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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-2066**

William P. Brady, et al.,
Respondents,

vs.

Christopher Michael Hilger, et al.,
Appellants.

**Filed May 30, 2017
Affirmed
Randall, Judge***

Ramsey County District Court
File No. 62-CV-14-4370

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Considered and decided by Peterson, Presiding Judge; Smith, Tracy M., Judge; and
Randall, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

RANDALL, Judge

Appellants, owners of the residential property adjacent to the residential property owned by respondents, challenge the judgment in favor of respondents, arguing that the district court (1) erred by holding as a matter of law that there was a valid restrictive covenant in force and by submitting to a jury the question of which land was restricted, and (2) abused its discretion by refusing to give appellants' requested jury instructions and by denying appellants' motion for judgment as a matter of law (JMOL) or a new trial. We see no error and no abuse of discretion. Affirmed.

FACTS

Appellants Christopher and Ann Hilger and respondents William and Julie Brady own adjacent pieces of residential property divided by an east-west line. Appellants own the north property; respondents own the south property. The dividing line runs through a rectangular piece of land known as Lot 12, which is roughly 80 feet from north to south and runs from the west to the east boundaries of the properties. Appellants own the north 50 feet and respondents the south 30 feet of Lot 12.

In 1948, the owners of the two properties agreed to a restrictive covenant (the covenant) providing in relevant part that "the space and area between the said dwellings . . . shall be graded to a uniform level, and . . . maintained in perpetuity" and that "no buildings or structures shall be erected upon the space or area between the dwellings." The covenant was duly recorded on the certificates of title of both properties. In 1978, the covenant expired by operation of Minn. Stat. § 500.20, subd. 2a (2016) (providing that

restrictive covenants automatically expire after 30 years). However, neither those who owned it then nor any subsequent owners were aware that the covenant had expired until 2012. The only structure ever erected on Lot 12 was a small dirt-floor storage shed, built by the owners of the north property sometime between 1979 and 1987.

In 1987, Benson and Mary Whitney (the Whitneys) purchased the north property, and in 2002, respondents purchased the south property. Both the Whitneys and respondents believed there was a covenant in force and that it restricted Lot 12.

Acting on this belief, respondents in 2002 asked the Whitneys' approval of an addition to respondents' home that would extend onto Lot 12. Respondents drafted an "Agreement and Partial Release of Restrictive Covenant" (the agreement), providing that respondents' addition could extend onto the southern 15 feet of Lot 12, releasing the 1948 covenant with respect to that addition, and continuing "[a]ll other terms of the 1948 [covenant]." The agreement was recorded on both certificates of title.

In 2010, appellants purchased the north property from the Whitneys. Appellants were provided with, but did not read, copies of the covenant and the agreement. Appellants added a porch to the southeast corner of their house that did not extend onto Lot 12, and respondents, believing that the covenant restricted only Lot 12, did not object to appellants' porch.

But respondents did object when appellants began building a two-story garage on Lot 12. Believing that the garage would violate the covenant and the agreement, respondents served a complaint and sought a temporary restraining order (TRO). Appellants opposed the TRO, arguing that the agreement restricted not Lot 12, but rather

the plot of land bordered on the north by the south side of appellants' house, on the south by the north side of respondents' house, on the west by a line running from the southwest corner of appellants' house to the northwest corner of respondents' house, and on the east by a line running from the southeast corner of appellants' house to the northeast corner of respondents' house (the four-corner plot). Appellants also filed a counterclaim, seeking to remove the agreement from the certificates of title, and moved for summary judgment. Respondents moved to convert the TRO into a temporary injunction.

The district court denied appellants' summary-judgment motion, finding that there was a fact issue as to which land was restricted by the agreement, and granted respondents' motion for a temporary injunction.¹ Appellants again moved for summary judgment, reiterating their argument that the agreement restricted the four-corner plot, not Lot 12, and arguing in the alternative that the agreement was invalid per se because the covenant expired in 1978 under Minn. Stat. § 500.20, subd. 2a. Because the parties' properties were Torrens properties, they stipulated that a report from the Ramsey County Examiner of Titles (the examiner) was required to determine whether the agreement could be removed from the certificates of title.²

¹ After the first summary judgment ruling, the district court judge who had been involved with the case until this point retired, and a new judge was assigned. The term "district court" is used to refer to both judges.

² See Minn. Stat. § 508.71, subd. 2 (2016) (providing that a registered owner who seeks to alter a certificate of title may petition the court for an order and "The Court may hear and determine the petition after notice given to all parties in interest, as determined by the examiner of titles . . .").

The parties to the agreement, i.e., respondents and the Whitneys, were deposed as to their intent when they made the agreement. The examiner's report was based in part on their depositions and stated:

This [e]xaminer is aware of no law that would prevent owners of properties previously subject to restrictive covenants from subjecting their properties to similar restrictions by reference to the expired restrictions. It is my opinion that the [2002] agreement . . . created valid restrictions on the subject properties.

....

A mutual mistake of fact can void an agreement, but only if it is material. Based on the evidence in the Court file the parties to the [2002] agreement were mistaken about the current validity of the restrictions on their properties, but intentionally and voluntarily re-established them by their subsequent agreement. [Respondents and the Whitneys] intended that the properties be subject to restrictions as modified, so the validity of the prior restrictions was not material. The mutual mistake of fact does not affect the actions of the parties to the [2002] agreement.

At the time that [appellants] acquired their portion of the subject properties the original agreement and the [2002 a]greement both appeared as memorials on the certificate of title for [appellants' property]. Those documents at the very least put potential buyers on inquiry [n]otice of the possible evidence of restrictions on the property. A prudent buyer would have inquired of the seller or the adjoining property owner as to the existence of such restrictions.

The examiner recommended that the district court enter an order stating "that the restrictions contained in [the agreement] are valid encumbrances on the subject properties" Following a hearing on whether the examiner's report should be adopted, the district court adopted the report in part.³ In its order, the district court found:

³ The district court rejected the examiner's report as to specifically what land was restricted by the agreement, noting that "the [e]xaminer exceeded his authority in making a

9. [One respondent's] intent behind the 2002 agreement was to reestablish and confirm the restrictions of the 1948 agreement except as modified to allow expansion of his home. "This was intended to be a new agreement to continue the limitations on Lot 12, but allow for an exception for the construction that encroaches into Lot 12. That's what the intent was."

10. [The other respondent] acknowledged the 1948 restrictions and stated that there was a general understanding "among the four of us" that there was a restriction there that they all wanted to see maintained.

11. Benson Whitney, former owner of [appellants'] property and party to the 2002 agreement, stated his purpose in making the 2002 agreement "[w]as to try to preserve a restriction on the property—to keep a restriction on the property, because I thought it was a benefit . . . my intention was to have an agreement." Benson Whitney intended the 2002 agreement to be a reaffirmation of the restrictive terms found in the 1948 agreement with the exception of a one-time variance for [respondents'] home expansion.

12. Mary Whitney, former owner of [appellants'] property and party to the 2002 agreement, intended the 2002 agreement to be a new agreement that continued "the spirit" of the 1948 agreement. Her intent was to "continue" with the restrictions because she wanted to protect herself and her children; she liked her space and her privacy. She did not consider it an amendment, but stated it was a new agreement to continue the spirit of the 1948 agreement.

The district court concluded that the agreement imposed valid restrictions on the parties' properties as a matter of law but denied appellants' second summary-judgment motion, reiterating that there was a fact issue as to what land is restricted by the agreement.

Appellants requested a trial to resolve the fact issue; respondents opposed the request. The district court rejected respondents' argument that the case involved only an

determination as to the meaning to be given the terms of the agreement" because the district court had already ruled that the term "the space and area between the said dwellings" was ambiguous when it denied appellants' first motion for summary judgment.

equitable claim that could be resolved by a declaratory judgment and an injunction and set a trial date.

Before trial, appellants proposed a jury instruction on the construction of restrictive covenants; during trial, they submitted another instruction on the construction of contracts.

The district court rejected these two instructions and instructed the jury that:

This case is about a restrictive covenant . . . created in 2002 between [respondents] and the Whitneys. A restrictive covenant is a type of contract that runs with the land upon which it is placed. This means that the contract is binding on all future purchasers of the property after the agreement is made.

There is no issue about the validity of the 2002 contract. You are to decide the facts. Do not take anything the court has said or ruled as a sign of what your verdict should be.

The issue left to you, as the jury[,] to decide is the meaning of the 2002 restrictive covenant at the time it was made.

In determining the meaning of the contract, you are to determine what the parties [respondents] and the Whitneys reasonably meant to accomplish in view of:

1. [T]he contract as a whole;
2. [I]ts plain language;
3. [T]he circumstances surrounding the making of the contract;
4. [T]he intent of the parties at the time the contract was made;
5. [T]he conduct of the parties to the contract, [respondents] and the Whitneys, after the contract was made.

The jury determined that the covenant and agreement restricted Lot 12, not the four-corner plot, and the district court adopted the jury's verdict. Appellants moved for judgment as a matter of law (JMOL) or a new trial; their motion was denied.

Appellants now challenge the denials of their motion for summary judgment, arguing that the district court erred by holding as a matter of law that the 2002 agreement

imposed a valid restrictive covenant on appellants' property and by submitting the interpretation of the covenant to a jury instead of interpreting it in appellants' favor as a matter of law. Appellants also challenge the denial of their motion for JMOL or a new trial, arguing that the district court abused its discretion by refusing to give appellants' requested jury instructions.

D E C I S I O N

1. Denial of Appellants' Motion for Summary Judgment

While the denial of a motion for summary judgment is not generally within the scope of appellate review of a judgment entered after a jury verdict, this rule does not apply when the denial of summary judgment was based on a legal conclusion on an issue that was not presented to the jury. *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 918-19 (Minn. 2009); *Schmitz v. Rinke, Noonan, Smoley, Deter, Colombo, Wiant, Von Korff and Hobbs, Ltd.*, 783 N.W.2d 733, 744 (Minn. App. 2010). The denial of a motion for summary judgment is reviewed "to determine whether a genuine issue of material fact exists and whether the law was correctly applied." *Dunn. v. Nat'l Beverage Corp.*, 729 N.W.2d 637, 644 (Minn. App. 2007), *aff'd* 745 N.W.2d 549 (Minn. 2008). This court reviews both determinations de novo. *STAR Centers, Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76 (Minn. 2002).

A. Validity of the 2002 Agreement

Both respondents and both Whitneys testified that, by the 2002 agreement, they intended to confirm and preserve the restrictions imposed by the 1948 covenant, with the sole exception of allowing respondents to build an addition to their home extending 15 feet

into Lot 12. The district court agreed with the examiner that respondents' and the Whitneys' mistaken belief that the 1948 covenant was still in force in 2002 was irrelevant to their agreement to impose its restrictions on their properties and denied appellants' motion for summary judgment on that ground.

Appellants argue that the agreement was merely an unsuccessful attempt to revive or resurrect the expired 1948 covenant. But appellants provide no evidence or authority that respondents and the Whitneys were not free in 2002 to impose restrictions on their properties and to memorialize those restrictions in the agreement. Appellants also argue that, because respondents and the Whitneys did not substitute new language in the agreement but instead agreed that "All other terms of the 1948 [covenant] shall remain in full force and effect except as modified by this [agreement]," they did not specifically agree that nothing would be built on Lot 12. But the district court's conclusion that the agreement imposed valid restrictions on "the space and area between the said dwellings" did not attempt to define what that phrase meant. The district court did not err in concluding, as the examiner had concluded, that the agreement imposes valid restrictions on some part of both properties.

2. Submitting the Interpretation of the Covenant to a Jury

When a restrictive covenant is ambiguous, "extrinsic evidence is necessary to determine the intent of the parties." *State by Crow Wing Env't Prot. Ass'n v. City of Breezy Point*, 363 N.W.2d 778, 781 (Minn. App. 1985), *review denied* (Minn. May 20, 1985). The district court here concluded that the agreement was ambiguous as to the land to which it

applied—either Lot 12 (as respondents argued) or the four-corner plot (as appellants argued)—and submitted the issue to a jury.

Appellants argue that the district court erred by not interpreting the covenant language as a matter of law to restrict the four-corner plot and therefore permit appellants to build a garage on Lot 12. For this argument, they rely on language from *Mission Covenant Church v. Nelson*, 253 Minn. 230, 233, 92 N.W.2d 440, 442 (1958).

[I]nasmuch as the law leans in favor of the unrestricted use of property[,] a strained construction will not be adopted in favor of restrictions. There is much authority that covenants and agreements restricting the free use of property are strictly construed against limitations upon such use. Such restrictions will not be aided or extended by implication or enlarged by construction and doubt will be resolved in favor of the unrestricted use of property.

Id. at 233, 91 N.W.2d at 442 (citation omitted).

Appellants’ reliance is misplaced; *Mission Covenant Church* is distinguishable. It concerned three tracts of property, A, B, and C. *Id.* at 232, 91 N.W.2d at 441. A and C were conveyed to another owner by deeds restricting various uses of the tracts; the restrictions were for “the benefit of the grantor and its successors and assigns and for the benefit of any person or persons hereafter purchasing tract B.” *Id.* at 232, 92 N.W.2d at 441. The supreme court addressed “whether the deeds from [the grantor] covering tracts A and C created implied restrictions or so-called reciprocal negative easements against the part retained by [the grantors], thereby restricting tract B to the same uses permitted in tracts A and C,” and concluded that “the conveyances of tracts A and C [did not] create any implied restrictions or reciprocal negative easements against tract B.” *Id.* at 232-33,

91 N.W.2d at 442, 444. That issue is different from the issue here: it is undisputed that the covenant restricts some of each party's land; the question is which land it restricts.

Appellants' view that the rule requiring strict construction of covenants means that any dispute concerning use of property must be resolved in favor of the owner would make covenants meaningless. *See Turner v. Alpha Phi Sorority House*, 276 N.W.2d 63, 67 (Minn. 1979) (holding, in the context of contracts, that the rule requiring ambiguous terms to be construed against the drafter does not "ineluctably lead to the conclusion that the drafter is to lose"). Providing a jury with evidence of the parties' intent and asking it to resolve the ambiguity was not error.

The district court did not err in denying appellants' motion for summary judgment either on the ground that the 2002 agreement was invalid as a matter of law or on the ground that appellants were entitled to a judgment that the covenant restricted the four-corner plot as a matter of law.

3. Denial of Appellants' Motion for JMOL or a New Trial

Appellants do not challenge the accuracy of the jury instructions given, but they argue that they are entitled to JMOL or a new trial because the district court rejected two instructions appellants proposed. "District courts are allowed considerable latitude in selecting language used in the jury charge and determining the propriety of a specific instruction." *Morlock v. St. Paul Guardian Ins. Co.*, 650 N.W.2d 154, 159 (Minn. 2002). "If a trial court's instruction contains a complete and correct statement of the law, denial of the requested instruction, even if such instruction accurately states the law, is not ground for a new trial." *Larson v. Powder Ridge Ski Corp.*, 432 N.W.2d 774, 776 (Minn. App.

1988); *see also Hilligoss v. Cargill, Inc.*, 649 N.W.2d 142, 147 (Minn. 2002) (“Where instructions overall fairly and correctly state the applicable law, appellant is not entitled to a new trial.”). But whether a trial court must give a particular jury instruction raises an issue of law that this court reviews de novo. *State v. Bashire*, 606 N.W.2d 449, 452 (Minn. App. 2000), *review denied* (Minn. Mar. 28, 2000).

Appellants proposed specific instructions on the construction of restrictive covenants and on the construction of contracts. But “[appellate] court[s] prefer[] a general instruction where practical, in order to avoid overemphasis in favor of a party, or jury confusion.” *Fallin v. Maplewood-North St. Paul Dist. No. 622*, 362 N.W.2d 318, 322 (Minn. 1985) (concluding that “submission of the reasonable care standard and not elaborating on the plaintiff’s four theories of negligence neither destroyed the substantial correctness of the charge nor resulted in substantial prejudice”).

A. Instruction on Restrictive Covenants

Appellants filed a proposed additional jury instruction based on *Mission Covenant Church*:

Covenants and agreements restricting the free use of property are strictly interpreted against limiting the use of the property. Any doubt about the meaning of a restrictive covenant should be resolved in favor of the unrestricted use of property.

The district court gave three reasons for its rejection of appellants’ proposed instruction on this topic. *See Mission Covenant Church*, 253 Minn. at 233, 91 N.W.2d at 442.

First, the district court found, “there was ample evidence as to the intent of the drafters of the 2002 agreement.” Appellants argue that evidence of the drafters’ intent was

irrelevant because any language in the agreement deemed ambiguous had to be construed in appellants' favor, regardless of the drafters' intent. But appellants present no support for the view that ambiguity in a restrictive covenant inevitably results in a decision for the landowner. See *Turner* 276 N.W.2d at 67 (holding that construing ambiguous terms against the drafter does not "ineluctably lead to the conclusion that the drafter is to lose").

Second, the district court observed, "[Appellants] had no factual basis for arguing that the jury should conclude that no restrictions existed at all." The jury was told that restrictions existed and asked only to determine which land was affected by those restrictions. Appellants rely on *McKush v. Hecker*, 559 N.W.2d 725, 728 (Minn. App. 1997) (citing *Mission Covenant Church*, 253 Minn. at 233, 91 N.W.2d at 442, for the proposition that "agreements restricting the free use of property are strictly construed against limits on use"), to argue that this rule applies "when the parties agree that *some* restriction exists, but disagree on the *extent* of the restriction." But the question here is not the extent of the restriction: it is the location of the land restricted. It is unclear why appellants, who built a porch on part of the four-corner plot in 2010 with no permission or objection from respondents, now claim that a covenant restricting the four-corner plot is less restrictive than a covenant restricting Lot 12, on which they wish to build a garage.

Third, the district court noted, "[N]o evidence was presented that the interpretation of the 2002 Agreement advanced by [appellants] was in any way less restrictive than that testified to by the drafters of the 2002 Agreement." Appellants claim that they have been "arguing for a less restrictive interpretation of the covenant: they argued that the covenant did not cover all of Lot 12 and did not prohibit their proposed garage, while [respondents]

argued that it did.” But appellants provide no evidence that the covenant restricts neither the four-corner plot (on which appellants built their porch) nor Lot 12, on which they now wish to build a garage.

Finally, appellants note that the district court “identified no legal misstatement or other defect in [appellants’] proposed instructions regarding the strict-construction rule for restrictive covenants.” But “denial of [a] requested instruction, even if such instruction accurately states the law, is not ground for a new trial.” *Larson*, 432 N.W.2d at 776. The rejection of appellants’ proposed instruction on restrictive covenants does not entitle them to a new trial.

B. Instruction on Construing Contract Ambiguities

During trial, appellants proposed a jury instruction based on *Turner*:

The words of an agreement are to be taken most strongly against the party using them. If a contract is prepared by one of the parties and the language is ambiguous, it should be construed most strongly in favor of the opposing party—but read in the sense in which a prudent and reasonable person would have understood it.

See Turner, 276 N.W.2d at 66. Appellants argue that the district court erred in rejecting this instruction. But *Turner* is distinguishable: in that case, “[n]o evidence was introduced as to the meaning which the parties attached to the ambiguous term and, accordingly, the [district] court instructed the jury consistently with this rule.” *Id.*; *see also Ecolab, Inc. v. Gartland*, 537 N.W.2d 292, 292 (Minn. App. 1995) (“Where no evidence is presented regarding the parties’ intent at the time a[n] . . . agreement is signed, ambiguities in the agreement’s language must be construed against the drafter and the agreement’s

restrictions must be read narrowly.” (Emphasis added)). Here, as the district court found, “there was ample evidence as to the intent of the drafters of the 2002 agreement.” The record supports this finding: all four signers of the agreement testified as to their intent during depositions and again at trial. Thus, there was no basis for the instruction.

As the district court observed, appellants, who are arguing for their interpretation of the agreement, were not parties to the agreement, and they provide no support for their view that their interpretation has precedence over the intent of those who were parties to the agreement. “When construing an ambiguous contract, the court has a duty to give effect to the intent of the parties.” *Id.* at 295.

Appellants are not entitled to a new trial. The district court did not abuse its discretion by rejecting their proposed jury instructions or by denying their motions for summary judgment.

Affirmed.