

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 22, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 98-1320

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

T. R. THOMPSON BUILDERS, INC.,

PLAINTIFF-APPELLANT,

v.

**FRANCOIS OIL COMPANY, INC., AND
MADISON GAS AND ELECTRIC COMPANY,**

DEFENDANTS-RESPONDENTS,

STATE BANK OF MT. HOREB,

DEFENDANT.

APPEAL from an order of the circuit court for Dane County:
ANGELA B. BARTELL, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

PER CURIAM. T.R. Thompson Builders, Inc. (Thompson),
appeals from an order of the circuit court dismissing its claims against Francois

Oil Company, Inc., Madison Gas and Electric Company, and the State Bank of Mt. Horeb. The issues on appeal are: (1) whether the provisions of the restrictive covenant are enforceable against Francois; and (2) whether the changes to the landscaped area unreasonably interfere with Thompson's rights under the landscaping agreement. Because we conclude that the provisions of the restrictive covenant are not enforceable, and that Francois's use of the area did not unreasonably interfere with Thompson's rights under the landscaping agreement, we affirm.

Thompson and Francois own adjacent property located on Lot 37 of the Acewood Plat in the City of Madison. Thompson operates an apartment building and Francois operates a gas station. For the past several years, the parties have been disputing Francois's renovation of an old-style gasoline station to a more modern convenience store and gas station.

In December 1986, Francois and Thompson recorded a landscaping agreement which preserved a ten-foot strip of Francois's property along the border of the Francois property with Thompson. The agreement provided that the strip of property was to be landscaped "as mutually agreed" with the costs shared. Under the agreement, Thompson has primary responsibility for the maintenance of the landscaped property. In November 1996, Francois granted a right-of-way over the landscaped property to MG&E for underground electrical service. Thompson brought this action seeking to enforce restrictive covenants contained in the Protective Covenants of Acewood Plat against Francois and to prohibit impingement of the landscaped area by MG&E.

The first issue is whether the restrictive covenant is enforceable against Francois. The interpretation of a restrictive covenant is a question of law

which we review independently of the trial court. *Zinda v. Krause*, 191 Wis.2d 154, 165, 528 N.W.2d 55, 59 (Ct. App. 1995) (citation omitted). Whether the language of a restrictive covenant is ambiguous is also a question of law. *Id.* (citation omitted). Since public policy favors the free and unrestricted use of property, restrictions in deeds must be strictly construed to favor unencumbered and free use of property. *See Crowley v. Knapp*, 94 Wis.2d 421, 434, 288 N.W.2d 815, 822 (1980). After reviewing the covenants, we agree with the circuit court's conclusion that the language of the covenant is ambiguous and internally inconsistent, and therefore not enforceable against Francois.

Thompson seeks to enforce Part C-2 of the covenants which requires that before a building is constructed, the Architectural Control Committee (ACC) must approve the construction plans and specifications. Francois did not obtain approval of the ACC before starting the construction project on its property. Part B-1 of the covenants states: "The residential area covenants in part C in their entirety shall apply to all of the lots in said plat, excepting Lots 1 and 37 which are governed by the business area provisions hereinafter set forth." Part B-2 states: "The business area covenants in Part F-1 apply to lots 21 and 37 of said plat." Part F-1, however, does not contain any business covenants. Part D further provides that the provisions of Part E-1 apply to the approval of all business buildings constructed in the business area. Part E-1 does not contain any provisions for the approval of the exterior of buildings.

Thompson seeks to enforce Part C-2 against Francois, yet Part B-1 states that Part C-2 does not apply to Lot 37. Part B-2 states that Lot 37 is covered by Part F-1, but that part does not contain any relevant provisions. Thompson argues that the intent can be ascertained by the language used throughout the covenant. However, as demonstrated above, the covenant is inconsistent

throughout. The circuit court concluded that because of these internal inconsistencies and ambiguities, the covenants were not enforceable against Francois. We agree.

The second issue is whether the use of the ten-foot strip of property under the right-of-way given to MG&E unreasonably interferes with Thompson's rights under the landscaping agreement. Thompson argues that the circuit court misinterpreted the landscaping agreement by concluding that the agreement applied only to landscaping planted after the agreement was recorded. Thompson also argues that the agreement precluded Francois from entering into any agreement with MG&E, and that the circuit court erred by finding that the additions MG&E made to the property did not interfere with Thompson's use of the property as provided for by the landscaping agreement.

The agreement provides, in pertinent part, that the area is to be reserved as a landscaped area "with landscaping to be placed thereon and maintained as mutually agreed." We agree with the circuit court's interpretation that the agreement "clearly looks exclusively to the future and does not cover preexisting landscaping."

Thompson further argues that the agreement precluded Francois from entering into any agreement with MG&E. Once again, we agree with the circuit court's conclusion that the landscaping agreement did not preclude Francois's agreement with MG&E. As the circuit court stated, under Wisconsin law, the owner of the servient estate, Francois, may make all proper use of its land, including the right to make change upon it, as long as it does not unreasonably interfere with the use by the easement holder. *See Hunter v. McDonald*, 78 Wis.2d 338, 343, 254 N.W.2d 282, 285 (1977). "This oft-repeated statement of

the servient owner's rights and duties virtually always phrases his duty in terms of protecting the easement holder's right to use the easement for the purpose for which it is created." *Id.* at 344, 254 N.W.2d at 285 (citation omitted). Therefore, the agreement did not preclude Francois from granting a right-of-way to MG&E as long as that use of the property did not interfere with Thompson's right to use the property as provided by the agreement.

The circuit court found that evidence established that Thompson continued to have access to the landscaped area and to maintain the landscaping, the rights which were granted to it under the agreement. The court further found that the changes made by Francois and MG&E did not interfere with Thompson's access to the property or its ability to maintain the landscaping. We agree that the evidence did not establish an unreasonable interference by Francois of the rights granted to Thompson under the landscaping agreement. Therefore, we affirm the decision of the circuit court.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

