IN THE SUPREME COURT OF THE STATE OF NEVADA

KENNETH A. SOLKY; AND EMMA M. SOLKY, HUSBAND AND WIFE,
Appellants,
vs.
BRUCE R. SMITH AS TRUSTEE OF THE QUAIL QUALIFIED PERSONAL RESIDENCE TRUST I DATED AUGUST 25, 2005; AND HELEN L. SMITH AS TRUSTEE OF THE QUAIL QUALIFIED PERSONAL RESIDENCE TRUST II DATED AUGUST 25, 2005,
Respondents.

No. 60008

ORDER OF AFFIRMANCE

This is an appeal from a final judgment in a real property action. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

This case concerns two adjoining neighbors, the Smiths, respondents, and the Solkys, appellants. In 1980, the Smiths purchased real property in Henderson, Nevada where they built their home (the Smith Parcel). Two years later, the Smiths purchased an adjoining property (the Solky Parcel) to protect their view. In May 1984, the Smiths conveyed the Solky Parcel to the Youngmans, subject to restrictive covenants (the Deed Restriction) that limited the height of the structures, vegetation, and trees on the Solky Parcel. The recorded Deed Restriction was part of the deed itself and provided that it ran with the burdened estate and was binding upon grantees, successors, and assigns. Six years later, the Nilsens acquired the Solky Parcel. After the Nilsens began planting trees, the Smiths notified them of the Deed Restriction. Out of

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neighborliness, the Smiths and Nilsens signed a Covenant of Non-Waiver of Deed Restriction (Non-Waiver Agreement) that forbear strict enforcement of the Deed Restriction concerning a few trees but provided that any forbearance did not constitute a waiver, release, modification, or alteration of the Deed Restriction. The recorded Non-Waiver Agreement also ran with the land and bound all successors and assigns. The Deed Restriction and Non-Waiver agreement both contained attorney fees clauses.

In 2000, the Solkys acquired the Solky Parcel and began an in-depth renovation of their home. Mr. Smith contends that he reminded Mr. Solky of the Deed Restriction on multiple occasions, including shortly before the Solkys replaced the majority of their landscaping and planted large trees in 2007. The day after the delivery of tall trees, Mr. Smith called Mr. Solky regarding the Deed Restriction and then faxed Mr. Solky a copy of the deed containing the Deed Restriction. The Solkys continued with their landscaping even after Mr. Smith's counsel sent a demand letter.

The Smiths commenced an action for injunctive and declaratory relief, as well as damages for violation of the Deed Restriction. On summary judgment, the district court concluded that the Deed Restriction was valid but reserved the issues of the scope of its enforcement and the Non-Waiver Agreement for trial. After a bench trial, the district court entered its findings of fact, conclusions of law, and final judgment in favor of the Smiths and against the Solkys. The district court found that the Solkys had violated the fully enforceable terms of the Deed Restriction and Non-Waiver Agreement and entered an injunction enforcing the terms of the restriction. The district court also awarded the

Smiths $72,338.50 in attorney fees based on the Deed Restriction and Non-Waiver Agreement. The Solkys now appeal, arguing that the district court: (1) abused its discretion by failing to limit the scope of the Deed Restriction based on the relative hardship doctrine, laches, and changed circumstances; and (2) abused its discretion by granting the Smiths attorney fees. We disagree.

The district court did not abuse its discretion when it granted the Smiths injunctive and declaratory relief based on the scope of the Deed Restriction

The Solkys argue that the district court abused its discretion by failing to limit the scope of the Deed Restriction or consider less drastic remedies based on the relative hardship doctrine. We disagree.

We review a district court's decision to grant a permanent injunction and its determination in an action for declaratory judgment for an abuse of discretion. *Chateau Vegas Wine, Inc. v. S. Wine & Spirits of America, Inc.*, 127 Nev. ___, ___, 265 P.3d 680, 684 (2011); *Cnty. of Clark, ex rel. Univ. Med. Ctr. v. Upchurch*, 114 Nev. 749, 752, 961 P.2d 754, 756 (1998). Other courts review the scope of a deed restriction de novo as a question of law. *See, e.g., Bloomfield Estates Improvement Ass'n, Inc. v. City of Birmingham*, 737 N.W.2d 670, 674 (Mich. 2007). We review a district court's factual determinations deferentially and will not overturn such findings if supported by substantial evidence, unless clearly erroneous. *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009). We strictly construe restrictive covenants, which are enforceable if the original purpose for the covenant continues to result in a substantial benefit. *Diaz v. Ferne*, 120 Nev. 70, 73, 84 P.3d 664, 666 (2004).

We conclude that the district court did not abuse its discretion when it granted injunctive relief based on the scope of the Deed Restriction. The original purpose of the Deed Restriction was to preserve

the Smiths' view from the Smith Parcel. The Smiths' preserved view from their parcel substantially benefits them.[1] *See Leonard v. Stoebling*, 102 Nev. 543, 550-51, 728 P.2d 1358, 1363 (1986) (recognizing that a view from a residence was a unique asset, which warranted the issuance of a mandatory injunction). Accordingly, the district court strictly construed the Deed Restriction, which clearly restricted the height of structures to 17 feet above ground level and trees to 16 feet above ground level on the Solky Parcel. Substantial evidence supports the district court's finding that the Solkys violated the Deed Restriction. The record includes color photographs of people on ladders with measuring sticks and a topography map that shows numerous trees and the light pole on the Solky Parcel violating the Deed Restriction.

In order to grant injunctive relief, the "balance of equities" must favor the moving party. *State Farm Mut. Auto Ins. v. Jafbros Inc.*, 109 Nev. 926, 928, 860 P.2d 176, 178 (1993). However, "[t]he equitable principle of relative hardship is available only to innocent parties who proceed without knowledge or warning that they are acting contrary to

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[1]The Solkys argue that changed conditions justify non-enforcement of the Deed Restriction because evidence indicates that their community has dense and high vegetation, so that a view corridor does not exist. We disagree because "[c]hanged conditions sufficient to justify nonenforcement of an otherwise valid restrictive covenant must be so fundamental as to thwart the original purpose of the restriction." *Gladstone v. Gregory*, 95 Nev. 474, 478, 596 P.2d 491, 494 (1979). We conclude that the Smiths had no right to limit the heights on properties other than the Solky Parcel that they had previously owned. The original purpose of the Deed Restriction still remains because the Smiths can still maintain their view over the Solky Parcel, regardless of their view of the other properties in the neighborhood. Therefore, conditions have not fundamentally changed on the Solky Parcel and the Smith Parcel.

others' vested property rights," or if the party seeking the injunction engaged in some inequitable conduct. *Gladstone*, 95 Nev. at 480, 596 P.2d at 495. A party assumes the risk of increased damages when they continue construction after notice of objections. *Id.* When a party has constructive notice of a restriction, "equity and good conscience will not permit that person to act in violation thereof, and one seeking to enjoin such a violation is entitled to relief regardless of relative damage[s]." *Id.*

We conclude that because the Solkys had constructive and actual notice of the restrictive covenants running with their land, they were not entitled to a balancing of equities. *See* NRS 111.320 (providing that subsequent purchasers of land are deemed to have notice of a deed's contents by virtue of the recording statutes). The Deed Restriction and the terms therein were recorded twice: once initially (on May 25, 1984) and then re-affirmed and ratified in the Non-Waiver Agreement (on January 10, 1991).

Moreover, the Solkys had actual notice of the Deed Restriction.[2] As we indicated in *Gladstone*, the nonmoving party is not entitled to a balancing of equities if it knowingly violates a restrictive

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[2]The Solkys argue that this case resembles *Horvath v. Gladstone*, 97 Nev. 594, 637 P.2d 531 (1981), because in that case, the relative hardship doctrine was available to owners who only had constructive notice of the restriction. We disagree and conclude that *Horvath* did not hinge simply on constructive notice. The purchaser in *Horvath* likely had constructive notice but we held that the balancing of equities was available to the purchaser because he had performed no act in violation of the restrictions and merely purchased a house containing an existing violation. 97 Nev. at 597, 637 P.2d at 533. Here, no violation existed prior to the acquisition of the Solky Parcel. The Solkys violated the Deed Restriction after having both constructive and actual notice of its existence, so we conclude that *Horvath* is not analogous to these facts.

covenant. 95 Nev. at 480, 596 P.2d at 495 (where defendant-builders have constructive notice of restrictive covenants on the land, and continue to build after a neighbor objects to breach of the covenants, the builder assumes the risk of damages incurred after notice of the objection). During the time that the Solkys began planting their new palm trees, Mr. Smith contacted Mr. Solky and told him of the Deed Restriction. Mr. Smith then faxed Mr. Solky a copy of the Deed Restriction, which Mr. Solky acknowledged that he received. Despite that notice, Mr. Solky continued installing the trees. Mr. Smith then retained counsel who wrote a letter advising the Solkys of the Smiths' intention to enforce the Deed Restriction. The Solkys did not take any steps to ensure that the new trees would not grow beyond the height limitation in the Deed Restriction. Furthermore, the only evidence of the Smiths' inequitable conduct is speculative. *See Gladstone*, 95 Nev. at 480, 596 P.2d at 495 (holding that the relative hardship doctrine is only available when the party seeking injunction has engaged in inequitable conduct). Accordingly, we conclude that the district court did not abuse its discretion in granting the Smiths injunctive relief based on the scope of the Deed Restriction.

The district court did not abuse its discretion when it awarded the Smiths attorney fees, which were recoverable under the plain terms of the Deed Restriction and Non-Waiver Agreement

The Solkys argue that the district court awarded attorney fees as special damages. Alternatively, the Solkys argue that the Smiths were not entitled to attorney fees under the Deed Restriction and Non-Waiver

Agreement because the Solkys did not sign either instrument and did not know about any Deed Restriction.[3] We disagree.

It is unclear whether the district court awarded attorney fees as special damages, under the plain terms of the Deed Restriction, Non-Waiver Agreement, or both. We may affirm the attorney fees award on either ground. *See Sengel v. IGT*, 116 Nev. 565, 570, 2 P.3d 258, 261 (2000) (holding that a correct result will not be reversed simply because it is based on the wrong reason). We review a district court's decision to award attorney fees for a manifest abuse of discretion. *Kahn v. Morse & Mowbray*, 121 Nev. 464, 479, 117 P.3d 227, 238 (2005). Attorney fees are generally not recoverable absent a statute, rule, or contractual provision. *Horgan v. Felton*, 123 Nev. 577, 583, 170 P.3d 982, 986 (2007). We construe words in a restrictive covenant according to their plain and popular meaning, like those in a contract. *Diaz v. Ferne*, 120 Nev. 70, 73, 84 P.3d 664, 666 (2004).[4] We conclude that the district court did not

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[3]The Solkys argue that the Deed Restriction is the controlling document because the Non-Waiver Agreement has no provision for successor and assigns. We disagree because the Non-Waiver Agreement clearly states that its provisions shall be binding upon successors, assigns, and the burdened estate. The Solkys also argue that the Deed Restriction is one-sided and fails for a lack of mutuality of the remedy because only the Smiths could recover attorney fees. We conclude that regardless of whether the Deed Restriction contained the proper mutuality of remedy, the Non-Waiver Agreement contained the proper mutuality of remedy. *See Rowland v. Lepire*, 99 Nev. 308, 316, 662 P.2d 1332, 1337 (1983) (holding that builders were not entitled to attorney fees pursuant to a construction contract provision when it contained no reciprocal provision for the benefit of the owners).

[4]Other courts have upheld attorney fees based upon language within restrictive covenants. *See Deane Gardenhome Ass'n v. Denktas*, 16 Cal.Rptr.2d 816, 819 (Ct. App. 1993) (granting attorney fees to

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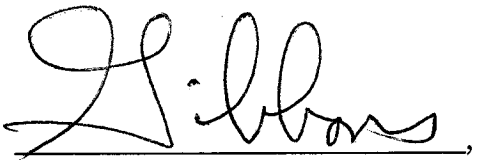
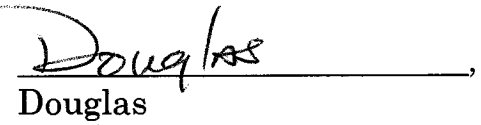
manifestly abuse its discretion because the plain language of both the Deed Restriction and Non-Waiver Agreement provided that the Smiths were entitled to attorney fees.

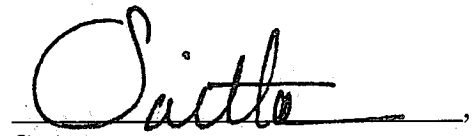
Accordingly, we ORDER the judgment of the district court AFFIRMED.[5]



Gibbons, J.



Douglas, J.



Saitta, J.

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homeowners who were successful in defending an HOA suit seeking injunction when an HOA restrictive covenant expressly entitled the prevailing party to attorney fees); *Jackson Square Towne House Home Ass'n, Inc. v. Hannigan*, 867 So. 2d 960, 965-66 (La. Ct. App. 2004) (upholding an award of attorney fees pursuant to a restrictive covenant providing for reasonable attorney fees in the event that the HOA took action to enforce the covenant); *Village of Hickory Pointe Homeowners Ass'n v. Smyk*, 686 N.W.2d 506, 509 (Mich. Ct. App. 2004) (concluding that the HOA was entitled to recover attorney fees when the subdivision's restrictive covenant contained an attorney fee provision); *Prairie Hills Water & Dev. Co. v. Gross*, 653 N.W.2d 745, 755 (S.D. 2002) (concluding that a subdivision's attorney fees provision was incidental to covenants made for the benefit of the property, ran with the land, and was enforceable against subsequent lot owners in a nuisance action, even though lot owners were not in privity with original grantor).

[5]We have considered the parties' remaining arguments and conclude they are without merit.

cc: Hon. Kenneth C. Cory, District Judge
Leonard I. Gang, Settlement Judge
Law Office of Edgar C. Smith
Ales & Bryson
Eighth District Court Clerk