

RENDERED: MARCH 24, 2017; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2015-CA-001948-MR  
AND  
NO. 2016-CA-000164-MR

KEITH A. GADD  
AND JHT PROPERTIES, LLC

APPELLANTS

v. APPEAL FROM GARRARD CIRCUIT COURT  
HONORABLE C. HUNTER DAUGHERTY, JUDGE  
ACTION NO. 13-CI-00308

DON HENSLEY

APPELLEE

OPINION  
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

\*\* \*\* \* \* \* \* \*

BEFORE: CLAYTON, MAZE, AND STUMBO, JUDGES.

CLAYTON, JUDGE: Keith A. Gadd and JHT Properties, LLC (hereinafter collectively referred to as “Gadd”) appeal from the Garrard Circuit Court judgments granting summary judgment to Don Hensley, denying Gadd’s cross motion for summary judgment, permanently enjoining Gadd from any further

violations of the Deed Restrictions, and denying Gadd's counterclaim for harassment. On appeal, Gadd made a motion to consolidate the two appeals, which the Court of Appeals granted.

This case involves the interpretation of deed restrictions related to the short-term rental of Gadd's homes. Hensley objected to Gadd's advertising and rental of this property because, according to him, it violated the subdivision's deed restrictions. Gadd interpreted the restrictions differently and countered that the short-term rental of his residential property did not violate the deed restrictions. In addition, Gadd claims harassment by Hensley and other neighbors in their efforts to stop him from renting his property. After careful consideration, we affirm in part, reverse in part, and remand.

#### BACKGROUND

Don Hensley and his wife are the developers of Woodlawn Estates, which is a subdivision located on Herrington Lake in Garrard County, Kentucky. They reside in the subdivision and own a number of properties in it. Keith A. Gadd and JHT Properties, LLC purchased two lots<sup>1</sup> (numbered 2 and 3) in the subdivision. JHT Properties is a Kentucky limited liability company, and Keith is its managing member. Gadd purchased the lots in 2008 and 2009 and planned to personally use them approximately two to three months each year, although it is unclear the manner in which he planned to use two lots for personal use. Gadd intended to lease the lots at other times.

---

<sup>1</sup> Since the filing of the complaint, Gadd has sold Lot 2.

This action commenced when Don Hensley filed a complaint on October 3, 2013, alleging that Gadd had violated certain restrictions and that his “renters” had created an “annoyance and or nuisance” to other members of the neighborhood. Gadd answered the complaint and filed a separate counterclaim for harassment as authorized under Kentucky Revised Statutes (KRS) 525.070.

Hensley, on January 23, 2014, made a motion for summary judgment, asserting that no genuine issues of material fact existed and that he was entitled to a permanent injunction against Gadd. Gadd responded and filed a cross motion for summary judgment. The trial court denied Hensley’s motion verbally during a hearing on February 7, 2014, and the order was entered on the docket sheet.

Next, a hearing was held on November 6, 2015, about the summary judgment motions. At the hearing, both parties’ counsels agreed that the issues of material fact had been addressed by deposition, and requested that the trial court make its decision on the matter under Kentucky Rules of Civil Procedure (CR) 43.04(1). The depositions of Hensley and nine other residents of Woodlawn Estates were submitted. Gadd’s evidence consisted primarily of his affidavit, which incorporated by reference the allegations in his Answer and Counterclaim.

On November 20, 2015, the trial court entered findings of fact, conclusions of law, and a judgment wherein it granted Hensley summary judgment against Gadd; permanently enjoined Gadd from any further violations of the applicable restrictions; awarded Hensley his costs; denied Hensley’s request for punitive damages; and, denied Gadd’s counterclaim for harassment.

The trial court noted that the deed restrictions, which stated that the property shall only be used for “single family residential purposes,” was not important because families come in all shapes and sizes in this day and age. However, the trial court was concerned about the section of the restrictions which said the property is “residential.” The trial court concluded that inhabitants of short-term rentals, that is, one-night, two-night, or one week rentals, were not residents. In addition, the trial court determined that Gadd’s use of the property was the operation of a business in contravention of the deed’s language. Therefore, the trial court granted judgment against Gadd and permanently enjoined them from any violation of the restrictions.

Thereafter, Gadd made a motion for finality language to be added to the November 20, 2015 judgment and to stay the injunction against Gadd’s short-term rentals. The trial court entered an order on January 25, 2016, staying the enforcement of the original judgment pending the resolution of the appeal and adding finality language although it opined that on its face the original judgment was final and appealable as of November 20, 2015. Gadd appeals from these judgments.

#### STANDARD OF REVIEW

“The standard of review on appeal of summary judgment is whether the trial court correctly found there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.” *Carter v. Smith*, 366 S.W.3d 414, 419 (Ky. 2012). We must “view the evidence in the light most

favorable to the nonmoving party,” and we will only sustain the circuit court’s grant of summary judgment “if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor.” *Lewis v. B & R Corp.*, 56 S.W.3d 432, 436 (Ky. App. 2001). “[S]ummary judgments involve no fact finding[.]” *Associated Ins. Serv., Inc. v. Garcia*, 307 S.W.3d 58, 61 (Ky. 2010). Consequently, our review is *de novo*. *Id.*

Additionally, on appeal, interpretation or construction of restrictive covenants is a question of law subject to *de novo* review. *Triple Crown Subdivision Homeowners Ass’n, Inc. v. Oberst*, 279 S.W.3d 138, 141 (Ky. 2008). The primary issue is the interpretation of the language of the deed restrictions to ascertain whether Gadd’s short-term rental of his property violated certain restrictions.

## ANALYSIS

In essence, the dispute involves Gadd renting its property for short-term, that is, for a week or weekend, which according to Hensley, is a violation of the deed restrictions. The restrictions in the deed are recorded in the Garrard County, Kentucky, Deed Book 155, at page 642. The germane restrictions are as follows:

### Paragraph 1

Lots 2 through 15 shall be known and described as single family residential lots and shall be used only for single family residential use purposes. Structures erected

thereon shall be designed for and occupied by one family: no more than one residential structure shall be erected on each lot.

#### Paragraph 13

No trade, business, or profession of any kind shall be carried out upon any residential lot nor shall anything be done thereon which may become an annoyance or a nuisance to the neighborhood . . . .

#### Paragraph 14

No sign for advertising or for any other purpose shall be displayed any place on any residential lot or on any residential structure on any lot except one sign for advertising the sale or rental thereof . . . .

Gadd maintains, based on Paragraph 14, that the language in the restrictions indicates that renting one's property is allowed. And further, the language in the restrictions provides no time limitation on the rental of the property; hence, he was allowed to rent his property for a short-term time period.

In response, Hensley argues that Gadd's leasing of the lots was done contrary to the language in the Deed of Restriction since the deed restrictions articulate that the property shall be used only for single-family residences and dictates that the structures erected thereon shall be designed for and occupied by one family. Nonetheless, in his deposition, Hensley conceded that a "single family" could include members of the extended family as well as guests of the family.

Further, while Hensley admitted that a specific time limit was not stated in the restrictions, he expressed the opinion that an appropriate time period

for renting the properties under the deed restrictions would be six months to a year. Notwithstanding the lack of a definite time period for renting the homes in the restrictions, which ostensibly creates an ambiguity, Hensley still argues that rentals on a daily or short-term basis were contrary to the deed restrictions. He believed that overnight rentals gave the properties a “motel atmosphere” inconsistent with the character of the neighborhood.

In addition, the deed restrictions do not prohibit renting or leasing the property, but they do state that no business is allowed that creates a nuisance or an annoyance to the neighborhood. Hensley maintained that Gadd and his renters created an “annoyance and/or nuisance” to other members of the neighborhood.

Hensley and several neighbors testified in their depositions that, among other things, Gadd’s renters caused excessive noise, parked numerous vehicles on the street (which was prohibited in the deed restrictions), overused the septic tank causing offensive odors, and engaged in conduct that caused damage to the golf course including the theft of the flags on the golf course greens.

Gadd acknowledged that the properties have been advertised for short-term rental use in both [LexingtonRentalHomes.com](http://LexingtonRentalHomes.com) and [Homeaway.com](http://Homeaway.com). The ads offer nightly and weekly rental terms. And the ad on [Homeaway.com](http://Homeaway.com) advertises that prospective renters will pay a 10% tax rate and a cleaning fee of \$125.

The following three unpublished Court of Appeals' decisions<sup>2</sup> - *Hyatt v. Court*, 2009 WL 2633659 (Ky. App. 2009); *Vonderhaar v. Lakeside Place Homeowners Ass'n, Inc.*, 2014 WL 3887913 (Ky. App. 2014); and, *Barrickman v. Wells*, 2015 WL 2357179 (Ky. App. 2015) were cited by the trial court.

In *Hyatt v. Court*, this Court held that the vacation rental of a personal residence located within a subdivision constituted "commercial use" in violation of the subdivision's restrictive covenants. *Id.* at 3-4. Similar to these facts, the homeowners advertised the rental of their home on the internet plus charged a cleaning fee, a security deposit, and sales tax.

*Vonderhaar* and, *Barrickman*, which both cite to *Hyatt*, have somewhat different results. The Court in *Vonderhaar* cited *Hyatt* with approval and found in favor of the homeowner's association regarding its complaint against the defendants, *Vonderhaar* and Adams. The Court held that the rental of the *Vonderhaar* and Adams' residence (they were co-owners) violated the restrictions that required the property to be used only for single-family residential purposes and also restricted any business, commercial, trade, or professional use. Nonetheless, Gadd argues that because the rental of property was not mentioned in the *Vonderhaar* defendants' deed restrictions, as it was here, and because the owners in *Vonderhaar* never intended to live in the residence, the case is distinguishable.

---

<sup>2</sup> CR 76.28(4)(c) states: "Opinions that are not to be published shall not be cited or used as binding precedent in any other case in any court of this state; however, unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court."



Whereas, the Court in *Barrickman* reasoned somewhat differently.

The conflict concerned a restriction in the development's covenants, which prohibited "commercial use" of the property. The Barrickmans contended that this restriction should be interpreted to prohibit the neighbors from renting private residences for short-term vacation use. Because the trial court determined that the language of the restrictive covenant, which prohibited "commercial uses or purposes," was ambiguous, it allowed testimony from the developer. The developer testified that preventing short-term rental of homes was not the purpose of the restriction. Rather, its intent was to keep landowners from operating retail establishments.

The Court of Appeals agreed with the lower court and held that deed restriction did not apply to short-term rentals, was not an impermissible commercial use of the property, and if the intent of the covenant was to prohibit short-term rentals, the homeowners organization could have drafted this particular language in the covenant. While *Barrickman* supports Gadd's opinion that short-term rental of his property is permissible, it also supports Hensley's position because it highlights that the importance of the developer's intent in the interpretation of the covenant. Here, Hensley maintains that it was never intended for the single-family residences to be used for short-term vacation rental for transients.

The aforementioned discussion of the three unpublished cases while illustrative, is not precedential. To address whether short-term rental by Gadd of

his property is a violation of the deed of restrictions, we turn to published case law concerning the interpretation of restrictive covenants.

Kentucky's treatment of restricted covenants has changed significantly over the last century. *KL & JL Invs., Inc. v. Lynch*, 472 S.W.3d 540, 545 (Ky. App. 2015), as modified (Apr. 17, 2015), review denied (Oct. 21, 2015). In the past, Kentucky jurisprudence perceived restrictive covenants as a burden on the ownership of property and construed them strictly; any doubt regarding the drafter's intent was resolved against the enforcement of such covenants.

But since *Brandon v. Price*, 314 S.W.2d 521 (Ky. 1958), Kentucky has approached restrictive covenants from the viewpoint that they are to be regarded more as a protection to the property owner and the public rather than as a restriction on the use of property and the old-time doctrine of strict construction no longer applies. In fact, Kentucky has abandoned the rule of strict construction of restrictive covenants. *Highbaugh Enters. Inc. v. Deatrick & James Const. Co.*, 554 S.W.2d 878, 879 (Ky. App. 1977).

Nonetheless, a Court construes restrictive covenants according to their plain language. Parties are bound by the clear meaning of the language used, the same as any other contract. *See Larkins v. Miller*, 239 S.W.3d 112, 115 (Ky. App. 2007). According to *Connor v. Clemons*, 308 Ky. 9, 11, 213 S.W.2d 438, 439 (Ky. 1948), "the strict construction rule should not be used to defeat the obvious intention of the parties though not precisely expressed, but will be applied when ambiguous language creates a doubt as to what was prohibited." The Court goes

on to state that “[i]n the case of doubtful meaning, the restriction should be construed in favor of the free use of property and against the limitations.” *Id.* Applied to the facts in this case, Gadd would be permitted to rent his property for any time period.

As previously explained, in the case at bar, the deed restrictions clearly indicate that rental of the property is allowed. Paragraph 14 articulates that rental of the property is permitted when it instructs that only one sign may be placed “for advertising the sale or rental thereof”. Hence, this language expressly provides that rental of the property is permitted. However, no time limit on the rental of the property is specified in the covenants. In addition, Paragraph 13 constrains residents from operating any trade, business, or profession in the neighborhood. The vagueness in the deed restrictions creates uncertainty, that is, ambiguity, which necessitates the interpretation of the language in the restrictive covenant.

Still, the phrase in the deed restrictions, “single family residential purposes,” does not in and of itself create ambiguity. One’s decision to rent one’s home does not alter its residential purposes. The focus is not on the duration of the occupation but on the purposes of the occupation. The Court has explained that “‘house’ is all inclusive and may include any and every kind of structure, depending upon the context in which it is used and the purpose sought to be effected.” *Dartmouth-Willow Terrace, Inc. v. MacLean*, 371 S.W.2d 937, 939 (Ky. 1963) (citations omitted). Whether a property is being used for residential

purposes focuses not on the intended duration of the stay but on the actual use and activities on the property. Here, Gadd intended to use the property for his living purposes a portion of the time and rent it to others to use for their living purposes at other times.

To address the issue of ambiguity in a restrictive covenant, we begin by noting that the rules governing the construction of restrictive covenants generally are the same as those applicable to contracts. *Williams v. City of Kuttawa*, 466 S.W.3d 505, 509 (Ky. App. 2015). Further, as observed earlier, it is a longstanding principle of Kentucky law that in the case of ambiguity or doubt in a restrictive covenant, the intention of the party must be resolved in favor of the free and untrammelled use of the land. *Glenmore Distilleries Co. v. Fiorella*, 273 Ky. 549, 117 S.W.2d 173, 176 (1938). And that intention, in respect to a restrictive covenant, is to be gathered from the entire context of an instrument. *McFarland v. Hanley*, 258 S.W.2d 3 (Ky. 1953). Finally, ambiguous restrictions in covenants, like provisions in other written instruments, must be construed most strongly against the person who created them. *Parrish v. Newbury*, 279 S.W.2d 229, 234 (Ky. 1955).

Here, the meaning of the deed restrictions is unclear because rental of property is allowed, but no time limitation is provided in the deed restrictions. Further complicating the uncertainty surrounding the meaning of the deed restrictions, is whether the short-term rental of one's home transforms a single-family residence into a service that is a trade, business, or profession. "A contract

is ambiguous if a reasonable person would find it susceptible to different or inconsistent interpretations.” *See Hazard Coal Corp. v. Knight*, 325 S.W.3d 290, 298 (Ky. 2010). In the case at bar, it is indisputable that the meaning is ambiguous.

When terminology gives rise to a latent ambiguity, the ambiguity in the restrictive covenant is typically determined by Kentucky appellate courts on a case-by-case basis. Initially, we note that when the language of a covenant is ambiguous, the ambiguity is construed against the drafter. In this matter, Hensley prepared the deed restrictions. He testified in his deposition that he had legal representation and thoroughly researched other deeds in the area when he drafted the covenant. Consequently, Hensley is responsible for the language in the deed of restrictions. It is a legal precept that ambiguous restrictions in covenants, like provisions in other written instruments, must be construed most strongly against the person who created them. *Parrish*, 279 S.W.2d at 234.

Furthermore, we deem significant that other residents in the development rented and worked from their homes. For instance, one property owner rented his home for three years – one year to one party and two years to another party. And some residents operated businesses from their homes. Gadd suggests that Hensley waived any right to enforce the restrictions. In our estimation, other residents’ use of their homes for these purposes supports the proposition that the deed restrictions are imprecise.

Further, the prohibition against a trade, business, or profession, does not appear to encompass Gadd's activities in renting his home to others. First, Gadd offered his home for short-term rental via internet and telephone offsite of the property and from his Lexington office. Second, renting the property was not a commercial activity since no commercial activity was conducted at the home. The rental of one's home does not transform it from a single-family residence since a vacation renter uses a home for the purposes of eating, sleeping, and other residential purposes. Consequently, this use is residential, not commercial, no matter how short the rental duration. In fact, the deponents (other residents) indicated that Gadd's renters behaved in much the same way as the permanent residents.

As observed earlier, restrictive covenants are seen as a protection for the property owner and the public. *See Brandon*, 314 S.W.2d at 521. Clearly, Gadd's ability to rent his home for any length of time, short or long, supports his, the homeowner's, unrestricted use of the property. This interpretation protects the property owner.

Moreover, we are bound to construe a restrictive covenant according to its plain language. But although the strict construction rule should not be used to defeat the obvious intention of the parties, it will be applied when ambiguous language creates a doubt as to what was prohibited. In the case of doubtful meaning, the restriction should be construed in favor of the free use of property and against the limitations. *Connor*, 213 S.W.2d at 439. Further, as observed

earlier, it is a longstanding principle of Kentucky law that in the case of ambiguity or doubt in a restrictive covenant, the intention of the party must be resolved in favor of the free and untrammelled use of the land. *See Glenmore Distilleries*, 117 S.W.2d at 176.

To conclude, since the deed restrictions are unclear (they permit rental but specify no time limit), we believe that the language of the restrictive deed does not prevent Gadd from renting his property on a short-term basis. If Hensley wanted to limit rental of the property to a certain time period, he could have included such language in the deed restrictions. He did not. When language is ambiguous it is not permitted to constrain the free exercise of a property-owner's use of property. Therefore, we reverse the decision of the trial court granting Hensley summary judgment and remand for consideration in light of this decision. This decision also lifts the pending stay on his ability to rent his property for a short-term period.

With regard to the counterclaim of harassment, Gadd has simply not proven harassment. We concur with the trial court judge that Hensley and the other residents did not intend to harass, annoy, or alarm Gadd. Instead, the residents attempted to ameliorate certain problems and situations by contacting the appropriate governmental agency. Further, no one has expressed any desire to prevent Gadd's use of his property as authorized by the deed restrictions. The actual conflict was about the meaning of the deed restrictions. The trial court's decision denying Gadd's counterclaim for harassment is affirmed.

## CONCLUSION

The decision of the Garrard Circuit Court granting Hensley's summary judgment is reversed and remanded, but its decision regarding Gadd's counterclaim for harassment is affirmed.

ALL CONCUR.

### BRIEF FOR APPELLANTS:

Carroll M. Redford, III  
Elizabeth C. Woodford  
Lexington, Kentucky

### BRIEF AND ORAL ARGUMENT FOR APPELLEE:

Frederick V. Short  
Stanford, Kentucky

### ORAL ARGUMENT FOR APPELLANT:

Carroll M. Redford, III  
Lexington, Kentucky