**IN THE CHANCERY COURT FOR SULLIVAN COUNTY**
**AT BRISTOL, TENNESSEE**

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| **JOHN WILLIAM MUSICK** | ) | |
| | ) | |
| Plaintiff | ) | |
| | ) | |
| v. | ) | Civil Action: B0022310 (M) |
| | ) | |
| **ALBERT E. MORETZ** | ) | |
| | ) | |
| Defendant | ) | |
| | ) | |
| and | ) | |
| | ) | |
| **BRENDA S. MORETZ** | ) | |
| | ) | |
| Defendant | ) | |

**PLAINTIFFF'S POST TRIAL BRIEF**

**A. Table of Authorities**

## B. Background

The plaintiff filed a Motion for Declaratory Judgment on August 28, 2009 seeking, among other things, a declaration that (1) plaintiff's proposed "pool cabana" is not a "storage building" under the Apple Valley property Restricted Covenant (the "Covenant") in Sullivan County (2) a declaration that the defendants' actions have been unreasonable, arbitrary and capricious; (3) a declaration of estoppel; and (4) an award of the costs and other damages.

Following trial on February 23, 2010, the Court requested a brief outlining the parties' arguments whether paragraph 13 of the covenant prohibits a "pool cabana." Paragraph 13 of the covenant reads:

> 13. No storage shed, storage building, dog cages or dog runs shall be constructed on any lot. (A full copy of the covenant is attached as Exhibit I).

For the following reasons and arguments, the plaintiff prays the Court declare that a "Pool Cabana" is not a "storage building" or "storage shed" and award Plaintiff his requested relief.

## C. Argument

*A. By Definition, Plaintiff's Proposed "Pool Cabana" is not a "Storage Building."*

The *Websters II New College Dictionary* (1999) defines the following terms:

> **Cabana**: "A shelter on a beach or at a swimming pool that is used as a bathhouse."

> **Outbuilding**: "A building, as a barn or shed, separate from but associated with a main building."
> **Shed**: "1. A small structure, either freestanding or attached to a larger structure, used for storage or shelter. 2. A large low building often open on one or more sides."

By its very definition, an "outbuilding" is *any* building apart from the main structure. Thus, both "pool cabanas" and "storage" building are types of "outbuildings." A storage building is defined by its purpose (storage) and is just one subset of the term "outbuildings." Plaintiff's proposed "pool cabana" is clearly not a "storage building" by any definition.

*B. Contemporary vernacular indicates that a" pool cabana" is not a "storage building."*

Google image searches for "Pool Cabana" and "Storage Building" indicate that they are not the same. When showing the first 60 google images of pool cabanas (exhibit II), the images are remarkably different than the first 60 google images of "storage buildings" (exhibit III).

*C. The Tennessee Court of Appeals has determined that a "storage building" does NOT include all "outbuildings."*

When the Tennessee Court of Appeals examined the specific definition of "storage building" in *Bruno v. Rounds,* S.W.3d, 2003 WL 21392643 (Tenn.Ct.App. 2003), the court found specifically that "storage building" did not apply to all "outbuildings."

> The covenant, by its terms, clearly applies only to "barns and storage buildings" and not to all outbuildings. Restrictive covenants should be enforced in accordance with the clearly expressed intentions of the parties, but "should not be extended to cover circumstances not plainly included within their terms." *Richards v. Abbottsford Homeowners Assoc.,* 809 S.W.2d 193, 195 (Tenn.Ct.App.1990). Had the drafters intended for the covenant to cover all

> outbuildings or all ancillary buildings, they could have easily inserted this into the covenant. This was not done and as such, this Court will not extend the plain language of the covenant to apply to all ancillary buildings. (underline added)

The defendant in this case claims that all "outbuildings" are "storage buildings" in direct contradiction to *Bruno*. In his deposition dated January 18, 2010 (Exhibit IV) Mr. Moretz was asked: "Under this agreement, is every outbuilding prohibited in your opinion?" Mr. Moretz answered, "In the restrictions, it is." Following up, the plaintiff asked the same question another way, "So, just so I'm clear, when it says no storage shed, storage building, that means no outbuildings are permitted?" Mr. Moretz answered, "Whatsoever." At trial, all this deposition testimony was introduced into evidence during the cross examination of Mr. Moretz.

The plaintiff requests this Court to find as the Appeals Court did in *Bruno*: "Had the drafters intended for the covenant to cover all outbuildings or all ancillary buildings, they could have easily inserted this into the covenant. This was not done and as such, this Court will not extend the plain language of the covenant to apply to all ancillary buildings. (*id)*"

*D. Restrictions prohibiting free use of property must be narrowly construed.*

In a recent Tennessee Supreme Court case, *Williams v. Fox,* 219 S.W.3d 319, 324 (Tenn. 2007), the Supreme Court of Tennessee strictly limited an attempt to expand the language of a restrictive covenant. In *Williams*, the subdivision's restrictive covenant specifically prohibited "mobile homes" and "trailers" and the Supreme Court determined that the restriction did not apply to "modular homes."

> "In sum, we hold that "modular homes" are distinct types of structures from "mobile homes" and "trailers," and because the restrictive covenant did not expressly prohibit "modular homes," the plain wording of the covenant cannot be expanded to prohibit the defendant's modular home.

A "pool cabana" is no more of a "storage building" than a "modular home" is a "mobile home." Borrowing from the Supreme Court, this Court should easily conclude that "pool cabanas" are distinct types of structures from "storage buildings" and because the restrictive covenant did not expressly prohibit "all outbuildings," the plain wording of the covenant cannot be expanded to prohibit the defendant's pool cabana.

*E. The object of contract interpretation is to ascertain the parties' intent.*

Interpretation of a promise or agreement or a term thereof is the ascertainment of its meaning. See *RESTATEMENT (SECOND) OF CONTRACTS* § 200 (1981). The restrictive covenant contract is not a unilateral contract, but bilateral. The plaintiff did NOT interpret the contract to preclude the construction of the pool cabana when the contract was signed. Although the defendants believe the Cabana is prohibited, that evidence is not unilaterally determinative as to the meaning of the covenant, and is only one-half the equation.

*F. In interpreting a contract, an interpretation is favored that is internally harmonious and gives meaning to each piece of the contract.*

A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together. See *RESTATEMENT (SECOND) OF CONTRACTS* § 202 (1981). Defendants' overly broad construction regarding the definition of "storage building" – i.e., that all out buildings are necessarily prohibited storage buildings – would create an internal conflict with the language in paragraph 10 of the Covenant.[1] Thus, defendants' interpretation is disfavored. *RESTATEMENT (SECOND) OF CONTRACTS* § 203 (1981) reads "an interpretation which gives a reasonable, lawful, and effective meaning

[1] Paragraph 10 reads, "No …outbuildings shall be used on any lot at any time as a residence, either temporarily or permanently" indicating that "outbuildings" were considered in the creation of the covenant and not specifically prohibited in paragraph 13.

to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect."

*G. With respect to form contracts that are not jointly negotiated and drafted at arms' length, any ambiguity should be construed against the party who drafted the contract (*CONTRA PROFERENTUM*).*

The doctrine of *Contra proferentem* provides that an ambiguous term will be construed against the party that imposed its inclusion in the contract – or, more accurately, against (the interests of) the party who imposed it. The interpretation will therefore favor the party that did not insist on its inclusion. The bedrock rule of contract interpretation applies if the clause was included at the unilateral insistence of one party without having been subject to negotiation by the counter-party, as in a form contract. *RESTATEMENT (SECOND) OF CONTRACTS* § 206 (1981) reads "In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing other-wise proceeds."

In this case, any doubt that plaintiff's proposed "Pool Cabana" is not a "storage building" favors the plaintiff. Arguably, since the Court has requested a brief to answer the very question "is a pool cabana a storage building," shows that there is indeed ambiguity present and the Court should construe the contract in favor of the party that did not draft the contract – plaintiff.

Ironically, the defendant has stated that the very author of the covenant at issue in this lawsuit (attorney Kerry Musick – no relation to the plaintiff) has opined that the proposed cabana is acceptable under the covenant (Blankenship deposition p. 11– exhibit

VI, and again at trial by Moretz). If the defendant had wished that all outbuildings be prohibited, then the defendant should have specifically said that all outbuildings are prohibited, a point apparently known to the author of the covenant.

Restrictive covenants are valid in Tennessee but, as limitations on the unrestricted enjoyment of land, they are not favored, *Waller v. Thomas,* 545 S.W.2d 745, 747 (Tenn.App.1976). Restrictive covenants should be strictly construed, with any ambiguities resolved against the restriction. *Id.* Restrictive covenants "are to be interpreted as any other writing, *i.e.,* in construing documents words must be given their ordinary and customary meaning and not a strained or unnatural interpretation" *Aldridge v. Morgan,* 912 S.W.2d 151, 153 (Tenn.App.1995).

The Tennessee Supreme Court, writing in *Williams v. Fox,* 219 S.W.3d 319, 324 (Tenn. 2007), states:

> As a general rule, restrictive covenants are not favored in Tennessee because they are in derogation of the right of free use and enjoyment of property. *See Arthur v. Lake Tansi Vill., Inc.,* 590 S.W.2d 923, 927 (Tenn.1979); *Shea v. Sargent,* 499 S.W.2d 871, 873 (Tenn.1973). Therefore, such restrictive covenants are strictly construed. *See Arthur,* 590 S.W.2d at 927; *Shea,* 499 S.W.2d at 873-74. Courts refrain from extending a restrictive covenant to any activity not clearly and expressly prohibited by its plain terms. *See Turnley v. Garfinkel,* 211 Tenn. 125, 362 S.W.2d 921, 923 (1962); *Beacon Hills Homeowners Ass'n, Inc. v. Palmer Props., Inc.,* 911 S.W.2d 736, 739 (Tenn.Ct.App.1995). When the terms of a covenant may be construed more than one way, the courts must resolve any ambiguities against the party seeking to enforce the restriction and in a manner which advances the unrestricted use of the property. *See Hillis v. Powers,* 875 S.W.2d 273, 275-76 (Tenn.Ct.App.1993); *Parks v. Richardson,* 567 S.W.2d 465, 468 (Tenn.Ct.App.1977).

*H. There is no precedent in Tennessee to define a cabana as a storage building.*

**All** published legal cases in Tennessee in which any outbuilding was declared in violation of a restricted covenant was because the various covenants specifically prohibited "**outbuildings**," not "storage buildings" e.g. *Zachry v. Siriyutwatana* S.W.2d,

WL 39586, (Tenn.Ct.App. 1988). For this court to declare that a cabana is indeed a 'storage building" would create a precedent in Tennessee that runs counter to all these cases. In New Jersey, in *Steiger v. Lenoci,* 323 N.J.Super. 529, 733 A.2d 1192, (N.J.Super.A.D., 1999) the Court of Appeals declared a "pool cabana" in violation of a restricted covenant when the covenant read, "no outbuildings of any kind or character ... shall be erected upon any lot." Had the defendants wished that "pool cabanas" be prohibited, they should have drafted the covenant to prohibit all outbuildings, not just "storage buildings."

*H. Alternative Ruling in limited narrow scope.*

The Court expressed concerns that the creation of a Pool Cabana could create a slippery slope that leads to a proliferation of questionable outbuildings. The court could find in favor of the defendants' position and issue a ruling limited in scope to the specific facts of this case and to plaintiff's proposed pool cabana. For example, the Court could determine that plaintiff's proposed pool cabana that meets all of the following requirements and thus, is not a "storage building":

1. The outbuilding must be adjacent to a swimming pool,
2. The outbuilding must be surrounded by a privacy fence of at least six feet,
3. The outbuilding must be used for changing and unchanging of clothes for swimmers and
4. The building must be of the same type and look of the primary residence.
5. The primary purpose is not storage,
6. The structure must provide "proven" value of at least $6500.

Such a ruling would meet the plaintiff's need of a pool cabana and in turn, protect the developer's interest in preventing a proliferation of storage buildings.

For all of these reasons listed above, the plaintiff respectfully requests a declaration that plaintiff's proposed "Pool Cabana" is not a "storage building."

Respectfully submitted,

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JOHN WILLIAM MUSICK, *pro se*
112 Sterling Court
Bluff City, TN 37618

**CERTIFICATE OF SERVICE**

I herby certify that a true and exact copy of the foregoing Motion and attached exhibits were sent by US mail, with proper postage, to Teresa Murray Smith at 3229 Highway 126 in Blountville, TN on the ____ day of _____, 2009.

_____
John William Musick, *pro se*