clear and unambiguous. The warranty deed was conveyed subject to the following:

> (1) Reservation of all oil, gas, and other minerals lying in, on, and under subject property, and all rights incident thereto.
>
> (2) Any and all easements, exceptions, reservations, restrictions, rights of way, conditions, covenants, etc., affecting the subject property, of use, or of record.
>
> (3) Any and all utility, drainage, and other easements, whether of use or of record.
>
> (4) Ad valorem taxes for the year 2007, which shall be paid by the Grantors.
>
> (5) No structures are to be erected on the property.

By deed, these covenants were conveyed to Misita. *See Shaw v. Burchfield,* 481 So. 2d 247, 252 (Miss. 1985) ("Where there is no substantial ambiguity requiring adjudication, a contract must be enforced as written. We are not in such cases so concerned with what the parties may have meant or intended but rather with what they said, for the language employed in a contract is the surest guide to what was intended." (internal citations omitted)). "The

language of restrictive covenants is to be read 'in its ordinary sense[.]'" *Stokes v. Bd. of Dirs. of La Cav Imp. Co.,* 654 So. 2d 524, 527 (Miss. 1995). The language in the warranty deed prohibits structures without limitation as to any type of structure, permanent or temporary. Since the language of the warranty deed is clear, we must not venture outside the language of the deed to construe its terms.

¶22. In *Sullivan v. Kolb,* 742 So. 2d 771, 776 (¶15) (Miss. Ct. App. 1999), this Court found the term structure to be unambiguous.[1] Specifically, the *Sullivan* Court found that the restrictive covenant prohibiting structures, other than that specifically authorized, was not ambiguous. *Id.* The Court in *Sullivan* provided as follows:

> Where the language is clear and unambiguous, protective covenants will not be disregarded merely because a use is prohibited or restricted. If the intent to prohibit or restrict the use of land is expressed in clear and unambiguous wording, enforcement is available in the courts of this State. The plain meaning of the words in issue are as follows:
>
> (1) building — Something that is built, as for human habitation; a structure — the act, process, art or occupation of constructing.
>
> (2) dwelling — a place to live in; an abode.
>
> (3) structure — Something made up of a number of parts that are held or put together in a particular way. — The way in which parts are arranged or put together to form a whole; makeup. — The interrelation or arrangement of parts in a complex entity. — Something constructed.
>
> (4) improvement — The act or process of improving. — The state of being improved. — A change or addition that improves; and,
>
> (5) house — A structure serving as a dwelling for one or more persons, esp. for a family.

---

[1] *See also Greenberg v. Koslow,* 475 S.W.2d 434, 437 (Mo. Ct. App. 1971) (defining structure as a "production composed of parts artificially joined together according to plan and designed to accomplish a definite purpose[.]").

Id. at 777 (¶16).

¶23. Here, the warranty deed prohibited structures, and no language in the deed limited the types of prohibited structures or set forth any sort of enumeration of exceptions for any authorized structures.[2] Also, the warranty deed's restriction on structures restricted all structures, not just permanent ones. No language in the warranty deed indicates that the parties intended to prohibit only fixtures or permanent buildings.[3] In reading the restrictive language of the warranty deed in its ordinary sense and in considering the entire document, no ambiguity exists as to the term structure. Moreover, as previously discussed, the *Sullivan* court determined the word structure as used in the restrictive covenant was unambiguous.[4] *See Stokes,* 654 So. 2d at 527-29 (enforcing restrictive term of warranty deed providing for no buildings or structures). Fundamentally, the intention of the parties as shown by the language in the deed controls. *See Vikes v. Pedersen*, 19 N.W.2d 176, 177-78 (Wis. 1945) (finding advertising signs, gas pumps, poles, and piled materials violated restrictive covenant

---

[2] *See Sullivan,* 742 So. 2d at 776 (¶15) (finding term structure to be unambiguous); *James v Smith*, 537 So. 2d 1074, 1078 (Fla. Dist. Ct. App. 1989) (covenant restricting any structure of a temporary nature prohibited travel trailer from being on the property for security guard and caretaker); *Miami Conservancy Dist. v. Elleman,* 363 N.E.2d 593, 595-96 (Ohio Ct. App. 1976) (mobile homes found to be mere structures within meaning of deed restriction prohibiting any structures); *Abel v Bryant*, 353 S.W.2d 322, 323-24 (Tex. Civ. App. 1962) (two steel air conditioner compressors and condensing units on cement foundations constituted structures in violation of restrictive language prohibiting structures).

[3] *See Elleman*, 363 N.E.2d at 595-96.

[4] *See Elleman*, 363 N.E.2d at 596; *Greenberg,* 475 S.W.2d at 437 (absent any indication of any special language or peculiar meaning intended by the parties, the court adopted a definition of structure as a "production composed of parts artificially joined together according to plan and designed to accomplish a definite purpose[.]").

prohibiting erection of any structure).[5]

¶24. Based on the foregoing, I concur in part and dissent in part.

GRIFFIS, P.J., BARNES AND JAMES, JJ., JOIN THIS OPINION.

[5] *See also* Donald M. Zupanec, *"What Constitutes "Structure" within Restrictive Covenant,"* 75 A.L.R.3d 1095, 1102-03 (1977) (addressing law on restrictive covenants and warranty deeds restricting structures); *see generally Beyt v. Woodvale Place Apartments*, 297 So. 2d 448, 450-51 (La. Ct. App. 1974) (concluding that the wide hard-surface boulevard constituted a structure violating no-structure restriction in covenant); *Freedman v. Kittle*, 262 A.D.2d 909, 911 (N.Y. App. Div. 1999) (finding that restrictive covenant prohibiting building or structure applied to erection of a fence); *McBride v Behrman*, 272 N.E.2d 181, 188 (Ohio Com. Pl. 1971) (finding term "temporary structure" not ambiguous); *Steward v. Welsh*, 178 S.W.2d 506, 508-09 (Tex. 1944) (finding seven-foot-high fence violated restriction against structures in covenant); *Alexander Schroeder Lumber Co. v Corona*, 288 S.W.2d 829, 832-35 (Tex. App. 1956) (concluding that seven-foot fence violated no-structure covenant).