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IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
February 15, 2023 Session

JOEL C. RILEY ET AL. v. HECTOR G. JARAMILLO ET AL.

Appeal from the Circuit Court for McMinn County
No. 2021-CV-38 W. Jeffrey Hollingsworth, Judge[1]

No. E2022-01181-COA-R3-CV

This is a dispute involving the usage and subdivision of real property in McMinn County. The plaintiffs sought declaratory judgment that a restrictive covenant contained in the deed to their property applied to other parcels originating from the same parent tract. Upon competing motions for summary judgment and following a hearing, the trial court entered an order granting summary judgment in favor of the defendants and dismissing the plaintiffs' claims with prejudice. The trial court determined that the language in the plaintiffs' deed was not sufficient to create an express restrictive covenant upon the property subsequently conveyed to the defendants and that the plaintiffs did not produce sufficient evidence of a "common plan" for the original tract such as would warrant imposition of an implied negative reciprocal easement. The plaintiffs have appealed. Discerning no reversible error, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

THOMAS R. FRIERSON, II, J., delivered the opinion of the court, in which D. MICHAEL SWINEY, C.J., and JOHN W. MCCLARTY, J., joined.

Roger E. Jenne, Cleveland, Tennessee, for the appellants, Joel C. Riley and Myra Lee Houseley Riley, Individually and as Trustees, respectively, of the Joel C. Riley Revocable Living Trust and of the Myra Lee Houseley Riley Revocable Living Trust.

Brian Linkowski, Atlanta, Georgia, and Bridget J. Willhite and James F. Mitchell, III, Athens, Tennessee, for the appellees, Hector G. Jaramillo and Heather Jaramillo.

Matthew A. Grossman and Richard E. Graves, Knoxville, Tennessee, and Harry R. Cash, Chattanooga, Tennessee, for the appellee, River Valley AG Credit ACA.

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[1] Sitting by interchange.

Harry R. Cash, Trustee, Chattanooga, Tennessee, Pro Se.[2]

OPINION

I. Factual and Procedural Background

This case focuses on the deed of conveyance language relating to a series of real property transfers all initiating from a 174-acre tract of land in McMinn County ("the Parent Tract"), which had been inherited by a brother and sister, Martin Bacon Walthall and Blanche Walthall Ferris ("the Walthalls"), in 1955. The plaintiff landowners, Joel C. Riley and Myra Lee Houseley Riley, individually and respectively as trustees of revocable living trusts in each of their names (collectively, "the Rileys"), initiated this action by filing a complaint for declaratory judgment in the McMinn County Circuit Court ("trial court") on January 28, 2021, initially naming as defendants adjoining landowners Hector G. Jaramillo and Heather Jaramillo. The Rileys had acquired title to a 16.72-acre parcel of land in 1993 from the Walthalls via warranty deed ("the Riley Deed"). The Riley Deed referenced and incorporated a copy of a survey ("the Riley Survey") performed contemporaneously with their purchase of the 16.72-acre parcel. In 2002, the Rileys conveyed their respective individual interests in the real property into the Joel C. Riley Revocable Living Trust and the Myra Lee Houseley Riley Revocable Living Trust.

Through their complaint, the Rileys sought declaratory judgment enforcing a restrictive covenant contained in the Riley Deed, which limited lot size if the land were subdivided or sold to a minimum of 1.5 acres. The Rileys also alleged that "the Walthall[s], by their prior deeds and conveyances created an equitable servitude or implied negative easement thereby restricting all of the unconveyed 174 acre tract . . . ." In addition to seeking declaratory judgment, the Rileys requested injunctive relief barring the defendants or their successors from developing the land originating from the Parent Tract with parcels containing under 1.5 acres each.

The Walthalls were identified in the Riley Deed as the "First Parties," and the Rileys were described as the "Second Parties." The restrictive covenant at issue in the Riley Deed provided as follows in pertinent part:

> It is understood and agreed that this conveyance is made and accepted and said realty is hereby granted upon and subject to the following covenants, conditions, restrictions, and reservations (in addition to any hereinabove or

[2] Mr. Cash filed a notice of joinder in the responsive appellate brief filed by counsel for Hector G. Jaramillo, Heather Jaramillo, and River Valley AG Credit ACA.

> hereafter mentioned), which covenants, conditions, restrictions, and reservations shall apply to and run with the said land conveyed herein <u>and the land of First Parties.</u>
>
> In the event, Second Parties desire to subdivide or sell all or any portion of the property described hereinbefore, the property shall not be subdivided or sold in plots or tracts of less than one and one-half (1½) acres each, and shall further be restricted that not more than one residence shall be constructed, erected or maintained upon any lot, and all such residences shall be single family residences only.

(Emphasis added.) The warranty deed did not contain any reference to a specific tract as being the "land of First Parties." The instrument of conveyance also included language explaining the "purpose of these restrictions," stating, *inter alia*, the Walthalls' desires that the land be used for "attractive residential and collateral purposes only" and that "the desired tone of the community" be maintained.

The facts underlying the relevant chains of title are undisputed. Following their 1955 inheritance of the Parent Tract, the Walthalls sold two parcels in 1986. The first tract, containing 7.29 acres, was conveyed to Raymond L. Axley and Barbra Kay Axley via warranty deed ("the Axley Deed"). The Axley Deed included a restrictive covenant and language substantially similar to that later included in the Riley Deed but absent the "land of First Parties" language. The second parcel was a 42-acre tract conveyed to James Michael Sharp and James E. Sharp via warranty deed ("the Sharp Deed"). Although the Sharp Deed did not contain the same 1.5-acre restrictive covenant, the Walthalls and the Sharps executed a subsequent agreement detailing the Sharps' permitted usage of the land ("the Sharp Agreement"). The Sharp Agreement stated in relevant part: "There shall not exceed 42 houses on the 42-Acre tract, an average of one house per acre." It is undisputed that the neighborhood created from the Sharps' land, known as Wheatland Hills Subdivision, contains lots that are less than 1.5 acres in size.

In 1994, the Walthalls executed deeds by gift transferring interests in portions of the original tract to several of their children and grandchildren ("the Walthall Heirs"). None of these deeds contained restrictive covenants as found in the Riley Deed and the Axley Deed. In February 2020, the Jaramillos purchased most of the remainder of the Parent Tract, approximately 95 acres, from the Walthall Heirs via warranty deed. This deed from the Walthall Heirs to the Jaramillos did not contain the restrictive covenants found in the Riley Deed and the Axley Deed. The Jaramillos proceeded to have a plat prepared for the real property, establishing a division of the land into seventy lots, each of which was smaller than 1.5 acres. All deeds referred to above were duly recorded with the McMinn County Register of Deeds. The Rileys subsequently commenced this

lawsuit in January 2021 to enforce the 1.5-acre minimum restrictive covenant contained in the Riley deed relating to the Jaramillos' tract.

From a procedural standpoint, the Rileys amended their complaint in March 2021 to add River Valley AG Credit ACA ("River Valley") as the holder of a promissory note respecting the Jaramillos' property and Harry R. Cash as trustee on an associated deed of trust. The Rileys amended their complaint a second time in June 2021 to add as defendants Janak P. Patel, Pravin P. Patel, and Tarunaben Patel as owners of real property allegedly subject to the restrictive covenants. The appellate record reflects a third amended complaint, filed on October 15, 2021, wherein the Rileys, pursuant to the trial court's order, added Margaret Travis Heater and William Theodore Heater as defendant landowners whose real property was purportedly subject to the restrictive covenants.[3]

In response to the Rileys' third amended complaint, the Jaramillos and River Valley filed a joint motion to dismiss on November 1, 2021. We note that on appeal, the Jaramillos refer to themselves and River Valley as "'Active Defendants' due to their more active involvement in prosecuting a defense." Mr. Cash has filed a notice that he is joining in the Jaramillos' and River Valley's appellate brief; however, he did not participate in the motion to dismiss. The remaining defendants, the Patels and the Heaters, do not appear to have filed any pleadings before the trial court, were not mentioned in the trial court's summary judgment order apart from the style of the case, and are not participating in this appeal. For ease of reference in this Opinion, we will refer to the Jaramillos and River Valley collectively as "Active Defendants" while noting that Mr. Cash has also joined Active Defendants in defending against the Rileys' appeal.

In their motion to dismiss, Active Defendants averred that the language appearing in the Riley Deed did not describe "land of First Parties" with sufficient specificity to impose the restrictive covenant against the Jaramillos' land. They additionally contended that the Rileys had not shown sufficient evidence of a common plan for development of the Parent Tract so as to warrant imposition of an implied negative reciprocal easement. The Rileys filed a response opposing the motion to dismiss, and Active Defendants filed a reply.

In an order entered on January 11, 2022, the trial court determined that the motion to dismiss should be treated as a motion for summary judgment pursuant to Tennessee Rule of Civil Procedure 12.02. *See* Tenn. R. Civ. P. 12.02 ("If, on a motion asserting the defense numbered (6) to dismiss for failure to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the

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[3] We note that the initial complaint and first two amended complaints are not in the appellate record. However, the procedural history regarding these pleadings is contained in the third amended complaint and is not disputed.

motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 . . . "). On February 4, 2022, River Valley filed an answer to the third amended complaint, in which the Jaramillos and Mr. Cash subsequently joined.

In their motion to dismiss, treated as a summary judgment motion, Active Defendants posited that the Statute of Frauds precluded application of the restrictive covenant to the Jaramillos' property because the Riley Deed failed to contain an adequate description of the phrase, "land of First Parties." In their supplemental summary judgment brief, Active Defendants also raised the defense of unclean hands predicated on two allegations: (1) the Rileys undisputedly owned two parcels of land, originally part of the real property conveyed to the Sharps and acquired by the Rileys via quitclaim deed in 2021, which were comprised of less than 1.5 acres each and (2) notwithstanding that the Riley Deed contained a restrictive covenant limiting the property to one residence per parcel, the Rileys' property in fact was improved with two residences, one constructed prior to execution of the Riley Deed and one built thereafter. Concerning the two parcels they acquired in 2021, designated as lots 5A and 8A of Wheatland Hills Subdivision, the Rileys maintain that these tracts were conveyed solely for use as fifty-foot rights of way.

Following a hearing on the competing motions for summary judgment, the trial court found that there was no express language in the deeds from the Walthalls to the Walthall Heirs creating the burden of any restrictive covenant affecting the Jaramillos' property. The trial court further found that the Jaramillos' real property could only be subject to the restrictive covenants of the Riley Deed if the language in the Riley Deed applied such restrictive covenants to the remaining portions of the Parent Tract. Determining that any imposition of a restrictive covenant depended on what was defined in the Riley Deed as "land of First Parties," the trial court concluded that the language was not sufficiently specific to impose a restrictive covenant upon the Jaramillos' property, particularly considering that Tennessee courts construe restrictive covenants strictly. *See Phillips v. Hatfield*, 624 S.W.3d 464, 475 (Tenn. 2021) ("[B]ecause such restrictive covenants are in derogation of the right to free use and enjoyment of property, Tennessee courts construe them strictly." (citing *Hughes v. New Life Dev. Corp.*, 387 S.W.3d 453, 481 (Tenn. 2012))).

In granting summary judgment in favor of Active Defendants, the trial court dismissed the Rileys' claims with prejudice. Having determined that summary judgment in favor of Active Defendants was warranted, the trial court did not directly address the Statute of Frauds or unclean hands defenses in its final order. The Rileys timely appealed.

II. Issues Presented

The Rileys present two issues on appeal, which we have restated slightly as follows:

1. Whether the trial court erred by declining to grant the Rileys' motion for summary judgment, in which they requested enforcement of the express restrictive covenants against the Jaramillos' real property, and by granting the Jaramillos' motion for summary judgment upon finding the restrictive covenants unenforceable.

2. Whether the trial court erred by declining to grant the Rileys' motion for summary judgment, in which they sought the imposition of an implied negative reciprocal easement against the Jaramillos' real property, and by granting the Jaramillos' motion for summary judgment on this issue and claim upon finding insufficient evidence of a common plan for development of the entire original tract.

The Jaramillos present two additional issues, which we have restated slightly as follows:

3. Whether the Statute of Frauds prevents imposition of the burden of the restrictive covenants in the Riley Deed to the "land of First Parties" and the Jaramillos' property because the Riley Deed contained no adequate description of "land of First Parties."

4. Whether Active Defendants' affirmative defenses entitle them to dismissal of the Rileys' claims because the Rileys are in violation of the restrictive covenants they seek to enforce against the Jaramillos' property.

III. Standard of Review

The grant or denial of a motion for summary judgment is a matter of law; therefore, our standard of review is *de novo* with no presumption of correctness. *See Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 250 (Tenn. 2015); *Dick Broad. Co. of Tenn. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 671 (Tenn. 2013) (citing *Kinsler v. Berkline, LLC*, 320 S.W.3d 796, 799 (Tenn. 2010)). As such, this Court must "make a fresh determination of whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been satisfied." *Rye*, 477 S.W.3d at 250. As our Supreme

Court has explained concerning the requirements for a movant to prevail on a motion for summary judgment pursuant to Tennessee Rule of Civil Procedure 56:

> [W]hen the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense. We reiterate that a moving party seeking summary judgment by attacking the nonmoving party's evidence must do more than make a conclusory assertion that summary judgment is appropriate on this basis. Rather, Tennessee Rule 56.03 requires the moving party to support its motion with "a separate concise statement of material facts as to which the moving party contends there is no genuine issue for trial." Tenn. R. Civ. P. 56.03. "Each fact is to be set forth in a separate, numbered paragraph and supported by a specific citation to the record." *Id.* When such a motion is made, any party opposing summary judgment must file a response to each fact set forth by the movant in the manner provided in Tennessee Rule 56.03. "[W]hen a motion for summary judgment is made [and] . . . supported as provided in [Tennessee Rule 56]," to survive summary judgment, the nonmoving party "may not rest upon the mere allegations or denials of [its] pleading," but must respond, and by affidavits or one of the other means provided in Tennessee Rule 56, "set forth specific facts" *at the summary judgment stage* "showing that there is a genuine issue for trial." Tenn. R. Civ. P. 56.06. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co.,* 475 U.S. [574,] 586, 106 S. Ct. 1348, [89 L.Ed.2d 538 (1986)]. The nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party. If a summary judgment motion is filed before adequate time for discovery has been provided, the nonmoving party may seek a continuance to engage in additional discovery as provided in Tennessee Rule 56.07. However, after adequate time for discovery has been provided, summary judgment should be granted if the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the existence of a genuine issue of material fact for trial. Tenn. R. Civ. P. 56.04, 56.06. The focus is on the evidence the nonmoving party comes forward with at the summary judgment stage, not on hypothetical evidence that theoretically could be adduced, despite the passage of discovery deadlines, at a future trial.

Rye, 477 S.W.3d at 264-65. "Whether the nonmoving party is a plaintiff or a defendant—and whether or not the nonmoving party bears the burden of proof at trial on the challenged claim or defense—at the summary judgment stage, '[t]he nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party.'" *TWB Architects, Inc. v. The Braxton, LLC*, 578 S.W.3d 879, 889 (Tenn. 2019) (quoting *Rye*, 477 S.W.3d at 265). Pursuant to Tennessee Rule of Civil Procedure 56.04, the trial court must "state the legal grounds upon which the court denies or grants the motion" for summary judgment, and our Supreme Court has instructed that the trial court must state these grounds "before it invites or requests the prevailing party to draft a proposed order." *See Smith v. UHS of Lakeside, Inc.*, 439 S.W.3d 303, 316 (Tenn. 2014). We note that construction of a restrictive covenant is a question of law, which we review *de novo* with no presumption of correctness. *Hughes v. New Life Dev. Corp.*, 387 S.W.3d 453, 480-81 (Tenn. 2012).

IV. Imposing the Servitude of Restrictive Covenants

On appeal, the Rileys present issues addressing both an express restrictive covenant and an implied negative reciprocal easement. For clarity, guidance from our Supreme Court instructs that in Tennessee a negative easement has become indistinguishable from a restrictive covenant. As the High Court has recently explained:

> Servitudes include a variety of devices, including covenants, easements, and profits. [Restatement (Third) of Prop.: Servitudes] § 1.1 cmt. d. We acknowledge that Tennessee caselaw has often referred to "negative easements," "negative reciprocal easements," and "implied negative reciprocal easements." See, e.g., Massey v. R.W. Graf, Inc., 277 S.W.3d 902, 909-11 (Tenn. Ct. App. 2008). The Restatement makes clear that in spite of historical differences, "[a] 'negative' easement, the obligation not to use land in one's possession in specified ways, has become indistinguishable from a restrictive covenant." Restatement (Third) of Prop.: Servitudes § 1.2 cmt. b. See also id. § 1.2 cmt. h (explaining historical differences between the concepts).

Phillips, 624 S.W.3d at 473 (further stating that under the facts in *Phillips*, the Court would refer to the device at issue predominantly as a restrictive covenant). Both impose a burden of servitude on the use of property, and the distinction in the case at bar stems from the means by which the restrictive covenants arise. An express restrictive covenant arises from restrictions expressly included in the deed and agreed to by the parties while an implied negative reciprocal easement is imposed when equity requires based upon the conduct and intent of the grantor when conveying the property and is for the benefit of

the grantee. *See generally* Restatement (Third) of Prop. (Servitudes) § 1.1. Both express and implied restrictions can "run with the land" and bind remote grantees. *Id.*

A. Imposition of Express Restrictive Covenant

The Rileys argue that the express language of the Riley Deed imposed the 1.5-acre subdivision restrictive covenant on the Jaramillos' property through incorporation of the Riley Survey. The Riley Survey referenced by deed book number the Walthalls' deed to the Parent Tract, a portion of which eventually constituted the Jaramillos' property, as owned by the Walthalls. The Rileys assert that this reference to the Parent Tract in the Riley Deed demonstrates that the Parent Tract is the "land of First Parties." They further advance the position that all restrictive covenants contained in the Riley Deed apply to the "land of First Parties" and run with the land through the express deed language. Raising an issue concerning their defense pursuant to the Statute of Frauds, the Jaramillos posit that the Statute of Frauds prevents imposition of the restrictive covenant as a burden on their property because the Walthalls' land was not sufficiently described in the deed. Upon careful review, we agree with the Jaramillos. Although the trial court did not expressly reference the Statute of Frauds in its final order, we note that the court's determination regarding the inapplicability of the express restrictive covenant at issue to the Jaramillos' property was predicated upon the insufficiency of the written description in the Riley Deed, leading to an implication that the deed description did not satisfy the Statute of Frauds. Upon review of the record and applicable authorities, we conclude that the trial court did not err in this conclusion.

Tennessee law does not favor restrictive covenants. *Phillips*, 624 S.W.3d at 475. As this Court has stated:

> An owner of land may sell portions of it and make restrictions as to its use for the benefit of himself as well as for the benefit of those to whom he sells. *Laughlin v. Wagner*, 146 Tenn. 647, 244 S.W. 475 (1922); *Benton v. Bush*, 644 S.W.2d 690, 691 (Tenn. Ct. App. 1982). Even though Tennessee law does not favor private restrictions upon the use and enjoyment of land, our courts will enforce the covenants as they would contracts, according to the clearly expressed intention of the parties. *Benton*, 644 S.W.2d [690,] 691 [(Tenn. Ct. App. 1982)]; *Carr v. Trivett*, 24 Tenn. App. 308, 143 S.W.2d 900, 903 (1940).

Gambrell v. Nivens, 275 S.W.3d 429, 436-37 (Tenn. Ct. App. 2008).

Restrictive covenants in deeds are subject to the Statute of Frauds, meaning that for a deed restriction to be applicable to a tract, it must contain a sufficient written

property description. *See Case v. Brier Hill Collieries*, 235 S.W. 57, 59 (Tenn. 1921) ("[A] description of land is good within the statute of frauds which on its face appears to refer to some definite tract, and which by the aid of parol proof can with reasonable certainty be applied to designate such tract."). As the *Case* Court explained: "If the description is on its face so indefinite as to be applicable to any tract of land, then parol evidence is not admissible at all 'because its effect is to supply by parol a material part of the agreement, which the statute of frauds requires to be . . . in writing.'" *Id.* (quoting *Dobson v. Litton*, 45 Tenn. 616, 620 (1868)).

Active Defendants acknowledge that the restrictive covenants present in the Riley Deed were referenced in their chain of title. The restrictive covenant in question provided in pertinent part:

> In the event, Second Parties desire to subdivide or sell all or any portion of the property described hereinbefore, the property shall not be subdivided or sold in plots or tracts of less than one and one-half (1½) acres each, and shall further be restricted that not more than one residence shall be constructed, erected or maintained upon any lot, and all such residences shall be single family residences only.

For the burden of this restrictive covenant to be imposed upon the Jaramillos' tract, which was a portion of the Parent Tract at the time of the Riley deed's execution, the restrictive covenant must apply to the Parent Tract as well. The Rileys argue that it does so by the following language contained in the Riley Deed:

> It is understood and agreed that this conveyance is made and accepted and said realty is hereby granted upon and subject to the following covenants, conditions, restrictions, and reservations (in addition to any hereinabove or hereafter mentioned), which covenants, conditions, restrictions, and reservations shall apply to and run with the said land conveyed herein <u>and the land of First Parties.</u>

(Emphasis added.)

In support of their position, the Rileys contend that the Riley Survey, which was incorporated into the Riley Deed, referenced by deed book number "the original 174-acre tract." In fact, the Riley Survey did refer to the recording of the Parent Tract and indicated that the land conveyed to the Rileys was a portion of that tract. Nonetheless, the Riley Deed contained no property description for "land of First Parties." The Rileys urge that a reference to the deed book recording of the Parent Tract was sufficient to identify it as the land of First Parties. However, much of the acreage contained in the

Parent Tract had been sold and conveyed by the time of the Riley Deed's execution, thereby altering the exact bounds of the Parent Tract significantly.

In concluding that the Riley Deed did not impose an express restrictive covenant upon the Jaramillos' property, the trial court found that apart from the conveyance to the Sharps occurring before the execution of the Riley Deed, "[t]he more significant transaction . . . happened after the Riley Deed" and was the Walthalls' 1994 execution of "a series of gift deeds to various children and grandchildren." As the trial court elucidated, a 1994 warranty deed conveying portions of the Parent Tract to the Walthall Heirs "contain[ed] no restrictive covenant containing the restrictions found in the Riley deed." The trial court further found in relevant part:

> The gift deeds also contain "exceptions" to the transfer of title. Those exceptions are the property previously sold to the Sharps, the Axleys and the Rileys. There is a clause that says
>
> > "All of These Exceptions are Subject to various rights of way, and restrictive covenants as are created in said Deeds and are hereby Transferred to the grantees or trustees in whom this property is vested hereunder."
>
> A strict reading of the clause set forth above is that the rights of way and restrictive covenants imposed on the land previously sold to the Sharps, Axleys and Rileys can be enforced against the Sharps, Axleys and Rileys by the heirs. It does not impose those rights of way or restrictive covenants on the land that was given to the Walthall heirs. It is undisputed that the Jaramillos bought their land from the heirs and there is no evidence that any of the documents related to that sale contain or refer to the covenants found in the Riley deed.
>
> The only argument for [the Rileys'] position is that the language in the Riley deed that "said covenants apply to and runs with the said land conveyed herein and with the land of the First Parties" imposes the restrictive covenants on the Jaramillos' land. There is no definition of "land of the First Parties[."] That language is not enough to impose the covenants on the Jaramillos' property.

Analyzing the Riley Deed language, we determine that the trial court did not err in concluding that the deed language is not sufficiently specific to apply an express restrictive covenant relative to the Jaramillos' property. The Riley Deed references the "land of First Parties" and identifies the Walthalls as the first parties. However, the

instrument of conveyance fails to specify what real property the "land of First Parties" refers to with sufficient specificity to be valid under the Statute of Frauds. *See Denison-Gholson Dry Goods Co. v. Hill*, 185 S.W. 723, 725 (Tenn. 1916) (explaining that when a deed description could have applied to indefinite lands with equal exactness, the description was not sufficient to be valid under the Statute of Frauds); *see also Wilson v. Calhoun*, 11 S.W.2d 906, 908 (Tenn. 1928) (concluding that when a property description was provided with definite boundaries and could not apply to other lands, the description was sufficient to be valid under the Statute of Frauds).

Although the Riley Deed referenced the Riley Survey, which displayed a section of the Parent Tract and indicated its ownership by the Walthalls, the Riley Deed did not indicate that this land was intended to be the "land of First Parties." The phrase, "land of First Parties," could refer with equal exactness to any real property owned by the Walthalls at the time of the conveyance. In addition, the Riley Survey did not depict the entirety of the Parent Tract. Moreover, the deed book recording referenced in the Riley Survey was for the original conveyance to the Walthalls, much of which had been previously sold to the Axleys and Sharps. In *Denison-Gholson Dry Goods*, our Supreme Court determined that when a description of a tract of land could apply to any one of a number of tracts in the county and did not apply to a particular parcel, the description was insufficient. *Denison-Gholson*, 185 S.W. at 725 ("The rule is that a description of land applicable with equal exactness to any one of an indefinite number of tracts cannot be aided by parol evidence.").

The Rileys further contend that the Riley Survey's reference to the Walthalls' ownership of the Parent Tract and its recordation demonstrates that the Walthalls intended the entire Parent Tract to be the "land of First Parties." However, the references in the Riley Survey represented the Walthalls' original acquisition, and portions of the Parent Tract had subsequently been conveyed to both the Axleys and the Sharps by the time of the Riley Deed's execution. The land described in the referenced deed book did not match the Parent Tract, nor was the entirety of the Parent Tract shown on the Riley Survey.

Thus, the phrase, "land of First Parties," does not on its face apply to the Parent Tract exclusively and could "equally apply" to other lands. *See Wilson*, 11 S.W.2d at 907 (explaining that a property description must be such that "it could not equally apply to any other lands"). Given this uncertainty, "if the right to enforce the covenant as to other property is doubtful such right will be denied." *See Shea v. Sargent*, 499 S.W.2d 871, 874 (Tenn. 1973) (quoting *S. Adver. Co. v. Sherman*, 308 S.W.2d 491, 493 (Tenn. Ct. App. 1957)). We discern no error in the trial court's conclusion that "land of First Parties" was not sufficiently specific to subject the Jaramillos' property to the restrictive covenants.

Furthermore, assuming, *arguendo*, that "land of First Parties" had adequately described the Parent Tract, we cannot conclude that the language of the specific restrictive covenants in the Riley Deed expressly applied to the Parent Tract. The Riley Deed stated: "In the event, S<u>econd Parties</u> desire to subdivide . . . " (emphasis added). Active Defendants postulate that the express language of the Riley Deed therefore applied the lot size restrictive covenant only to the second parties, who were identified in the deed as the Rileys. We agree. The Jaramillos are not the Rileys' successors in title. We emphasize that the wording of a covenant must be "strictly construed, without the drawing of unnecessary implications." *See Shea*, 499 S.W.2d at 873. Additionally, "[t]he Court need not go beyond the plain meaning of the covenant wording itself to find 'the clearly expressed intention of the parties[.]'" *Id.* (quoting *Turnley v. Garfinkel*, 362 S.W.2d 921, 923 (Tenn. 1962)).

We note that courts interpret restrictive covenants in a deed under the same rules of construction as applied in contract interpretation. *See Massey v. R.W. Graf, Inc.*, 277 S.W.3d 902, 908 (Tenn. Ct. App. 2008). "In contract interpretation, it is well-settled that the 'particular and specific provisions of a contract prevail over general provisions.'" *Lamar Adver. Co. v. By-Pass Partners*, 313 S.W.3d 779, 794 (Tenn. Ct. App. 2009) (quoting *Precision Mech. Contractors v. Metro. Dev. & Hous. Agency*, No. M2000-02117-COA-R3-CV, 2001 WL 1285900, at *5 (Tenn. Ct. App. Oct. 25, 2001)). Although the introduction of the restrictive covenants in the Riley Deed stated that the covenants applied to the land of First Parties, the specific provisions of this individual restrictive covenant indicated an application to second parties, and the language of the specific provision prevails when in conflict with general provisions of a deed.

We discern no genuine issue of material fact that would result in the imposition of the express restrictive covenants upon the Jaramillos' real property. The trial court did not err in granting summary judgment on this issue in favor of Active Defendants.

B. Imposition of Implied Negative Reciprocal Easement

The Rileys assert that the Jaramillos' property is subject to an implied negative reciprocal easement. In support, the Rileys argue that the Riley Deed and the deeds conveying property to the Axleys and Sharps established evidence of a general (or common) plan of development for the land by the Walthalls. They further urge that the Jaramillos had knowledge of the plan because reference to all deed restrictions was conceded to be in their chain of title. The Jaramillos counter that there was no general plan established by the Walthalls due to variations in restrictive covenants among the Axley, Sharp, and Riley deeds. The Jaramillos also claim that they possessed no actual knowledge of any restrictive covenant on their property because a search of all prior

deeds would not have shown evidence of a general plan to develop the property. Upon careful review, we conclude that the trial court properly determined that the proof does not establish a general plan of development.

As our Supreme Court has recently explained concerning the doctrine of implied negative reciprocal easements:

> The doctrine of implied negative reciprocal easements is an extension of the original concept that addresses circumstances in which the creation of a servitude on certain land is not expressly apparent and, therefore, must be implied. Under the doctrine, the creation of a servitude can be implied by virtue of, among other circumstances, the conveyance of land pursuant to a general plan of development. See Restatement (Third) of Prop.: Servitudes § 2.14. The quintessential example occurs in the context of restrictive covenants applicable to a residential subdivision. See id. § 2.14 cmt. a & b.

Phillips, 624 S.W.3d at 477. To establish an implied negative reciprocal easement, a plaintiff must prove:

> (1) that the parties derived their title from a common grantor;
>
> (2) that the common grantor had a general plan for the property involved;
>
> (3) that the common grantor intended for the restrictive covenant to benefit the property involved; and
>
> (4) that the grantees had actual or constructive knowledge of the restriction when they purchased their parcels.

Id. at 472.

The *Phillips* Court quoted with approval the Restatement of Property, further instructing regarding these implied servitudes:

> The idea underlying the doctrine is that when a purchaser buys land subject to restrictions imposed to carry out a general plan of development, the purchaser is entitled to assume that all land in the development is, or will be, similarly restricted to carry out the general plan. By selling land with restrictions designed to put into effect a general plan of development, the

> developer impliedly represents to the purchasers that the rest of the land included in the plan is, or will be, similarly restricted. That representation is enforced, on the grounds of estoppel, by imposing an implied reciprocal servitude on the developer's remaining land included in the plan.

Id. at 477 (quoting Restatement (Third) of Prop.: Servitudes § 2.14 cmt. i) (emphasis in *Phillips* omitted). As our Supreme Court has cautioned, the doctrine of implied negative reciprocal easements "'is to be applied with great care,'" *Phillips*, 624 S.W.3d at 478 (quoting *Land Developers v. Maxwell*, 537 S.W.2d 904, 913 (Tenn. 1976)), inasmuch as it "'undercuts the statute of frauds and creates uncertainty in land titles,'" *Phillips*, 624 S.W.3d at 478 (quoting Restatement (Third) of Prop.: Servitudes § 2.14 cmt. i)).

As to the first element required for an implied negative reciprocal easement, it is undisputed in the instant action that the parties derived title from a common grantor and that their parcels of land originated from the Parent Tract. Furthermore, the deeds included in the record reflect a chain of title from the Walthalls to both the Rileys and the Jaramillos. The trial court determined, however, that the Rileys would be unable to prove the second required element: that the common grantors, the Walthalls, had a general plan, or "common plan" as the court termed it, for the real property involved.

The trial court found in relevant part:

> In this case, [the Rileys] have not produced proof of a common plan. The sale of land to the Axleys contained a covenant restricting sub-division to 1.5 acre lots. The subsequent sale to the Sharps from the same original 174 acre parcel did not restrict lot size to 1.5 acres. The sale to the Riley[s] occurring after the Sharp sale, contained the same restrictions as the Axley[s'] sale. The gift deeds did not contain a restrictive covenant. It cannot be held, under this proof, that the Walthalls had a common plan for the possible development of the original 174 acre tract.

Upon careful review, we agree with the trial court's conclusion that evidence of a common or general plan of development is lacking in the record. Likewise, evidence of the third element required for an implied negative reciprocal easement, the intent to have the restrictive covenant benefit the Parent Tract in this instance, is absent in the record. For purposes of this analysis, the Walthalls made three types of title conveyances: one to the Rileys, with the restrictive covenants stated previously and an expressed purpose "to maintain the desired tone of the community" (with a similar conveyance to the Axleys); one to the Sharps, which did not contain similar language or restrictive covenants, but concerning which there existed a separate agreement regarding the development of the neighborhood; and gift conveyances to various heirs, upon which there were no

restrictions. Clearly, the restrictive covenants on real property were not consistent among the conveyances. *Cf. Land Developers v. Maxwell*, 537 S.W.2d 904, 913 (Tenn. 1976) (utilizing deed language somewhat similar to that in the Riley Deed in all of the conveyances made prior to the death of the corporate general plan developer's founder).

The restrictive covenant at issue in the Riley Deed provided that the subdivision could be no less than 1.5 acres while the Sharps' Agreement contained a restriction stating that the lot size could be no less than an average of 1.0 acre. We find no indication in the record of an intent through the Riley Deed for the restrictive covenants to benefit the real property that would eventually become the Jaramillos' property. Instead, the deed, noted by the trial court, from the Walthalls to their heirs without restrictive covenants is indicative of an intention for the property not to be burdened by servitude. We therefore conclude that the Rileys failed to prove any contemplation by the Walthalls that the Jaramillo property, which initially was conveyed by the Walthalls as unrestricted to their heirs, was intended to be part of a general or common plan of development.

In contrast to the instant action, in the case of *Land Developers v. Maxwell*, a corporate grantee's remaining land was held to be subject to the same restrictions the grantee had placed upon land that it had sold via a series of deeds containing restrictive covenants. *Land Developers v. Maxwell*, 537 S.W.2d 904, 912-913 (Tenn. 1976). The deeds signed by the corporation and its officer mentioned the "'general uniform plan for a highclass residential suburb.'" *Id.* at 913. Our Supreme Court concluded that there was little question that a general plan was intended and held the remaining land of the corporation subject to the same conditions. *Id.* at 914.

Circumstances under which Tennessee courts have upheld the imposition of implied negative reciprocal easements have often involved the subdivision of a parent tract of land into various parcels with similar restrictive covenants having the effect of binding the remaining land of the grantor. For instance, in *Land Developers*, *see id.* at 907, there were initially 12 parcels, with additional land subsequently acquired by the corporation's founder, while in *Ridley v. Haiman*, 47 S.W.2d 750, 751 (Tenn. 1932), the parent tract was sold in 163 parcels. In *Land Developers*, evidence of a common plan was established by many deeds with similar restrictive covenants that included express mention of "'the general uniform plan.'" *See Land Developers*, 537 S.W.2d at 913. In *Ridley*, although the deeds involved did not include the restrictive covenants at issue, evidence of a "general development plan" was established by proof of the restrictive covenants' inclusion in advertising for all of the parcels and a public announcement made by a realtor prior to the parcels' sale at auction. *See Ridley*, 47 S.W.2d at 755.

Finally, concerning the fourth element of actual or constructive knowledge of the subject restrictive covenant at the time of purchase, we reiterate again that the Jaramillos acknowledge the restrictive covenants in the Riley Deed to have been referenced in their chain of title. However, actual or constructive knowledge of the servitude could only have been established had the restriction existed. Having determined that the restrictive covenants did not exist on the Jaramillos' property, we further determine that the Jaramillos could not have had actual knowledge of a servitude.

Tennessee law favors the free use of real property and applies the imposition of an implied negative reciprocal easement only with great care. *See Phillips*, 624 S.W.3d at 478. Inasmuch as we have discerned no proof of a clearly expressed intent in the record that rises to the level warranting imposition of an implied negative reciprocal easement from the Riley Deed upon the Jaramillos' property, we conclude that the trial court properly determined that there was insufficient evidence of a general plan of development for the Parent Tract. The trial court did not err in granting summary judgment to Active Defendants on this issue as well.

V. Remaining Issue

Focusing solely on their arguments related to the doctrine of unclean hands, Active Defendants present a question regarding whether their affirmative defenses entitle them to dismissal of the Rileys' claim. *See Norman v. Norman*, No. M2015-02364-COA-R3-CV, 2017 WL 3705121, at *5 (Tenn. Ct. App. Aug. 28, 2017) ("The doctrine of unclean hands is an equitable doctrine based on the principle that 'he who seeks equity must do equity.'" (quoting *In re Estate of Boote*, 265 S.W.3d 402, 417 (Tenn. Ct. App. 2007))). Having determined that the trial court did not err in granting summary judgment in favor of Active Defendants predicated upon its conclusion that neither an express restrictive covenant nor an implied negative reciprocal easement was applicable to the Jaramillos' property, we further determine that Active Defendants' remaining issue regarding affirmative defenses is pretermitted as moot.

VI. Conclusion

For the foregoing reasons, we affirm the trial court's judgment in its entirety. Costs on appeal are taxed to the appellants, Joel C. Riley and Myra Lee Houseley Riley, Individually and as Trustees, respectively, of the Joel C. Riley Revocable Living Trust and the Myra Lee Houseley Riley Revocable Living Trust. This case is remanded to the trial court for enforcement of its judgment and collection of costs assessed below.

s/ Thomas R. Frierson, II
THOMAS R. FRIERSON, II, JUDGE