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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2011

2100293

Grove Hill Homeowners' Association, Inc.

v.

William Rice and Laura Rice

Appeal from Lee Circuit Court
(CV-09-900178)

MOORE, Judge.

Grove Hill Homeowners' Association, Inc. ("the Association"), appeals from a judgment of the Lee Circuit Court ("the trial court") declining to issue a permanent injunction enjoining William Rice and Laura Rice from

maintaining a driveway on their property that does not comply with § 6.20 of the Grove Hill Subdivision Declaration of Covenants, Conditions, and Restrictions ("the restrictive covenants").

This is the second time this case has been before this court. See Grove Hill Homeowners' Ass'n v. Rice, 43 So. 3d 609 (Ala. Civ. App. 2010) ("Grove Hill"). In Grove Hill, we set forth the following facts pertinent to the present appeal:

> "In 2008, the Rices purchased property and a house located in the Grove Hill subdivision. On April 23, 2008, the Association sent a letter to the Rices welcoming them to the neighborhood. The Association attached a copy of the restrictive covenants to the letter, which also referred the reader to a Web site for further 'neighborhood information.' Section 6.20 of the restrictive covenants provides:
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> > "'**6.20 Driveways and Sidewalks.** All driveways and sidewalks for each Lot or Dwelling shall be constructed of asphalt or concrete. Other materials may be used but only if approved by the [Architectural Review Committee]. All driveways and sidewalks shall be paved; chert, gravel, and loose stone driveways and sidewalks are prohibited. Provided, however, that the foregoing shall not be applicable to any of the roadways within the Development which may constitute Common Areas.'
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> "(Bold typeface in original.) Section 5.05(a) of the restrictive covenants states that no improvements, including driveways, may be made to the exterior

appearance of any lot without preapproval of the Architectural Review Committee ('the ARC').

"At the time the Rices purchased the property, the construction of the house had not been completed, the house had been abandoned by the contractor for four months, and the house was in foreclosure. The contractor had built a narrow concrete driveway running from the street to the house. William testified that, at the time the Rices purchased the property, the driveway was stained with red mud and contained a long crack. No one from the Association or the ARC instructed the Rices that the driveway needed to be repaired or remodeled, but Laura told William that they needed to do something to correct the 'eyesore.'

"William testified that he considered several options to address the driveway problem, some of which he considered too expensive and others of which he deemed impractical. The Rices decided not to completely replace the driveway; instead, they decided to add a secondary pad to the driveway and to top the driveway with liquid asphalt and loose pea gravel. Under that plan, the driveway would retain its original concrete base. They contracted with a landscaping company, which performed the work. In violation of § 5.05 of the restrictive covenants, the Rices did not notify the ARC and obtain its approval before undertaking the modifications to the driveway.

"In late November or early December 2008, John Price, the president of the Association, received an anonymous complaint about the driveway. Barbara Arrington, the property manager, sent an e-mail to William asking whether the driveway had been completed. After receiving information that the driveway had been completed, Price contacted Jack Downs, then chairman of the ARC, about the issue. Downs inspected the driveway and opined to the members of the Association's board at a December

2008 meeting that the driveway did not comply with § 6.20.

"In January 2009, Diane Tillery assumed the role of ARC chairman from Downs. Tillery talked with the Rices and showed them the restrictive covenants. Tillery testified that, during that meeting, the Rices asked for a variance. Tillery agreed to discuss the matter with the ARC. The Rices thereafter submitted a survey of 21 neighbors, all of whom approved of the driveway, along with photographs of the driveway before the modifications and a description of the modification process. Tillery and the other four members of the ARC inspected the driveway. The ARC subsequently met and unanimously decided that the driveway did not comply with § 6.20. Tillery testified that the ARC did not discuss granting the Rices a variance; however, a letter dated January 19, 2009, which the Association introduced into evidence, indicates that the ARC rejected the Rices' request for the variance.

"Over the next month, Tillery exchanged e-mails and letters with the Rices and Laura's father, an attorney. The Rices sought a face-to-face meeting with the ARC to discuss their view that the modifications had actually improved the condition of the driveway, but the ARC did not agree to any 'appeal.' The Association, on the other hand, sought information on the Rices' plans to remodel the driveway in compliance with § 6.20. After receiving a letter from Laura's father asking her to quit threatening the Rices, Tillery contacted the Association's attorney. That attorney filed a complaint against the Rices on April 7, 2009, seeking an injunction and damages. The Rices answered on May 11, 2009, and counterclaimed for attorney fees under the Alabama Litigation Accountability Act ('the ALAA'). See Ala. Code 1975, §§ 12-19-270 to -276.

> "The trial court rejected the Association's request for a preliminary injunction on May 20, 2009. The case proceeded to trial on June 5, 2009. At the trial, the Association introduced photographs showing loose gravel from the driveway scattered in the street. William admitted that loose gravel from the driveway had gotten onto the street. Tillery testified that the ARC was concerned about that problem as well as the aesthetic difference between the Rices' driveway and all the other driveways in the neighborhood and its potential impact on property values. Tillery testified that the Association wanted the Rices to comply with § 6.20 no matter the cost or disruption. William testified that it would cost $15,000 to make the changes the Association was demanding and that the Rices had taken no steps to change the driveway."

43 So. 3d at 611-12.

The trial court entered a judgment on July 14, 2009, determining that the driveway was "a concrete driveway covered with asphalt and gravel, a combination not contemplated in the covenant," and that the driveway conformed to the covenants and denying the relief requested by the Association. The Association appealed the trial court's judgment to this court on August 11, 2009. In Grove Hill, this court set out the standard for issuing a permanent injunction:

> "'To be entitled to a permanent injunction, a plaintiff must demonstrate success on the merits, a substantial threat of irreparable injury if the injunction is not granted, that the threatened injury to the plaintiff outweighs the harm the injunction may cause the defendant, and that

> granting the injunction will not disserve the public interest.'"

43 So. 3d at 613 (quoting TFT, Inc. v. Warning Sys., Inc., 751 So. 2d 1238, 1242 (Ala. 1999), overruled on other grounds, Holiday Isle, LLC v. Adkins, 12 So. 3d 1173 (Ala. 2008)). This court then determined that the trial court had erred in determining that § 6.20 contained a latent ambiguity, and we concluded that the Rices' driveway violated § 6.20 of the restrictive covenants and, therefore, that the Association had demonstrated success on the merits. 43 So. 3d at 615. We reversed the trial court's judgment and remanded the case for the trial court to consider "whether the Association carried its burden of proving the remaining elements necessary to obtain the permanent injunction it requested." Id.

On remand, the Association filed a motion for the entry of a judgment in its favor. The parties filed briefs on remand in support of their respective arguments, and, on May 28, 2010, the trial court entered an order that stated, in pertinent part:

> "Attorneys for the parties appeared before the Court for a hearing on April 30, 2010. The parties have agreed that no evidentiary hearing is required to comply with the order remanding the case back to the Circuit Court. Therefore, the Court enters this

ruling based on the testimony and evidence presented on July 6, 2009.

"The Court of Civil Appeals has tasked the Circuit Court with determining whether [the Association] ha[s] met the remaining standards as set forth in TFT, Inc. v. Warning Sys., Inc., necessary for the issuance of a permanent injunction.

> "'To be entitled to a permanent injunction, a plaintiff must demonstrate success on the merits, a substantial threat of irreparable injury if the injunction is not granted, that the threatened injury to the plaintiff outweighs the harm the injunction may cause the defendant, and that granting the injunction will not disserve the public interest.'

"751 So. 2d 1238, 1242 (Ala. 1999), overruled on other grounds, Holiday Isle, LLC v. Adkins, 12 So. 3d 1173 (Ala. 2008). The Court of Civil Appeals ruled that [the Association] has indeed demonstrated success on the merits, and therefore has met the first prong of the TFT test.

"However, [the Association] ha[s] a more difficult time meeting the second prong of the TFT standard since [it] must show a substantial threat of irreparable injury if the injunction is not granted. The fact that the driveway is different from other driveways in the neighborhood is not sufficient to indicate an injury or a threat of an injury. Ms. Diana Tillery, the chair of the Architectural Review Committee, indicated that the Committee based [its] decision on the black-letter wording of the covenant. She did not mention any actual or threatened injury to the Homeowners' Association or any individual property owner. Ms. Tillery also stated that the basis of the decision was aesthetics and the possibility of loose stone on

the street. However, the president of the Homeowners' Association, Mr. John Price, stated that loose stone in the common areas of the neighborhood was acceptable. There was no testimony of any reports of damage or injury in the neighborhood due to loose stone on the street. No witness for [the Association] testified about a decrease in property values in the neighborhood due to the driveway. Mr. Billy Cleveland, the developer of the subdivision, stated that the driveway would not affect property value. Moreover, [the Association] did not produce evidence that [the Rices'] immediate neighbors -- those who would be most affected by the driveway's aesthetic value -- found the driveway objectionable. Therefore, aesthetic value is the only injury [the Association] ha[s] truly attempted to show, and the aesthetic value of the driveway is improved from the original condition of the driveway.

"[The Association] ha[s] cited Tubbs v. Brandon, 573 So. 2d 1358 (Ala. 1979), and Taylor v. Kohler, 507 So. 2d 426 (Ala. 1987), for the tenet, 'The right to enjoin [a] breach will not depend on whether the covenantee will be damaged by the breach.' While neither Tubbs nor Taylor have been overturned, later caselaw suggests that the Alabama courts have not continued to strictly follow that particular holding of Tubbs. More modern caselaw adopts the relative hardship test as outlined in Lange v. Scofield, 567 So. 2d 1299, 1302 (Ala. 1990): '[A] covenant will not be enforced if to do so would harm one landowner without substantially benefiting another landowner.' The holding in Lange essentially matches the third of the four prongs of the TFT test for the issuance of a permanent injunction.

"In this instance, despite the fact that [the Rices] did incur the expenses on their own, their only feasible option would have been to tear up the old driveway and install a new one. Mr. Rice testified that it would cost an estimated $15,000.00

> to tear up the driveway and replace it. If [the Rices] were required to change the current driveway, the only option at this point would also be to tear up the existing driveway and replace it entirely, also at a cost of $15,000.00. There was no testimony concerning any other possible remedies at trial. Enforcing the covenant against [the Rices] as strictly as [the Association] desire[s] would harm [the Rices] substantially more than it would benefit [the Association]. See Lange. Moreover, the aesthetic harm to [the Association] is far less than the monetary harm [the Rices] would incur in replacing the entire driveway. Therefore, [the Association] ha[s] not met the second prong of the TFT standard.
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> "The fourth prong of the TFT standard involves disservice to the public interest. The public interest would likely not be disserved by granting this injunction. The only possible members of the public that would be affected by a ruling either way in this case would be potential buyers of property in the subdivision. Those potential buyers would likely not be swayed one way or the other in their decision to purchase by the nature of the defendants' driveway. However, they would also likely not be swayed by a plain concrete driveway. Therefore, [the Association] ha[s] met the fourth prong of the TFT test.
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> "Judgment is entered for [the Rices]. [The Rices] have not proved damages under the Litigation Accountability Act. Each party is to bear its own costs and fees."

(Footnote and references to the record omitted.)

On June 25, 2010, the Association filed a Rule 59(e), Ala. R. Civ. P., motion, arguing that the "relative-hardship test" is not to be applied in the enforcement of neighborhood

restrictive covenants. The Rices filed a reply to the Association's motion, and the Association filed a response to the Rices' reply. On August 20, 2010, the trial court entered an order allowing the parties 30 days to submit additional caselaw regarding the application of the "relative-hardships doctrine," noting that the Association's postjudgment motion was being kept under advisement by agreement of the parties. The Association filed a supplement to its postjudgment motion on September 8, 2010. The Association's postjudgment motion was denied by operation of law on September 23, 2010.

The Association filed a notice of appeal to the Alabama Supreme Court on October 29, 2010; that court transferred the appeal to this court, pursuant to § 12-2-7(6), Ala. Code 1975.

On appeal, the Association argues that the trial court erred "by failing to find that [the Association] satisfied the second prong of the TFT standard because [the Association] will suffer irreparable injury as a matter of law." The Association cites Willow Lake Residential Ass'n v. Juliano, [Ms. 2081099, August 27, 2010] ___ So. 3d ___ (Ala. Civ. App. 2010), for the proposition that an injunction must be issued in cases when restrictive covenants have been violated. In

Willow Lake, residents of the Willow Lake subdivision erected a series of steps leading from their property to the edge of a lake in the subdivision on a common area bordering the lake. ___ So. 3d at ___. With regard to the trial court's finding that the construction of the steps enhanced the value of the subdivision property, this court stated:

> "As to the former finding -- that the construction of the steps actually enhanced the value of the subdivision -- the record contains no competent evidence as to the effect of the construction of the steps on the value of the subdivision property. The Association maintained throughout the proceedings that any violation of a restrictive covenant, if allowed over its objection, necessarily dilutes the power of the restrictive covenants and thereby lessens the value of the subdivision property. We agree. In creating the restrictive covenants, the partnership expressly declared that the purpose of the covenants was 'to protect the value and desirability of the Property.' Any unauthorized violation of the restrictive covenants would run counter to that purpose and would be classified as 'irreparable harm' as a matter of law. See Tubbs v. Brandon, 374 So. 2d 1358, 1361 (Ala. 1979). Thus, the steps, if allowed to stand in violation of the restrictive covenants, decrease the value of the subdivision property.
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> "Moreover, we conclude that it is immaterial whether the construction of the steps actually increased the value of the subdivision property. 'When a restrictive covenant is broken, [our supreme court] has stated that an injunction should be issued because the mere breach of the covenant is a sufficient basis for interference by injunction. The right to enjoin such a breach will not depend upon

> whether the covenantee will be damaged by the breach.' Tubbs v. Brandon, 374 So. 2d at 1361 (citing Reetz v. Ellis, 279 Ala. 453, 186 So. 2d 915 (1966)). As explained by our supreme court,
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> > "'the reasons for this rule are stated to be that the owner of land, when selling to another, may insist on such covenants as he pleases touching its use and has the right to define the injury for himself; and that, when the covenant is broken, an injunction should issue because, from the very nature of the case, the remedy at law is inadequate.'
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> "Reetz, 279 Ala. at 460, 186 So. 2d at 921. The trial court's reasoning would impermissibly allow individual homeowners to violate restrictive covenants if those homeowners were subjectively convinced that the violation would improve the value of the subdivision property. That reasoning directly contradicts the law that 'a party to a covenant is entitled to seek its enforcement even if the ... breach does not negatively impact the value of his property.' Viking Props., Inc. v. Holm, 155 Wash. 2d 112, 121 n.4, 118 P.3d 322, 327 n.4 (2005). Therefore, the trial court erred in determining that the steps enhanced the value of the subdivision property and in denying the Association relief on that basis."

Willow Lake Residential Ass'n v. Juliano, ___ So. 3d at ___.

We do not interpret Willow Lake as requiring that an injunction is due to be granted in every case in which a resident has violated a restrictive covenant. Indeed, this court has applied the doctrine of "undue hardship" in a case decided since Willow Lake was released. See Maxwell v. Boyd,

[Ms. 2090318, Dec. 17, 2010] ___ So. 3d ___ (Ala. Civ. App. 2010). In Maxwell, this court discussed the "undue-hardship" doctrine as follows:

> "In this case, the Boyds do not contend that their structure complies with the setback covenant or that the setback covenant is of doubtful meaning or ambiguous. Rather, they seek refuge in the common-law doctrine of 'undue hardship' most notably recognized in Alabama in Lange v. Scofield, 567 So. 2d 1299 (Ala. 1990). The holding in Lange, in pertinent part, is based upon the doctrine that enforcement of covenants running with land '"is governed by equitable principles, and will not be decreed if, under the facts of the particular case, it would be inequitable and unjust"'; specifically, if '"the restrictive covenant has ceased to have any beneficial or substantial value"' or '"the defendant will be subject to great hardship or the consequences would be inequitable,"' a court of equity will not enforce the covenant. 567 So. 2d at 1302 (quoting 20 Am. Jur. 2d Covenants, Conditions, & Restrictions § 313 (1965)). That said, however, the 'relative hardship' doctrine recognized in Lange is a creature of equity, and it follows that seeking the invocation of the doctrine will require the possession of clean hands. Cf. Hankins v. Crane, 979 So. 2d 801, 812 (Ala. Civ. App. 2007) (indicating availability of unclean hands as defense to covenant-enforcement action, but concluding that no factual basis for the defense existed in that case). Equity is to '"prevent a party from asserting his, her, or its rights under the law when that party's own wrongful conduct renders the assertion of such legal rights 'contrary to equity and good conscience.'"' Id. (quoting earlier Alabama cases).
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> "A pertinent specific application of the clean-hands doctrine is that a restrictive covenant should be enforced if the defendant had knowledge of

> it before constructing an improvement contrary to its provisions, even if the harm is disproportionate. Green v. Lawrence, 877 A.2d 1079, 1082 (Me. 2005) (citing 9 Powell on Real Property § 60.10(3)); accord Turner v. Sellers, 878 So. 2d 300, 306 (Ala. Civ. App. 2003) (affirming denial of relief from restrictive covenant when the burdened parties 'knew that there were restrictions on the free use of their lot when they purchased it'). The knowledge sufficient to warrant denial of the relative-hardship defense need not be actual, but may be constructive. Miller v. Associated Gulf Land Corp., 941 So. 2d 982, 989 (Ala. Civ. App. 2005) (noting that trial court's judgment denying relief from covenant was supported by evidence that the owners of the burdened lot had 'purchased the subject property knowing of the nature of the deed restriction and therefore at least constructively knowing' of nearby land conditions and property owners' rights)."

___ So. 3d at ___. Like the Boyds in Maxwell, the Rices had received notice of the restrictive covenants. William Rice testified that he had been made aware of the restrictive covenants upon receipt of the April 23, 2008, letter from the Association welcoming the Rices to the neighborhood.

The dissent attempts to distinguish this case from Maxwell by asserting that the driveway in the present case was not as clear a violation of the restrictive covenant at issue as was the violation at issue in Maxwell, particularly in light of the trial court's findings that the restrictive covenant contained a latent ambiguity, that the driveway

conformed to the covenant, and that, unlike in Maxwell, the Rices had not been warned during construction that their driveway would not comply with the covenant. ___ So. 3d at ___ (Bryan, J., dissenting, joined by Thompson, P.J.). We note first, as does the dissent, that the trial court's judgment, finding that the restrictive covenant contained a latent ambiguity, was reversed by this court in Grove Hill. Thus, we decline to rely on that finding to now conclude that the construction of the driveway was not a clear violation of the restrictive covenant. Moreover, there is no evidence in the record, testimonial or otherwise, suggesting that the Rices were in doubt as to whether their driveway would conform to the restrictive covenant at issue. Rather, William's testimony suggests that he had failed to take the restrictive covenants into consideration whatsoever in constructing the driveway. Additionally, it is undisputed that the Rices failed to obtain the preapproval of the Architectural Review Committee in constructing their driveway, in clear contravention of § 5.05(a) of the restrictive covenants. We disagree with the dissent, therefore, regarding the

distinction between the Rices' culpability and that of the violators of the covenant at issue in Maxwell.

With regard to the dissent's assertion that the Rices had not been warned that their construction was in violation of the restrictive covenants, ___ So. 3d at ___ (Bryan, J., dissenting, joined by Thompson, P.J.), we note that the law does not place the onus on the enforcer of restrictive covenants to warn violators thereof that they may not be in compliance, particularly in circumstances such as those in the present case, where the restrictive covenants require residents to gain preapproval of any improvements. Had the Rices obtained such preapproval, any resulting damages could have been avoided. We note also that there is no evidence in the record suggesting that the members of the Association were aware of the violation during construction of the driveway and failed to warn the Rices of that violation.

The dissent also asserts that the Rices' conduct does not rise to the level of "morally reprehensible, willful misconduct." ___ So. 3d at ___ (Bryan, J., dissenting, joined by Thompson, P.J.). Although the mere breach of a restrictive covenant is a sufficient basis for an injunction regardless of

whether there is damage to the covenantee, see Willow Lake, supra, as stated above, we recognize that this court has applied the relative-hardship test to provide violators of restrictive covenants relief under certain circumstances. See Lange v. Scofield, 567 So. 2d 1299 (Ala. 1990). "'Under [the relative-hardship] test a covenant will not be enforced if to do so would harm one landowner without substantially benefiting another landowner ....'" Turner v. Sellers, 878 So. 2d 300, 306 (Ala. Civ. App. 2003) (quoting Lange, 567 So. 2d at 1302).

Despite the apparent application of the doctrine of "clean hands" in Maxwell, we note that a review of caselaw from Alabama and other jurisdictions, as well as other authorities, indicates that, in cases in which the violator of a restrictive covenant had notice of the restrictive covenant before the violation occurred, the relative-hardship test is unavailable to the violator. See Maxwell; Cullen v. Tarini, 15 A.3d 968, 982 (R.I. 2011) (determining that a balance of the equities was not appropriate when violators knowingly violated the valid restrictive covenants that applied to their property); Burke v. Voicestream Wireless Corp. II, 207 Ariz.

393, 399, 87 P.3d 81, 87 (Ariz. Ct. App. 2004) (trial court erred by balancing hardships when party built structure knowing of restrictions and the neighborhood's opposition to structure); Hollis v. Garwall, Inc., 137 Wash. 2d 683, 699-700, 974 P.2d 836, 845 (1999) ("the benefit of the doctrine of balancing the equities, or relative hardships, is reserved for the innocent defendant who proceeds without knowledge or warning that his activity encroaches on another's property rights"); and Gladstone v. Gregory, 95 Nev. 474, 480, 596 P.2d 491, 495 (1979) ("The equitable principle of relative hardship is available only to innocent parties who proceed without knowledge or warning that they are acting contrary to others' vested property rights."). That limitation appears to be, as stated in Maxwell, a very "specific application of the clean-hands doctrine." ___ So. 3d at ___.

The dissent asserts that the apparent confusion as to whether the Rices' driveway comported with the restrictive covenants weighs heavily in the Rices' favor in balancing the equities. ___ So. 3d at ___ (Bryan, J., dissenting, joined by Thompson, P.J.). In Buffington v. T.O.E. Enterprises, 383 S.C. 388, 680 S.E.2d 289 (2009), the Supreme Court of South

Carolina determined that "it would be inequitable to consider [the] Petitioners' financial loss in purchasing and improving the land since they were on notice of the covenants when they purchased the property. To find otherwise would indicate that any business could defeat a restrictive covenant by spending a significant amount of money developing the land." 383 S.C. at 393, 680 S.E.2d at 291. Likewise, to allow a violator of a restrictive covenant who proceeds with construction, despite apparent confusion over whether the construction complies with that restrictive covenant, would suggest that a restrictive covenant could be defeated by proceeding with the construction and later arguing that the removal of the same would create an undue hardship. We, therefore, adopt the reasoning in Buffington and decline to apply the relative-hardship test in cases in which the violator of the restrictive covenant was aware of that covenant before the violation occurred.

The doctrine of "relative hardship" is, therefore, unavailable to the Rices to defeat the principle espoused in Willow Lake that, in the present case, the Association is entitled to seek the enforcement of its restrictive covenants. The trial court erred in declining to grant the permanent

injunction requested by the Association based on its application of the "relative-hardship" test. We therefore reverse the trial court's judgment and remand the cause for the entry of a judgment consistent with this opinion.

REVERSED AND REMANDED.

Thomas, J., concurs.

Pittman, J., concurs in the result, without writing.

Bryan, J., dissents, with writing, which Thompson, P.J., joins.

BRYAN, Judge, dissenting.

I respectfully dissent. Grove Hill Homeowners' Association, Inc. ("the Association"), sought a permanent injunction enjoining William Rice and Laura Rice from maintaining a driveway in violation of restrictive covenants. In its opinion in the first appeal in this case, this court recited the standard for issuing a permanent injunction:

> "'To be entitled to a permanent injunction, a plaintiff must demonstrate success on the merits, a substantial threat of irreparable injury if the injunction is not granted, that the threatened injury to the plaintiff outweighs the harm the injunction may cause the defendant, and that granting the injunction will not disserve the public interest.'
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> "TFT, Inc. v. Warning Sys., Inc., 751 So. 2d 1238, 1242 (Ala. 1999), overruled on other grounds, Holiday Isle, LLC v. Adkins, 12 So. 3d 1173 (Ala. 2008)."

Grove Hill Homeowners' Ass'n v. Rice, 43 So. 3d 609, 613 (Ala. Civ. App. 2010) ("Grove Hill"). In Grove Hill, this court concluded that the Association had established the first element of the permanent-injunction standard, i.e., success on the merits. 43 So. 3d at 615. We reversed the trial court's judgment and remanded the case for the trial court to consider

whether the Association had established the remaining three elements of the permanent-injunction standard.

In its judgment on remand, the trial court observed that the third element of the permanent-injunction standard outlined above "essentially matches" the relative-hardship test discussed in Lange v. Scofield, 567 So. 2d 1299 (Ala. 1990). The trial court then determined that enforcing the restrictive covenants against the Rices would harm them substantially more than it would benefit the Association and, consequently, denied the injunction. In reversing the trial court's judgment, the main opinion concludes that the relative-hardship test should not be applied "in cases in which the violator of the restrictive covenant was aware of that covenant before the violation occurred." ___ So. 3d at ___. However, the relative-hardship test is very similar to the third element of the permanent-injunction standard that this court in Grove Hill instructed the trial court to apply. Thus, I do not think that the trial court erred in balancing the harms or hardships in determining whether to enforce the restrictive covenants.

Essentially, the main opinion concludes that the clean-hands doctrine precludes the application of the relative-hardship test when a party seeking relief from a restrictive covenant had knowledge of the covenant before violating it. I would not apply the clean-hands doctrine to establish a bright-line rule precluding the application of the relative-hardship test in cases such as this one. The clean-hands doctrine "'finds expression in specific acts of willful misconduct'" that are "'morally reprehensible as to known facts.'" Retail Developers of Alabama, LLC v. East Gadsden Golf Club, Inc., 985 So. 2d 924, 932 (Ala. 2007) (quoting Sterling Oil of Oklahoma, Inc. v. Pack, 291 Ala. 727, 746, 287 So. 2d 847, 864 (1973)). The Rices' conduct does not rise to the level of morally reprehensible, willful misconduct. I would hold that a trial court should consider a party's knowledge of a restrictive covenant as a factor in applying the relative-hardship test rather than holding that such knowledge precludes the application of the test. See Harksen v. Peska, 581 N.W.2d 170, 176 (S.D. 1998) (stating that whether a party "knew that he was violating the covenant" was one factor to consider in applying the relative-hardship test

and concluding that it would be inequitable to require a property owner who built a cabin in violation of restrictive covenants to remove the cabin although he knew he was violating the covenants).

In concluding that the relative-hardship test does not apply, the main opinion relies in part on Maxwell v. Boyd, [Ms. 2090318, Dec. 17, 2010] ___ So. 3d ___ (Ala. Civ. App. 2010). However, the facts in Maxwell are distinguishable from the facts in this case. In Maxwell, the Boyds, homeowners seeking to avoid the enforcement of a restrictive covenant, built a garage that clearly violated the restrictive covenant. The Boyds did not contend that the garage complied with the restrictive covenant or that the restrictive covenant was "of doubtful meaning or ambiguous." ___ So. 3d at ___. While building the garage, the Boyds were warned numerous times that the structure would not comply with the restrictive covenant, but they built the garage regardless.

Conversely, in this case, the parties hotly disputed whether the Rices' driveway actually violated the restrictive covenants and whether the covenants contained a latent ambiguity. The question whether the Rices' driveway conformed

to the restrictive covenants is not as clear-cut as the question regarding conformity in Maxwell. As we noted in Grove Hill, the trial court determined that the restrictive covenants contained a latent ambiguity and that the Rices' driveway conformed to the covenants. 43 So. 3d at 613, 615. Although this court reversed the trial court's judgment in Grove Hill, the fact that the trial court initially ruled that the Rices had not violated the restrictive covenants suggests that the Rices did not act reprehensibly in constructing their driveway. Further, unlike the situation in Maxwell, the Rices were not repeatedly warned against constructing their driveway.

In concluding that the relative-hardship test should be applied in favor of the Rices, the trial court implicitly rejected the Association's unclean-hands argument. "'[W]here a trial court does not make specific findings of fact concerning an issue, [an appellate court] will assume that the trial court made those findings necessary to support its judgment, unless such findings are clearly erroneous.'" Woodland Grove Baptist Church v. Woodland Grove Cmty. Cemetery Ass'n, 947 So. 2d 1031, 1039 (Ala. 2006) (quoting Sundance

Marina, Inc. v. Reach, 567 So. 2d 1322, 1324 (Ala. 1990)). "The application of the clean hands doctrine is a matter within the sound discretion of the trial court." J & M Bail Bonding Co. v. Hayes, 748 So. 2d 198, 199 (Ala. 1999). Given the facts of this case, the trial court did not err in rejecting the Association's argument that the Rices' have unclean hands. The Rices' actions do not rise to the level of invoking the clean-hands doctrine, and the trial court correctly determined that enforcing the restrictive covenants against the Rices would harm them substantially more than it would benefit the Association. Thus, I would affirm the trial court's judgment applying the relative-hardship test in favor of the Rices.

Thompson, P.J., concurs.