Rel: April 19, 2019

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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2018-2019

2180075

Heaven's Gate Ministries International, Inc.

v.

Jewelon B. Burnett, Burnett Investment Group, Inc., and Remlap Properties, LLC

Appeal from Madison Circuit Court (CV-18-900380)

THOMPSON, Presiding Judge.

Heaven's Gate Ministries International, Inc. ("Heaven's Gate"), appeals from a declaratory judgment entered by the Madison Circuit Court ("the trial court") that terminated and

released five restrictive covenants connected to the Frank Clark Acres commercial subdivision ("the subdivision") in Huntsville.

The record indicates the following. Jewelon B. Burnett and Burnett Investment Group, Inc. ("the investment group"), each owned a parcel of property in the subdivision. Specifically, Burnett owned lot 3, and the investment group owned lot 4. At the time the declaratory-judgment action was filed on February 22, 2018, Remlap Properties, LLC ("Remlap"), had entered into a contract with Burnett and the investment group to purchase lots 3 and 4 ("the property"). (Hereinafter, Burnett, the investment group, and Remlap are collectively referred to as "the plaintiffs.") Heaven's Gate owned lot 17 in the subdivision and had a church at that location.[1]

The subdivision was created in 2003. Before any of the 23 lots in the subdivision were sold, the developers established and recorded restrictive covenants. Five of those restrictive covenants are at issue in this action: numbers 1,

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[1]The plaintiffs also named Siroos Bahani as a defendant in the action. However, Bahani was dismissed on May 10, 2018, before the matter was tried.

2, 3, 8, and 9. Those five restrictive covenants provide as follows:

> "1. (A) No building shall be erected, placed or altered on any lot until the construction specifications, a plat showing the location of the structure on the lot and a landscape plan, showing the type, size and location of plants and trees, and a parking layout, have been approved by the Architectural Control Committee. Approval will be to (1) insure the harmony of the external design with existing or planned structures and (2) to identify location with respect to topography and finish grade elevation. Approval shall be as hereafter provided.
>
> "(B) The Architectural Control Committee (the 'Committee') is composed of Timothy D. Clark, Donald B. Weir, Jr., and Patti R. Clark or their designated agents or successors. Neither the members of the Committee, nor their designated representatives, shall be entitled to any compensation for services performed pursuant to the Covenant.
>
> "(C) Architectural Standards: No exterior construction, alteration, addition, or erection of any nature whatsoever shall be commenced or placed upon any part of the subdivision, except such as is installed by the Declarant, or as is approved in accordance with this Section, or as is otherwise expressly permitted herein. No exterior construction, addition, erection, or alteration shall be made unless and until plans and specifications showing at least the nature, kind, shape, height, materials, and location shall have been submitted in writing to and approved by the Architectural Control Committee.

"In the event that the Architectural Control Committee fails to approve or to disapprove submitted plans and specifications within thirty (30) days after the plans and specifications have been submitted to it, approval will not be required, and this Section will be deemed to have been fully complied with. As a condition of approval under this Section, an owner, on behalf of himself and his successors-in-interest, shall assume all responsibilities for maintenance, repair, replacement, and insurance to and on any change, modification, addition or alteration. In the discretion of the Architectural Control Committee, an owner may be made to verify such condition of approval by a recordable written instrument acknowledged by such owner on behalf of himself and his successors-in-interest. The Architectural Control Committee shall be the sole arbiter of such plants [sic] and may withhold approval for any reason, including purely aesthetic considerations, and it shall be entitled to stop any construction in violation of these restrictions. Any member of the Architectural Control Committee or its representatives have the right, during reasonable hours and afer reasonable notice, to enter upon any property to inspect for the purpose of ascertaining whether or not these restrictive covenants have been or are being complied with. Such person or persons shall not be deemed guilty of trespass by reason of such entry. In addition to any other remedies available, the Architectural Control Committee may record in the appropriate land records office a notice of violation naming the violating owner.

"Plans and specifications are not approved for engineering or structural design or quality of materials, and by approving such plans and specifications neither the Architectural

Control Committee or the members thereof assumes liability or responsibility therefore, not for any defect in any structure constructed from such plans and specifications. Neither Declarant, the Architectural Control Committee, employees, and agents of any of them shall be liable in damages to anyone submitting plans and specifications to any of them for approval, or to any owner of property affecting [sic] by these restrictions by mistake in judgment, negligence, or nonfeasance arising out of or in connection with the approval or disapproval or failure to disapprove any such plans or specifications. Every person who submits plans or specifications and every owner agrees that he/she will not bring any action or suit against Declarant, the Architectural Control Committee, employees and agents of any of them to recover any such damages and hereby releases, remise, quitclaims and covenants not to sue for all claims, demands and causes of action arising out of or in connection with any judgment, negligence, or nonfeasance and hereby waives the provisions of any law which provided that a general release does not extend to claims, demands, and causes of action not known at the time the release is given.

"2. (A) Any metal exterior on the front of any building without brick, stucco, or synthetic stucco or decorative block or painted wood or acceptable siding shall <u>not</u> be permitted. Metal exterior on the rear or side of any building shall be permitted and approved by the Architectural Control Committee per Paragraph 2 above.

"(B) All parking lots or facilities shall be paved, landscaped, well lighted and kept clean.

"3. It shall be the responsibility of each owner and occupant to prevent the development of any

unclean, unhealthy, unsightly, or unkept condition on his or her property. No building shall be permitted to stand with its exterior in an unfinished condition for longer than twelve (12) months after commencement of construction. No property within the subdivision shall be used, in whole or in part, for the storage of any property or thing that will cause such lot to appear to be in an unclean or untidy condition or that will be obnoxious to the eye; nor shall any substance, thing or material be kept that will emit foul or obnoxious odors or that will cause any noise or other condition that will or might disturb the peace, quiet, safety, comfort, or serenity of the occupants of surrounding property.

"....

"8. The authority of the Architectural Control Committee shall include the approval of construction plans, plot plans showing the location of the building and any and all other structures to be located on said lot, landscape plans, parking lots, exterior paint colors, exterior materials and color, roof type and color of shingles. The builder and subsequent owners of a building shall not change or deviate from those selections approved by the Architectural Control Committee.

"9. The Architectural Control Committee may issue guidelines detailing acceptable fence styles, but in no event will a woven wire, hog wire or barbed wire fence be approved. Prior to starting construction of any fence a plan showing where the fence is to be located and a cross section of the fence must be submitted for approval to the Architectural Control Committee."

The plaintiffs filed this action seeking a declaratory judgment alleging, among other things, that the restrictive covenants at issue had "effectively been abandoned, the purpose of the [restrictive covenants had] failed, and the reason for the existence of the [restrictive covenants had] ended." The plaintiffs further alleged that the five restrictive covenants at issue were overbroad and ambiguous and, therefore, they contended, unenforceable. The plaintiffs asserted that all of the lot owners in the subdivision would benefit if the five restrictive covenants at issue were declared unenforceable.

On July 24, 2018, a trial was held on the matter. The evidence adduced at that trial indicated that the subdivision was zoned by the City of Huntsville for light industrial use. At the time of the trial, the lots in the subdivision were used for various commercial purposes. Curtis Parcus, a witness for the plaintiffs, testified that he was a due-diligence coordinator for the Broadway Group, which, he said is a related entity of Remlap. Parcus said that once a parcel of property is under contract he performs the title work, obtains a survey and environmental reports, and begins working

with the municipality and related departments to prepare the site for construction. In this case, Parcus said, his company was developing the property for a "national tenant." Later testimony indicated that that tenant was Dollar General and that a Dollar General store was to be constructed on lots 3 and 4.

In performing the title work, Parcus said, he noticed there were some restrictions on the property and that, sometimes, such restrictions "can be an issue with our tenant." The specific restrictions with which Parcus had difficulty were in covenants 1, 2, 3, 8, and 9, as set forth above. Parcus testified that a "Release of Restriction" document ("the release") was prepared to terminate the restrictions at issue. He said that the owners of 22 of the 23 lots signed the release. Only Heaven's Gate refused to sign it.

Parcus said that he met with board members of Heaven's Gate to see whether his tenant and Heaven's Gate could negotiate a compromise. Parcus testified that the board members complained to him of the wrecked vehicles that were stored in the lot adjacent to Heaven's Gate's property. The

lot belonged to an automobile-repair shop; lots 3 and 4 are on the far side of the subdivision, away from the location of Heaven's Gate's property. Parcus said that his client offered to erect a wooden privacy fence so that the vehicles would not be visible from the Heaven's Gate's church in exchange for approval to terminate the restrictions at issue. Heaven's Gate board members requested a metal fence instead. Parcus said that erecting a mental fence instead of a wooden fence added several thousand dollars to the cost of constructing the fence; however, his client approved the change. Heaven's Gate board members then advised Parcus that they wanted a fence that essentially enclosed the church property rather than merely blocking the offending lot. At that point, Parcus said, it was decided that the cost to erect such a fence was prohibitive, and the plaintiffs opted to file this action against Heaven's Gate.

Timothy Clark testified that he owned the property that became the subdivision in 2003. He was one of the three members of the architectural review committee ("the committee") referenced in the restrictive covenants. One of the three committee members had been his attorney, who had

since died. The third member, Clark said, was his wife. Clark testified that, although he had sought advice from his attorney from time to time, he was the person who approved or denied "prints" brought to him for approval. Pursuant to the terms of the restrictive covenants, if he did not approve a plan within 30 days of its submission, the plan was deemed approved. Clark said that he had reviewed only 2 sets of plans in the 12 years before the trial and that he had not visited the subdivision in several years. However, he said, Parcus had presented him with "prints" for lots 3 and 4 and he had "signed off on it."

Clark testified that "the majority" of structures in the subdivision had not been approved by him or the committee. He said that he was aware that there were a number of lots within the subdivision that were in violation of the restrictive covenants. Clark testified that he had not attempted to enforce the restrictive covenants. His primary purpose in preparing the restrictive covenants, Clark said, was to prevent businesses like "strip clubs" and stores selling or showing pornography from operating in the subdivision. He also intended to prevent livestock from being kept in the

subdivision. He agreed that at least one restrictive covenant, covenant three, was subjective and would be dependent on what he believed constituted "unclean, untidy, or unkempt material."

Carolyn Lucas, the pastor of Heaven's Gate's church, testified that Heaven's Gate objected to removing the restrictions at issue "because of the presence of the wrecked vehicles" on the lot adjacent to Heaven's Gate's lot. She said that she believed the vehicles violated not only the restrictive covenants but also Huntsville's zoning ordinances. A different lot in the subdivision appeared to be a junk yard, Lucas said. She acknowledged, however, that restrictive covenant ten, which is not one that the plaintiffs sought to have terminated, specifically prohibits "salvage yards, junkyards, or any storage facility of any damaged or wrecked motor vehicles of any kind." She did not have an issue with a Dollar General store being constructed on lots 3 and 4, saying that the store would not likely violate the restrictive covenants.

On July 26, 2018, the trial court entered a judgment in which it stated that, based on the evidence presented and the

arguments of the attorneys, the plaintiffs' request for declaratory relief was due to be granted. It then declared that restrictive covenants 1, 2, 3, 8, and 9 had no effect and were "lifted, terminated, and released." The trial court made no findings of fact in the judgment. On August 24, 2018, Heaven's Gate filed a motion to alter, amend, or vacate the judgment. The trial court denied the postjudgment motion without a hearing.

Heaven's Gate filed a timely appeal to our supreme court, which transferred the appeal to this court pursuant to § 12-2-7(6), Ala. Code 1975.

Heaven's Gate first contends that the trial court did not have subject-matter jurisdiction over this matter because, it argues, there is no justiciable controversy.[2] The plaintiffs, on the other hand, argue that § 6-6-223, Ala. Code 1975, part of the Declaratory Judgment Act, § 6-6-220 et seq., Ala. Code

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[2]Based on our review of the record, it appears that the issue of whether this matter involves a justiciable controversy is raised for the first time on appeal. Nevertheless, this court may address arguments raised for the first time on appeal that go to the subject-matter jurisdiction of the trial court. See Health Care Auth. for Baptist Health v. Davis, 158 So.3d 397, 402 (Ala. 2013).

1975, gives them the right to seek a declaratory judgment regarding the construction of the restrictive covenants. Section 6-6-223 provides:

> "Any person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder."

In the context of a declaratory-judgment action, our supreme court has said the following regarding the need for a concrete justiciable controversy to exist before a trial court obtains subject-matter jurisdiction.

> "'There must be a bona fide justiciable controversy in order to grant declaratory relief. If no justiciable controversy exists when the suit is commenced, then the court lacks jurisdiction.' Durham v. Community Bank of Marshall County, 584 So. 2d 834, 835 (Ala. 1991) (citations omitted). Where 'the trial court ha[s] no subject-matter jurisdiction, [it has] no alternative but to dismiss the action.' State v. Property at 2018 Rainbow Drive, 740 So. 2d 1025, 1029 (Ala. 1999). '"Any other action taken by a court lacking subject matter jurisdiction is null and void."' Id. (quoting Beach v. Director of Revenue, 934 S.W.2d 315, 318 (Mo. Ct. App. 1996)). ...
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> "This Court has recognized that a purpose of the Declaratory Judgment Act, codified at §§ 6-6-220

> through -232, Ala. Code 1975, is 'to enable parties between whom an actual controversy exists or those between whom litigation is inevitable to have the issues speedily determined when a speedy determination would prevent unnecessary injury caused by the delay of ordinary judicial proceedings.' Harper v. Brown, Stagner, Richardson, Inc., 873 So. 2d 220, 224 (Ala. 2003)(some emphasis added). Further, '[w]e have recognized that a justiciable controversy is one that is "'definite and concrete, touching the legal relations of the parties in adverse legal interest, and it must be a real and substantial controversy admitting of specific relief through a [judgment].'" MacKenzie v. First Alabama Bank, 598 So. 2d 1367, 1370 (Ala. 1992)(quoting Copeland v. Jefferson County, 284 Ala. 558, 561, 226 So. 2d 385, 387 (1969)).' Harper, 873 So. 2d at 224 (emphasis added). Thus, the Declaratory Judgment Act does not '"'empower courts to decide ... abstract propositions, or to give advisory opinions, however convenient it might be to have these questions decided for the government of future cases.'"' Bruner v. Geneva County Forestry Dep't, 865 So. 2d 1167, 1175 (Ala. 2003)(quoting Stamps v. Jefferson County Bd. of Educ., 642 So. 2d 941, 944 (Ala. 1994), quoting in turn Town of Warrior v. Blaylock, 275 Ala. 113, 114, 152 So. 2d 661, 662 (1963)) (emphasis added in Stamps)."

Gulf Beach Hotel, Inc. v. State ex rel. Whetstone, 935 So. 2d 1177, 1182-83 (Ala. 2006).

In Baldwin County v. Palmtree Penthouses, Ltd., 831 So. 2d 603, 608 (Ala. 2002), our supreme court concluded that a landowner's allegations against certain county officials that were based on the landowner's assumption that those officials would deny it a land-use certificate after changes were made

in the zoning ordinance years after the land was purchased did "nothing more than demonstrate [the landowner's] anticipation that there may be a controversy in the future." At the time the landowner filed the civil action, however, it had not been denied the right to develop the land in the manner it wished. Therefore, the supreme court said, there had been no denial and the landowner had not yet suffered an injury. Id. Accordingly, our supreme court held, the landowner had failed to invoke the jurisdiction of the trial court and the trial court's judgment was void. Id.

In this case, the record indicates that Clark, in his role as a member of the committee, "signed off" on the plans Parcus presented on behalf on Remlap. Parcus testified that, in conducting his due-diligence, he noticed some restrictions on the property and that, sometimes, such restrictions "can be an issue with our tenant." However, the record established that no issues have arisen yet. Lucas testified that she had no problem with the construction of the Dollar General store in the subdivision and said that she did not believe it was likely that Dollar General would violate the restrictive covenants. Any problems Remlap may encounter regarding the restrictive covenants are purely conjectural at this point.

We note that, in preparing this opinion, this court's research revealed that the cases dealing with the unenforceability of restrictive covenants involved the application of those covenants to certain specific situations. None of those cases were on point. Indeed, this court's research revealed no Alabama caselaw involving the termination of restrictive covenants based on a generalized allegation of unenforceability based on a theoretical situation. However, see High Mountain Ranch Group, LLC v. Niece, 532 S.W.3d 513, 519 (Tex App. 2017)(holding that, although potential purchasers of property "may well be concerned that [other] property owners may choose to pursue enforcement of the [restrictive covenants] if a commercial venture is established on [the lot at issue], such speculation by a potential purchaser does not create a justiciable controversy between [the seller of the lot at issue] and the ... subdivision property owners").

Our review of the record indicates that there is no actual controversy between the parties at this time, and it does not appear from the record before this court that a controversy between the parties is inevitable. Accordingly, we agree with Heaven's Gate that no justiciable controversy

exists. Because there is no justiciable controversy, the trial court did not obtain subject-matter jurisdiction over this matter. Gulf Beach Hotel, supra. "'A void judgment will not support an appeal.' Baldwin County v. Bay Minette, 854 So. 2d 42, 47 (Ala. 2003)(citing Stamps [v. Jefferson Cty. Bd. of Educ.], 642 So. 2d [941] at 945 [Ala. 1994)])." Gulf Beach Hotel, 935 So. 2d at 1183.

Because the judgment from which Heaven's Gate appealed is void, this appeal is dismissed, albeit with instructions to the trial court to vacate its judgment of July 26, 2018.

APPEAL DISMISSED WITH INSTRUCTIONS.

Moore and Donaldson, JJ., concur.

Edwards, J., dissents, with writing, which Hanson, J., joins.

EDWARDS, Judge, dissenting.

I respectfully dissent.

Jewelon B. Burnett, Burnett Investment Group, Inc., and Remlap Properties, LLC (hereinafter referred to collectively as "the plaintiffs"), alleged in their complaint that each owner in the Frank Clark Acres subdivision, except Siroos Bahani and Heaven's Gate Ministries International, Inc. ("HGMI"), had executed a release regarding the restrictive covenants at issue.[3] The releases included a statement that such owner

> "consent[ed] to the release, termination and vacation of restrictive provisions 1, 2, 3, 8, and 9 of the Restrictive Covenants ... as to all lots and property embraced by FRANK CLARK ACRES, and that restrictive covenants 1, 2, 3, 8 and 9 of the Restrictive Covenants shall no longer be of any force or effect against any lots or properties embraced by FRANK CLARK ACRES, or any re-subdivision thereof."

The plaintiffs further alleged in their complaint:

> "15. The aforementioned [restrictive covenants] have generally not been followed by the majority of the lot owners. In fact, many owners are currently in violation of the [restrictive covenants]. Further, to date, the [restrictive covenants] have not been enforced.

[3]As noted in the main opinion, see note 1, supra, Bahani was dismissed as a defendant before trial.

"16. Accordingly, because the [restrictive covenants] have effectively been abandoned, the purpose of the [restrictive covenants] has failed and the reason for the existence of the [restrictive covenants] has ended.

"17. Further, the [restrictive covenants] are overbroad and ambiguous. Consequently, the intent of the [restrictive covenants] cannot clearly be determined, therefore they are unenforceable.

"18. The overwhelming majority of lot owners agree the [restrictive covenants] should be abandoned, and all owners in the subdivision will benefit if the [restrictive covenants] are declared unenforceable.

"....

"21. [The p]laintiffs, as well as a majority of the record lot owners, maintain the [restrictive covenants] have lost their purpose, are ambiguous and unenforceable, and the community will benefit from the [restrictive covenants] being declared unenforceable. [Bahani and HGMI], however, maintain that the [restrictive covenants] are unambiguous and enforceable and that the community will not benefit from said [restrictive covenants] being declared to be unenforceable.

"....

"24. A justiciable controversy exists between the parties as to the benefit, ambiguity, relevance, and enforceability of the [restrictive covenants].

"25. Accordingly, a judicial determination resolving this justiciable controversy is necessary and appropriate.

"WHEREFORE, [the p]laintiffs request this Court enter an Order declaring the following:

"a. That Restrictions 1, 2, 3, 8, and 9 of Frank Clark Acres are overbroad and ambiguous, and because the [restrictive covenants] are subject to interpretation the intent cannot be ascertained;

b. That the purpose of [restrictive covenants] 1, 2, 3, 8, and 9 of Frank Clark Acres has failed and therefore, the reason for the existence of the [restrictive covenants] has ended; and

c. That [restrictive covenants] 1, 2, 3, 8, and 9 of Frank Clark Acres are unenforceable and are unduly burdensome to the economic development of the land within Frank Clark Acres."

HGMI filed an answer responding to the corresponding paragraphs of the complaint as follows:

"15. The first sentence is denied. In fact, fully seventeen (17) of the twenty-three (23) lots within the subdivision do not contain structures. There are structures located upon six (6) of the remaining lots and, by observation, it appears that one of the structures may have been erected in violation of the standards set forth within the restrictions. The others appear to have been in complete, or substantial, compliance with the construction standards, with the primary violation being that the frontage of the buildings do not contain brick, stucco or synthetic stucco or decorative block or painted wood or acceptable siding. As to the remaining lots, which are vacant of structures, only one, being Lot 12, appear to be being used in violation of the covenants. As to whether or not the restrictions have been enforced, [HGMI] has no specific knowledge thereof, but [HGMI] has sent letters demanding compliance by the owners of Lots 12 and 18. Copies of those letters are attached and incorporated herein by reference.

"16. Denied.

"17. Denied.

"18. Denied, in that the allegation relates to the entirety of the restrictions rather than to the specific restrictions reflected in the request for relief and referenced in the documents attached as Exhibit F. Because the restrictions were filed to '... establish a uniform plan of development, improvement and orderly sale of the subdivision' and because the restrictions require that '[n]o building shall be erected, placed or altered on any lot until construction plans, construction specifications, a plat showing the location of the structure on the lot and a landscape plan, showing the type, size and location of plants and trees, and a parking layout, have been approved by the Architectural Control Committee. Approval will be to (1) insure the harmony of the external design with existing or planned structures and (2) to identify location with respect to topography and finished grade elevation....,' and are therefore intended to be for the benefit of each lot and all lots.

"....

"21. The first sentence is denied. The second sentence, with respect to [HGMI], is admitted.

"....

"24. Denied, as stated.

"25. Denied.

"With respect to the claims for relief:

"a. Denied.

"b. Denied.

"c. Denied."

HGMI further asserted the following as part of its affirmative defenses:

> "5. The termination of the specific provisions of the restrictive covenants as requested by the [p]laintiffs will not confer a benefit to the owners of lots within the subdivision which would outweigh the detrimental effect of the termination of the provisions of such restrictions.
>
> "6. The restrictive covenants have not been abandoned, nor has the purpose for them failed or the reason for the existence of the restrictions has not ended."

After ore tenus proceedings, the trial court entered a judgment adjudicating the controversy between the plaintiffs and HGMI as follows:

> "ADJUDGED, ORDERED, and DECREED, that in respect to Frank Clark Acres subdivision ..., Restrictive Covenants 1, 2, 3, 8, and 9 (of the Restrictive Covenants For Frank Clark Acres as recorded in Book 1058, Page 0893, in the Office of the Judge of Probate of Madison County, Alabama), are declared by this Court to have no effect ....
>
> "Further, a copy of this Order shall be recorded in the Office of the Judge of Probate of Madison County, Alabama at [the p]laintiffs' expense."

HGMI filed a postjudgment motion. In that motion, HGMI contended as follows:

> "Comes Now [HGMI], by and through its undersigned attorneys, and moves this Court to alter, amend or vacate its Order ... which declares the Restrictive Covenants for Frank Clark Acres Subdivision numbered 1, 2, 3, 8 and 9 to be of no

> effect ... and assigns as grounds therefor the following, to-wit:
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> "1. The Order of the Court is contrary to the law.
>
> "2. The Order of the Court is contrary to the facts.
>
> "3. The Order of the Court is contrary to both the law and the facts.
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> "4. The Order of the Court fails to account for the objections duly made by [HGMI] to certain evidentiary matters referenced in a Motion for Partial Summary Judgment filed by [the p]laintiff[s], which documents were never introduced as evidence in the trial of this case.
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> "5. There is no evidence that the provisions of any part of the Restrictions with respect to Paragraph 3, which contains at least four separate provisions, each of which is a separate covenant, and, as previously pointed out to the Court, there is no way that all four of those are ambiguous or not subject to enforcement by court, in accordance with existing Alabama law."

It is undisputed that the restrictive covenants were a recorded encumbrance against the properties owned by Burnett and Burnett Investment Group, which Remlap sought to purchase and develop. The record reflects that the plaintiffs were uncertain as to the enforceability of restrictive covenants 1, 2, 3, 8, and 9, and Curtis Parcus, who worked for a development company affiliated with Remlap, affirmed during his testimony that the restrictive covenants would render the

property difficult to develop and, specifically, that such restrictions "sometimes can be an issue with our tenant." When asked what he did "in order to get the property ready for your desired tenants to come in," Parcus responded, "[w]e were going to have to draw up a Release of Restriction document and have everybody sign it -- that was in Frank Clark Acres." Parcus then discussed his unsuccessful negotiations with HGMI regarding its refusal to execute a release, and Parcus further testified that "[t]he date of closing has been extended so we could work through this process." After HGMI's refusal to execute a release, the plaintiffs sought a judgment declaring that the covenants at issue were invalid or no longer enforceable. HGMI opposed the plaintiffs' claim for declaratory relief on the merits, and HGMI objected to the trial court's entry of a judgment awarding the plaintiffs their requested relief.

As the foregoing reflects, the present case involved "a bona fide justiciable controversy," Durham v. Community Bank of Marshall Cty., 584 So. 2d 834, 835 (Ala. 1991); the plaintiffs and HGMI clearly took opposing legal positions regarding the validity and enforceability of the restrictive covenants in relation to the property at issue. Those

restrictive covenants are no less an encumbrance on the property at issue, or the subject of dispute, merely because the covenants might not need to be violated for purposes of the potential development of the property at issue for a particular tenant.

Hanson, J., concurs.