944 So.2d 1092
District Court of Appeal of Florida,
Second District.

Earl SMITH, Appellant,
v.
CITY OF FORT MYERS and Lee County,
Appellees.

No. 2D06–1693.
|
Nov. 17, 2006.

Synopsis

Background: Citizen brought declaratory judgment action against city and county, asserting that city's approval of transfer of property to county was illegal. The Circuit Court, Lee County, James H. Seals, J., dismissed complaint. Citizen appealed. The District Court of Appeal, 898 So.2d 1177, reversed and remanded. On remand the Circuit Court granted city and county summary judgment. Citizen appealed.

Holdings: The District Court of Appeal, Stringer, J., held that:

[1] the law of the case doctrine did not prohibit city from arguing that citizen lacked standing to challenge city's transfer of park to county, and

[2] citizen lacked standing to challenge the legality of city's transfer of park to county.

Affirmed.

Attorneys and Law Firms

***1093** Steven Carta of Simpson, Henderson, Carta & Randolph, Fort Myers, for Appellant.

Harold N. Hume, Jr., and J. Matthew Belcastro of Henderson, Franklin, Starnes & Holt, Fort Myers, for Appellee City of Fort Myers.

David M. Owen, Lee County Attorney, and Jack N. Peterson, Assistant County Attorney, Fort Myers, for Appellee Lee County.

Opinion

STRINGER, Judge.

Earl Smith seeks review of an order granting final summary judgment in favor of the City of Fort Myers and Lee County (together "Appellees") in Smith's declaratory judgment action. We conclude that Smith lacked standing to bring the declaratory judgment action and affirm.

Smith filed a complaint in the circuit court seeking a judicial declaration of the validity of the City's transfer to the County of its ownership of City of Palms Park ("the Park"), which serves as the spring training grounds for the Boston Red Sox. Specifically, Smith alleged that the City violated the notice requirements of the city code and section 163.380, Florida Statutes (2003).

Appellees responded to the complaint by filing motions to dismiss which argued that the complaint failed to state a cause of action and did not allege any basis for standing. The circuit court subsequently granted the motions, ruling that the amended complaint failed to state a cause of action. The court rejected Appellees' standing argument by finding that Smith would have had standing to bring the claim if the complaint had stated a cause of action.

On appeal of that order, this court reversed and remanded the case for further proceedings. *See Smith v. City of Fort Myers,* 898 So.2d 1177, 1178 (Fla. 2d DCA 2005). This court did not address the circuit court's finding that Smith had standing to bring the action, although the City raised the issue on appeal as an alternative basis for affirmance or as a "Tipsy Coachman" argument, *see Robertson v. State,* 829 So.2d 901, 906 (Fla.2002).

On remand, the parties entered into a stipulation regarding the undisputed facts, and Smith and the City filed motions for summary judgment based on those stipulated facts. The court granted the City's summary judgment motion and entered a final summary judgment in favor of Appellees. Smith appealed, and the City reasserts its standing argument as an alternative basis for affirmance. The City argues that Smith lacks standing to challenge the transfer of the Park because Smith has not established a special injury apart from his interest in the transfer of the Park as a taxpayer. Smith raises two arguments in response to the City's standing argument.

***1094** [1] [2] [3] First, Smith argues that the issue of his standing has already been decided by the circuit court and affirmed on appeal. Thus, according to Smith, the City is

barred from raising the issue by the doctrine of the law of the case. "The doctrine of the law of the case requires that questions of law actually decided on appeal must govern the case in the same court and the trial court, through all subsequent stages of the proceedings." *Fla. Dep't of Transp. v. Juliano,* 801 So.2d 101, 105 (Fla.2001). The doctrine of law of the case thus applies only to those issues "actually decided on appeal," whether explicitly or implicitly. *Id.* at 105–06.

Contrary to Smith's argument, this court did not decide the issue of standing in the first appeal. The issue was not raised as a basis for reversal by Smith as the appellant but was raised as an alternative basis for affirmance by the City as an appellee. This court's reversal on an entirely different basis does not mean that it considered the City's "Tipsy Coachman" argument. *See Warren v. Shands Teaching Hosp. & Clinics, Inc.,* 700 So.2d 702, 704 (Fla. 1st DCA 1997) (holding that an alternative ground for affirmance was not necessarily decided and thus did not trigger the doctrine of law of the case). Because the issue of standing was not actually decided on appeal, the City is not barred from raising it by the doctrine of law of the case.

[4] [5] Smith's second argument is that he is not required to establish a special injury in order to challenge the legality of the transfer of the Park. Generally, a private citizen is precluded from filing a taxpayer complaint to challenge government action unless the private citizen alleges and proves a "special injury," which is an injury that is different from that of the general public. *N. Broward Hosp. Dist. v. Fornes,* 476 So.2d 154 (Fla.1985); *Rickman v. Whitehurst,* 73 Fla. 152, 74 So. 205 (1917). This has been termed the "*Rickman* rule" or "special injury rule."

[6] The supreme court has recognized that the special injury rule is not absolute. First of all, if there is legislation expressly providing for standing, the special injury rule does not apply. *See, e.g., Fla. Wildlife Fed'n v. State Dep't of Envtl. Regulation,* 390 So.2d 64, 67 (Fla.1980) (holding that a showing of special injury was not required to bring an action pursuant to the EPA). In addition, the supreme court created an exception to the special injury rule for constitutional challenges to government action alleging a violation of the legislature's taxing and spending power. *Dep't of Admin. v. Horne,* 269 So.2d 659, 663 (Fla.1972).

Smith acknowledges the continued validity of the special injury rule to taxpayer suits. He has not alleged any special injury in this case, and he does not argue that there is legislative authority for standing or that the case somehow involves a constitutional challenge to government action alleging a violation of the legislature's taxing and spending power. Instead, Smith argues that under *Renard v. Dade County,* 261 So.2d 832, 835 (Fla.1972), he has standing because he is challenging the legality of the City's procedures used to transfer its ownership of the Park to the County. We conclude that Smith's reliance on *Renard* is misplaced because *Renard* applies only in the context of zoning suits.

Although originally applied in taxpayer suits, the special injury rule was extended to zoning suits in *Boucher v. Novotny,* 102 So.2d 132 (Fla.1958). In *Renard,* the supreme court limited the application of the special injury rule in zoning suits by holding that "[t]he *Boucher* rule was not intended to be applied to zoning matters other than suits by individuals for zoning ***1095** violations." 261 So.2d at 835. The *Renard* court thus concluded that an attack on a zoning ordinance enacted without proper notice could be brought by "[a]ny affected resident, citizen or property owner of the governmental unit in question" as previously set forth by supreme court precedent. *Id.* at 838. There is no indication in *Renard* that its exception applies in any context other than zoning suits.

In fact, the supreme court has twice mentioned the *Renard* exception as applying in the narrow context of zoning decisions. *See Citizens Growth Mgmt. Coalition of W. Palm Beach, Inc. v. City of W. Palm Beach, Inc.,* 450 So.2d 204, 206 (Fla.1984) ("The question of standing to challenge zoning decisions was comprehensively explained in *Renard v. Dade County.*"); *Fla. Wildlife Fed'n,* 390 So.2d at 67 (noting that the supreme court has carved out an exception to the special injury rule in zoning suits and citing *Renard* for this proposition). Furthermore, in a case issued a decade after *Renard,* the supreme court expressly reaffirmed the validity of the special injury rule and noted that there is only one exception to this rule in the context of taxpayer suits, which is the exception for constitutional challenges set forth in *Horne. Fornes,* 476 So.2d at 156 ("This Court has refused to depart from the special injury rule or expand our exception established in *Horne.*").

Smith cited the following cases in support of his argument for the extension of *Renard: City of Miami v. Save Brickell Ave., Inc.,* 426 So.2d 1100 (Fla. 3d DCA 1983); *Upper Keys Citizens Ass'n v. Wedel,* 341 So.2d 1062 (Fla. 3d DCA 1977); *Godheim v. City of Tampa,* 426 So.2d 1084 (Fla. 2d DCA 1983); and *City of Sarasota v. Windom,* 736 So.2d 741 (Fla. 2d DCA 1999). None of these cases compels such a reading of *Renard.*

Save Brickell Avenue and *Upper Keys Citizens Ass'n* are

not persuasive because in those cases the Third District applied the *Renard* exception to challenges in zoning suits. *Save Brickell Ave.,* 426 So.2d at 1103; *Upper Keys Citizens Ass'n,* 341 So.2d at 1064.

In *Godheim,* this court declined to apply the special injury rule to determine the standing of a taxpayer to challenge the award of a governmental contract based upon a violation of the notice requirements of the Sunshine Law. 426 So.2d at 1087–88. However, this court did not apply the special injury rule because standing was expressly conferred by the Sunshine Law. *Id.* at 1088. Thus, *Godheim* is not controlling because an exception to the special injury rule for taxpayer suits applied. Furthermore, this court did not cite *Renard* anywhere in its opinion.

The final case cited by Smith is *Windom,* a taxpayer suit in which the plaintiffs cited *Renard* in support of their argument that they had standing to seek permanent injunctions enjoining the City of Sarasota from installing speed humps or tables within the City and requiring the removal of speed humps or tables that had already been installed. 736 So.2d at 743. This court recognized the validity of the special injury rule and rejected the plaintiffs' suggestion that *Renard* applied, describing the exception as "generally dealing with a procedural challenge, such as a lack of notice, to the local government's legislation." *Id.* Smith's interpretation of this language as an extension of *Renard* to taxpayer suits is misplaced. Because this court did not apply the *Renard* exception in the taxpayer suit, the language is, at best, dicta.

Based on the above analysis, we can discern no legal basis to extend the *Renard* exception beyond zoning matters to all matters in which the legality of a procedural ***1096** enactment is at issue. Therefore, the special injury rule governs standing in this case. Because Smith failed to establish such a special injury, he lacked standing to file the declaratory judgment action. Accordingly, we affirm the circuit court's order granting final summary judgment in favor of Appellees.

Affirmed.

CASANUEVA and LaROSE, JJ., Concur.

All Citations

944 So.2d 1092, 31 Fla. L. Weekly D2898

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355 So.2d 222
District Court of Appeal of Florida, Second District.

Donald A. BARRETT and H. Jean Barrett, his wife, Flora A. Kirsheman, Theodore W. Kolz and Lois E. Kolz, his wife, Sidney A. Stephens and Irene C. Stephens, his wife, and James J. Wrasman and Winifred M. Wrasman, his wife, Appellants,
v.
John F. LEIHER, Appellee.

No. 77-480.
|
Feb. 24, 1978.

Residents of subdivision brought action against landowner, alleging that he had violated restrictive covenant running with the land. The Circuit Court for Pinellas County, Philip A. Federico, J., found that restrictive covenant was ambiguous and unenforceable and entered judgment for defendant, and plaintiffs appealed. The District Court of Appeal, Boardman, C. J., held that term "structure," as used in restrictive covenant prohibiting construction of any structure on residential lot other than one single family private dwelling, was not unenforceable for ambiguity, and that free-standing deck, which was constructed by landowner on his property, which was not attached to or connected to his residence, which was approximately 12 to 14 feet in height, and which was comprised of wooden deck suspended between corner posts approximately eight feet above ground level, was not "structure" permitted under covenant and had to be removed.

Reversed and remanded.

West Headnotes (2)

[1] Covenants
Nature and Operation in General

Reasonable, unambiguous restriction will be enforced according to intent of parties as expressed by clear and ordinary meaning of its terms; if it is necessary to construe a somewhat ambiguous term, intent of parties as to evil sought to be avoided expressed by covenants as a whole will be determinative, and only where intent cannot be ascertained will covenant not be enforced.

14 Cases that cite this headnote

[2] Covenants
Covenants as to Use of Property

Term "structure," as used in restrictive covenant prohibiting construction of any structure on residential lot other than one single family private dwelling with attached garage, was not unenforceable for ambiguity, and free-standing deck, which was constructed by landowner on his property, which was not attached to or connected to his residence, which was approximately 12 to 14 feet in height, and which was comprised of wooden deck suspended between corner posts approximately 8 feet above ground level, was not "structure" permitted under covenant and had to be removed.

9 Cases that cite this headnote

Attorneys and Law Firms

*223 Richard T. Bennison of MacKenzie, Castagna, Bennison & Gardner, Clearwater, for appellants.

No appearance for appellee.

Opinion

BOARDMAN, Chief Judge.

Appellants/plaintiffs, Donald A. Barrett, H. Jean Barrett, Flora A. Kirsheman, Theodore W. Kolz, Lois E. Kolz, Sidney A. Stephens, Irene C. Stephens, James J. Wrasman, and Winifred M. Wrasman, appeal an adverse final judgment rendered in favor of appellee/defendant, John F. Leiher. We reverse.

Appellants filed suit against appellee to require him to remove from his premises a structure which appellants alleged violated a restrictive covenant running with the land. There is no dispute as to the facts involved. Appellants and appellee were residents of Pennwood

Estates, a subdivision located in Pinellas County, Florida. By the declaration of restrictions duly recited and recorded October 6, 1967 in the public records, all lots of the subdivision were made subject to certain covenants which provided in pertinent part that:

1. All lots in this subdivision shall be known and described as residential lots. No structure shall be erected, altered, placed or permitted to remain on any residential lot other than one single family private dwelling with an attached garage for not less than two automobiles. No lot shall be reduced in size by any method whatsoever. Lots may be enlarged by consolidation with one or more adjoining lots under one ownership. In the event one or more lots are developed as a unit, all restrictions herein contained shall apply as to a single lot. In any event, no dwelling shall be erected, altered, placed or permitted to remain on any site smaller than one (1) lot as shown on the recorded plat.

2. No residence shall be erected upon any said lot which residence has less than 1650 square feet base building area exclusive ***224** of garages, servants' quarters, or open porches, or other areas which are either open or enclosed solely by screens. For the purpose of measurements for compliance with this restriction, outside wall dimensions may be used.

3. Prior to start of construction, builders' plans must be approved by the developer, its duly authorized agent or assigns. All dwellings shall be of masonry type construction with cement tile roofs. All dwellings shall have a concrete driveway and a concrete sidewalk along the road right-of-way, an exterior post lantern, sodded front yard at completion of construction, according to the developer's specifications.

7. Trailers, tents, shacks, barns or other temporary buildings of any design whatsoever, are expressly prohibited within this subdivision and no temporary residence shall be permitted in unfinished residential buildings. This shall not prevent temporary buildings used by contractors and developers in construction work, which shall be removed from the premises on completion of the building.

10. Fencing will be permitted but to be no higher than 5 feet and not to extend beyond the front corner of the house and must comply with specifications of County of Pinellas for residential purposes.

13. No clothes line shall be installed so as to be seen from the street in front of a residence. All garbage cans to have a decorative wall so they cannot be seen from the street in front of a residence.

15. These covenants are to run with the land and shall be binding upon all parties and all persons who may now own or who may hereafter become the owner or owners of any of the above described lots and all parties claiming under them, for a period of 25 years from the date this instrument is recorded, after which time said covenants, reservations and restrictions shall automatically extend for successive periods of 10 years each, unless prior to the commencement of any 10 year period an instrument in writing, signed by the owners of a majority of the lots hereby affected, has been recorded in the Public Records of Pinellas County, Florida, which said instrument may agree to change, alter or rescind said covenants, reservations and restrictions, in whole or part. (Emphasis added.)

Appellee testified that at the time he purchased his property in 1974 that he was aware of the restrictions and that they had been attached to his title insurance policy.

This controversy arose between the parties when appellee began construction of a free-standing deck on his property. From the evidence introduced, particularly the picture of the deck, it is apparent that it is not attached to or connected to his residence. As described in the complaint it was approximately twelve to fourteen feet in height; a wooden deck suspended between the corner posts approximately eight feet above the ground level; a wooden railing approximately four feet high around the perimeter of the deck; a palm-frond thatching suspended from the railing; and a wooden stairway and hand rail running from the deck to the ground. It was located in appellee's back yard half way between the rear of his residence and the rear lot line.

After a hearing the trial court found that paragraph one of the restrictions which are the subject matter of this suit, do (sic) not contain a definition of the word "structure", and therefore said restrictions are ambiguous as to the intent of the requirements therein contained, and in the case of Ballinger v. Smith, 54 So.2d 433, the Florida Supreme Court in citing the cases of Moore v. Stevens (90 Fla. 879), 106 So. 901, and Heisler v. Marceau (95 Fla. 135), 116 So. 447, held that "the law favors the free and untrammeled use of real property. Restrictions in conveyances on the

fee are regarded unfavorably and are, therefore, strictly construed, ***225** but where the intention is clear, the Courts will enforce such restrictions if not unreasonable."

That it is evident from the evidence presented that a number of swimming pools have been constructed in the sub-division, (sic) and that infact (sic) the developer who promulgated said restrictions, constructed some of said swimming pools, and

Therefore, by the intent of the restrictions, not all structures are forbidden in that it appears that the primary purpose of the restrictions is to restrict the use of the property for single family use. . . .

While we agree with the statement of law relied on by the trial court, as stated in the order appealed, we do not agree with its conclusion that the restrictive covenant at issue is ambiguous and unenforceable. Despite an acknowledgement by the courts of a predisposition against restrictive covenants, it is not necessary to specifically define each term within a covenant to draft an enforceable restriction.

[1] **[2]** Florida adheres to the general rule that a reasonable, unambiguous restriction will be enforced according to the intent of the parties as expressed by the clear and ordinary meaning of its terms. If it is necessary to construe a somewhat ambiguous term, the intent of the parties as to the evil sought to be avoided expressed by the covenants as a whole will be determinative. Only where intent cannot be ascertained will the covenant not be enforced. See Hagan v. Sabal Palms, Inc., 186 So.2d 302 (Fla.2d DCA 1966), citing Moore v. Stevens, 90 Fla. 879, 106 So. 901 (1925); 20 Am.Jur.2d Covenants, Conditions, and Restrictions ss 185-87 (1965).

The plain meaning of "structure" is embodied in Webster's International Dictionary: "Something constructed or built. . . ." We can find nothing ambiguous in the use of this term in the case before us and conclude that the deck is a structure as ordinarily understood. Since paragraph one of the declaration unambiguously, expressly prohibits any structure other than one single-family dwelling with an attached garage on any one lot, appellee's deck is not a structure permitted under the declaration of restrictions and must be removed. Furthermore, not only is the term structure not ambiguous, but the intent of paragraph one is clear from the body of the declaration. It was the overall purpose of the restrictions to develop and maintain a residential area of some homogeneity in density, size, design, and materials of the structures and appearance of the lots. Paragraph one serves this purpose by restricting density and providing a uniform design and appearance.

REVERSED and REMANDED for proceedings consistent with this opinion.

GRIMES and DANAHY, JJ., concur.

All Citations

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