IN THE SUPREME COURT OF FLORIDA

Case No. SC19-1371

SHANE R. HAYSLIP, et al.,

petitioners,

v.

U.S. HOME CORPORATION,

respondent.

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT,
CASE NO. 2D17-4372

AMICUS CURIAE BRIEF OF THE REAL PROPERTY PROBATE & TRUST LAW SECTION OF THE FLORIDA BAR

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IDENTITY AND INTEREST

The Real Property Probate & Trust Law Section of The Florida Bar ("Section") is a group of Florida lawyers who practice in the areas of real estate, trust and estate law. The Section is dedicated to serving all Florida lawyers and the public in these fields of practice. We produce educational materials and seminars, assist the public *pro bono*, draft legislation, draft rules of procedure, and occasionally serve as a friend of the court to assist on issues related to our fields of practice.[1] Our Section has over 10,000 members.

Pursuant to Section bylaws, the Executive Council of the Section voted unanimously to appear in this case if permitted by the Court. The Florida Bar approved the Section's involvement in this case. [2]

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[1] For example, see *North Carillon, LLC, v. CRC 603, LLC,* 135 So. 3d 274 (Fla. 2014; *Aldrich v. Basile*, 136 So. 3d 530 (Fla. 2014); *Chames v. DeMayo*, 972 So. 2d 850, 854-55 (Fla. 2007); *McKean v. Warburton***,** 919 So. 2d 341 (Fla. 2005); *May v. Illinois Nat. Ins. Co*., 771 So. 2d 1143 (Fla. 2000); *Friedberg v. SunBank/Miami*, 648 So. 2d 204 (Fla. 3d DCA 1994).

[2] The Executive Committee of the Section approved the filing of this brief, which was subsequently approved by the Section's Executive Council. Pursuant to Standing Board Policy 8.10, the Board of Governors of The Florida Bar (typically through its Executive Committee) must review a Section's amicus brief and grant approval before the brief can be filed with the Court. Although reviewed by the Board of Governors, the amicus brief will be submitted solely by the Section and supported by the separate resources of this voluntary organization---not in the name of The Florida Bar, and without implicating the mandatory membership dues paid by Florida Bar licensees. The Florida Bar approved our filing of this brief.

Kenneth B. Bell, Gerald B. Cope, Jr., Robert W. Goldman, and John W. Little III, are the four co-chairs of the amicus committee of the Section, which is charged with preparing *amicus* briefs for the Section. Gerald Cope is conflicted out of working on this brief.[3]

The Section's interest in this case stems from the Section's expertise and experience with real estate law, the construction of deeds, and the impact this case will have on Florida citizens and their real estate holdings.

SUMMARY OF ARGUMENT

The question certified by the district court of appeal is too broad and does not capture the issue in the case or the issue of great public importance. As modified by the Section, the certified question should be answered in the affirmative.

Whether the arbitration clause in this case is a real covenant running with the land or a personal covenant that does not run with the land, or a hybrid of the two, is a fact-based issue for the litigants to argue and for the courts to resolve. In resolving that issue, the Court should construe that arbitration covenant narrowly in favor of the unrestricted use of the property.

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[3] We acknowledge the tremendous assistance of Brian W. Hoffman, Esquire, in researching and helping the Section develop this brief.

ARGUMENT

I. MODIFY QUESTION OF GREAT PUBLIC IMPORTANCE

The question raised by the District Court of Appeal, Second District, is as follows:

> DOES A MANDATORY ARBITRATION PROVISION CONTAINED WITHIN A RESIDENTIAL WARRANTY DEED CONVEYING RESIDENTIAL PROPERTY FROM HOME BUILDER TO ORIGINAL PURCHASER RUN WITH THE LAND SUCH THAT IT IS BINDING ON SUBSEQUENT PURCHASERS WHERE THE INTENDED NATURE OF THE PROVISION IS CLEAR AND THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT WAS ON NOTICE OF THE PROVISION?

Hayslip v. U.S. Home Corp., 276 So. 3d 109, 118 (Fla. 2d DCA 2019).

For the reasons explained below, the question is too broad and seems to cover any arbitration clause regardless of the disputes to which the clause might apply.[4] For example, the arbitration clause might apply to personal

[4] The certified question and Second District opinion do not address equitable servitudes. The legal concept of real covenants versus personal covenants is distinct from equitable servitudes (though Florida case law is not always clear in differentiating these legal concepts). Out of concerns over modern land development, other jurisdictions have shifted away from the "touch or concern" requirement of equitable servitudes. This shift is noted in the Restatement (Third) of Property (Servitudes) § 3.2 (2000). To our knowledge, the "touch or concern" doctrine has not been superseded in Florida. Since the legal concept of equitable servitudes and any modification of the related rules of law are not within the scope of the certified question or the Second District's opinion, the Section has limited its legal analysis to controlling Florida law on real covenants versus personal covenants.

injury disputes or investment disputes, which would not run with the land. In order to avoid confusion, the important and more precise question before the Court could be better stated as follows (with the proposed additional language underlined):

> DOES A MANDATORY ARBITRATION PROVISION CONTAINED WITHIN A RESIDENTIAL WARRANTY DEED CONVEYING RESIDENTIAL PROPERTY FROM HOME BUILDER TO ORIGINAL PURCHASER <u>THAT TOUCHES AND CONCERNS THE LAND AND IS INTENDED TO ADDRESS AND RESOLVE DISPUTES OVER THE BENEFICIAL INTEREST IN AND ENJOYMENT</u> OF THE LAND RUN WITH THE LAND SUCH THAT IT IS BINDING ON SUBSEQUENT PURCHASERS WHERE THE INTENDED NATURE OF THE PROVISION IS CLEAR AND THE PARTY AGAINST WHOM ENFORCEMENT IS SOUGHT WAS ON NOTICE OF THE PROVISION?

II. REAL COVENANTS V. PERSONAL COVENANTS

Covenants are divisible into two major classes: (1) real covenants which run with the land and typically bind the heirs and assigns of the covenanting parties, and (2) personal covenants which bind only the covenanting parties personally. 19 Fla. Jur. 2d Deeds § 181; *Caulk v. Orange County,* 661 So. 2d 932, 933 (Fla. 3d DCA 1995). The most thorough explanation of the distinction between real covenants and personal covenants was articulated by the district court of appeal in *Maule Industries, Inc. v. Sheffield Steel Products, Inc.*, 105 So. 2d 798 (Fla. 3d DCA 1958), which summarized the distinction as follows:

> Real Covenants: A real covenant running with the land differs from a merely personal covenant because a real covenant concerns the property conveyed and the occupation and enjoyment thereof. If the performance of the covenant must touch and involve the land or some right or easement annexed and appurtenant thereto, and tends necessarily to enhance the value of the property or renders it more convenient and beneficial to the owner, it is a covenant running with the land.
> Personal Covenants: a personal covenant is collateral or is not immediately concerned with the property granted.[5]

108 So. 2d at 801.

The *Maule Industries* Court explained that the primary test as to whether the covenant runs with the land or is personal is whether it concerns the property granted and the occupation or enjoyment of that property, or is a collateral or a personal covenant not immediately concerning the property granted. 105 So. 2d at 801. In order that a covenant may run with the land it must have relation to the land or the interest or estate conveyed, and the thing required to be done must be something which touches such land, interest, or estate and the occupation, use, or enjoyment of the property. *Id.* The question whether a covenant runs with the land does not depend upon its being performed upon the land itself; its performance must touch and concern the land or some right or easement annexed or appurtenant

[5] This Court further elaborated that a personal covenant creates a personal obligation or right enforceable at law only between the original covenanting parties. *Palm Beach County v. Cove Club Inv'rs Ltd.*, 734 So. 2d 379, 382, n.4 (Fla. 1999).

to the land and tend necessarily to enhance its value or render it more convenient and beneficial to the owner or occupant. *Id.*

The explanation contained in *Maule Industries* was specifically cited and restated by this Court in *Palm Beach County v. Cove Club Inv'rs Ltd.*, 734 So. 2d at 382, n.4.

III. APPLICATION OF DEFINITIONS BY THE COURTS

The *Maule Industries* court and other Florida courts have articulated three criteria related to the enforcement of real covenants: (1) the existence of a covenant that touches and involves the land, (2) an intention that the covenant run with the land, and (3) notice of the covenant given to the party against whom enforcement is sought. *See Winn-Dixie Stores, Inc. v. Dolgencorp, Inc.* v. 964 So. 2d 261, 265 (Fla. 4th DCA 2007). While some courts have applied the definition and explanation contained in *Maule Industries*, other courts have relied on older case law that is much broader in defining and applying the meaning of a real covenant. For example, in *Hagan v. Sabal Palms, Inc*., 186 So. 2d 302 (Fla. 2d DCA 1966), the court cites and discusses *Maule Industries*, but then references an early case, *Burdine v. Sewell*, 92 Fla. 375 (Fla. 1926) that contains a simpler and broader definition of real covenants. In *Burdine*, this Court explained that: "[a] covenant is said to run with the land when either the liability to perform it or the right to take

advantage of it passes to the vendee or the assignee of the land." Ultimately, the *Hagan* Court applied the *Burdine* definition. 186 So. 2d at 311.

Whether a covenant is a real covenant is fact-driven in each case.[6] Therefore, it may be helpful to the Court to analyze the facts used by other courts to conclude a covenant was (or was not) a real covenant. See below:

Real Covenants:

In *Maule Industries, Inc.* - the grantor of the deed made certain covenants relating to maintenance by the grantor, its successors and assigns, of the railroad facilities used by the grantee. The Court determined that was a real covenant running with the land.

In *Hagan v. Sabal Palms, Inc.* – the original deed contained covenants against erection of any building except a dwelling in an unplatted subdivision. The Court determined this covenant was a real covenant and ran with the land.

Not Real Covenants:

In *Caulk v. Orange County*, 661 So. 2d 932, 933 (Fla. 5th DCA 1995) - the grantor of the deed reserved all rights, title and interest in any proceeds arising out of eminent domain or condemnation proceedings. The court noted the

[6] In some cases, the fact evidence may simply involve the deed and its clear terms (if they exist). In other cases, there may be multiple interpretations of deed language, which would mandate evidence beyond the terms of the deed. *See AT&T Wireless Services of Florida, Inc., v. WCI Communities, Inc.*, 932 So. 2d 251, 255 (Fla. 4th DCA 2005); *Evergreen Communities, Inc., v. Palafox Preserve Homeowners Assn,* 213 So. 3d 1127, 1128 (Fla. 1st DCA 2017).

covenant "concerns" the land, but it does so only tangentially. Unlike covenants for mineral rights and crops, which impact the land, the only thing this covenant "touches" and "concerns" is intangible personal property – specifically cash. In addition to not satisfying the touch and concern criteria, the Court determined that the second criteria that there be an intention that the covenant run with the land was also not satisfied because the covenant was specific to the grantee. *Id.*

IV. ANALYSIS AND MODEL ARBITRATION CLAUSE THAT RUNS WITH THE LAND

The district court of appeal in this case adopted the view that courts need not construe an arbitration covenant as real or personal using an overtechnical analysis. 276 So. 3d at 118 ("'[T]here would seem to be no reason for applying the rules of touching and concerning in an overtechnical manner, which is unreal from the standpoint of the parties themselves.' " quoting from *Kelly v. Tri-Cities Broadcasting, Inc.*, 147 Cal.App.3d 666, 195 Cal. Rptr. 303, 304 (1983)). Still, the rules of construction of real covenants seem to require a finding of some specificity and direct link to the beneficial interest and enjoyment of the land.

Further, restraints on the use of real property are not favored. *Evergreen Communities, Inc., v. Palafox Preserve Homeowners Assn,* 213 So. 3d at 1128. Consequently, any restriction on a property owner's use of the property must be strictly and narrowly construed in favor of the unrestricted use of real property. *Id.; see Beach Towing, Inc. v. Sunset Land Associates, LLC*, 278 So. 3d 857, 863 (Fla.

3d 2019). This rule applies to covenants that run with the land. *Bendo v. Silverwood Community Assn., Inc.*, 159 So. 3d 179, 180 (Fla. 5th DCA 2015).

Ideally, an arbitration clause in a deed that is intended to run with the land would specifically address potential land-based disputes or claims involving beneficial interests and enjoyment of the land, identify the benefitted property, and might look something like the following:

> The Grantor, its successors and assigns, shall provide maintenance for railroad facilities over the real property identified in exhibit A, owned by the Grantor, its successor and assigns, that are used by the Grantee, its successors and assigns, for railroad operations. Any dispute regarding maintenance or use of the railroad facilities between the Grantor, its successors and assigns, and the Grantee, its successors and assigns, shall be subject to binding arbitration as provided by Florida Statute, Chapter 682 (2019), or otherwise applicable Florida law.

The cases from other jurisdictions cited by the district court of appeal, like the model clause above, appear to be quite specific as to the direct land-based disputes or claims covered by the arbitration clause. See *Hayslip v. U.S. Home Corp.*, 276 So. 3d at 116-18 (Fla. 2d DCA 2019), where the court discusses *J&JB Timberlands, LLC v. Woolsey Energy II, LLC*, No. 14-cv-1318-SMY-RJD, 2017 WL 396174, at 1-2 (S.D. Ill. Jan. 30, 2017) (arbitration of damages from mineral extraction); *Baker v. Conoco Pipeline Co.*, 280 F. Supp. 2d 1285, 1292, 1294 (N.D. Okla. 2003) (arbitration of damage to fences, crops, and timber resulting from laying, maintaining, and removing pipeline); *Kelly v. Tri-Cities Broadcasting,*

Inc., 147 Cal.App.3d 666, 195 Cal. Rptr. 303, 304 (1983) (arbitration of land lease disputes).

The arbitration clause in this case appears to be quite broad, covering any possible claim by either covenanting party, and may include aspects of both personal and real covenants. That is a factual determination for the litigants to argue and the courts resolve. Whether such a hybrid covenant (if that is what it is), or some aspects of the covenant, can run with the land and bind subsequent purchasers like the Hayslips regarding certain disputes appears to have no answer in our jurisprudence (or none that we could locate). But, as already noted above, in evaluating the covenant and deciding the case, the Court should narrowly and strictly construe the covenant in favor of the property's unrestricted use. *See Beach Towing, Inc., LLC*, 278 So. 3d at 863.

CONCLUSION

The certified question, as modified by the Section, should be answered in the affirmative. Whether the arbitration clause in this case qualifies as a real covenant binding on the Hayslips is a factual determination based on the record before the Court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing was served this 17th day of December, 2020, via electronic mail to DAVID M. GREENE, ESQ., designated email: dgreene@burnettlaw.com, C. DAVID HARPER, ESQ., designated email: charper@foley.com, LAWRENCE J. DOUGHERTY, ESQ., designated email: ldougherty@foley.com, MANUEL FARACH, ESQ., designated email: mfarach@mcglinchey.com and DAVID GERSTEN, ESQ., designated email: dgersten@grsm.com.

/s/ Robert W. Goldman

CERTIFICATE OF FONT COMPLIANCE

I certify that this brief complies with the font requirement of rule 9.210 (a) (2), Florida Rules of Appellate Procedure.

/s/ Robert W. Goldman, FBN339180