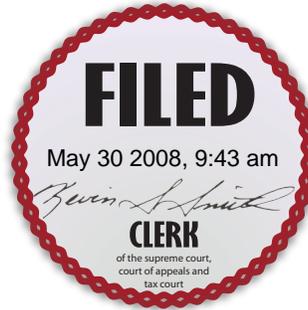


**Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.**



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**IN THE  
COURT OF APPEALS OF INDIANA**

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JOE HUFF, NICOLE HUFF, )  
GARY STIPCAK, CARLA STIPCAK, )  
GCS REAL ESTATE, LLC, and )  
WGH REAL ESTATE, LLC, )  
 )  
Appellants-Defendants, )  
 )  
vs. )  
 )  
STAN SADLER, as Receiver, )  
 )  
Appellee-Plaintiff. )

No. 55A05-0710-CV-585

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APPEAL FROM THE MORGAN SUPERIOR COURT  
The Honorable David H. Coleman, Special Judge  
Cause No. 55D01-0603-MI-168

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**May 30, 2008**

**MEMORANDUM DECISION – NOT FOR PUBLICATION**

**BAKER, Chief Judge**

Appellants-defendants Joe and Nicole Huff (the Huffs), Gary and Carly Stipcak (the Stipcaks), GCS Real Estate, LLC, and WGH Real Estate, LLC (collectively, the appellants), appeal the trial court's grant of summary judgment in favor of appellee-plaintiff Stan Sadler. The trial court determined that the appellants, whose properties adjoined Big Lake in the Foxrun Subdivision in Morgan County, were responsible as a matter of law for the costs of maintaining and repairing the lake and its dams. The appellants argue that the trial court erred in concluding as a matter of law that the covenants and restrictions applicable to the subdivision were clear and unambiguous, inasmuch as there were latent ambiguities in the covenants. Therefore, the appellants maintain that a genuine issue of material fact exists because extrinsic evidence should be introduced to determine the meaning of the covenants and the obligations of the various landowners. Concluding that the trial court properly found that the landowners whose property adjoined the lake were responsible for its maintenance and repair as a matter of law, we affirm.

### FACTS

Perry D. Cruse and his wife are the owners and developers of the Foxrun residential subdivision, which consists of approximately 112 lots. The original subdivision plat was recorded on November 16, 1998, in the Morgan County Recorder's office. In conjunction with filing that plat, Cruse recorded an initial set of covenants and restrictions that same day.

Approximately two years later, Cruse filed a replat of the subdivisions, which was accepted by the Morgan County Board of County Commissioners on September 5, 2000,

and was recorded on September 8, 2000. The Foxrun replat references and incorporates the prior covenants. The Foxrun replat provided that “USE OF ALL LAKES AND PONDS ARE RESTRICTED TO THE OWNERS OF LOTS WHICH ADJOIN THEM.” Tr. p. 135. The covenants were also recorded on September 8, 2000, in the Morgan County Recorder’s Office.

Several of the subdivided lots in Foxrun adjoin the various lakes and ponds in Foxrun. Moreover, the lakes and ponds are part of the lots, inasmuch as the lot line boundaries for these adjoining lots extend to the center of those waters. Most of the other lots in the Foxrun Subdivision are not adjacent to any lake or pond. In accordance with the Foxrun replat and covenants, only the owners whose lots adjoin a lake or pond have access to that particular body of water. More specifically, the Foxrun covenants provide that:

19. Lake and Pond Maintenance. The lakes and ponds (constructed or proposed) shall be for the sole benefit and use of Owners of the lots, which adjoin the lake(s) or ponds. No other lot Owners in this subdivision will be allowed access to the lake(s) or ponds. The lake and pond dam(s) shall be maintained in accordance with sound engineering and ecological practice. Cost of all maintenance and repair of the lake(s), ponds and dams shall be prorated equally among the Owners of lots, which adjoin that specific lake or pond.

Id. at 143-44. The original Foxrun Covenants and Restrictions that were recorded in 1998 contained a nearly identical provision.

One of the lakes within the Foxrun Subdivision is Big Lake, which was constructed by Cruse along with a dam along the lake’s eastern edge. At some point, the dam developed serious structural deficiencies which, according to the Indiana

Department of Environmental Management (IDEM), required repair. Cruse reached an agreement with IDEM to correct the problems, but he subsequently defaulted on the mortgage held by First National Bank & Trust (First National) and declared bankruptcy. Thus, the deficiencies have not been corrected. After Cruse petitioned for bankruptcy, the Morgan Superior Court appointed Sadler as Receiver to take possession of the unsold Foxrun Subdivision lots for the purpose of selling the lots on behalf of First National.

In conjunction with the marketing and sale of the Foxrun lots, Cruse prepared and distributed certain promotional brochures regarding the subdivision. One of the promotional brochures stated that “many waterfront lots are still available.” Id. at 185, 195. A second brochure provided that “Big Lake is common to all 111 lots [and] some waterfront lots are still available.” Id. at 188, 198. The plat distributed with the second brochure stated that Lots 71, 72, and 73, which are adjacent to the Big Lake, are “Common Area to All Lot Owners for Lake Access.” Id. at 190, 200. The Big Lake is depicted as being located on lots 70-77 on the promotional brochures, but the lake is not on the Foxrun plat or replat.

Both brochures were distributed to the public by way of an information box at the entrance to Foxrun. During the years 2001 – 2004, Cruse gave a copy of both brochures to the Huffs and the Stipcaks. Cruse purportedly stated to Joe Huff and the Stipcaks that Big Lake is a “common area” for the benefit of all lot owners in Foxrun. Id. at 183, 194.

The Huffs and the Stipcaks own several lots that adjoin Big Lake. More particularly, the Huffs took title by warranty deed to lots 60-64, 69, 70, and 75 in 2001 and lots 58 and 64 in 2003, and the Stipcaks took title by warranty deed to lots 76 and 77

in 2001. The deeds specifically provided that the lots are subject to “all easements, agreements, and restrictions of record,” and were conveyed subsequent to the recording of the Foxrun replat and Foxrun covenants. Id. at 163-70.

On March 10, 2006, Sadler filed a complaint for a declaratory judgment, naming all of the owners in the Foxrun subdivision as defendants. Sadler sought a declaration that only the lot owners whose property adjoined Big Lake were responsible for the costs of repairing and maintaining the lake and its defective dam. Sadler filed the complaint because several lot owners asserted that the cost of maintaining and repairing the lakes and dams was to be born by all of the Foxrun lot owners. The complaint alleged that

25. [T]he correct interpretation and application of Section 18 of the Plat Covenants and Restrictions and Section 19 of the Replat Covenants and Restrictions clearly places the responsibility and liability for maintenance and repair of the lakes, ponds and dams on the owners of Lake Lots. The Replat Covenants and Restrictions state that the “cost of all maintenance and repair of the lake(s), ponds and dams shall be prorated equally among the Owners of lots, which specifically adjoin the specific lake or pond.”
26. Foxrun Lot Owners who own Lake Lots within the Foxrun Subdivision should, on a pro rata basis, be responsible for the costs of the maintenance and repair of the lake(s), ponds and dams their lots adjoin. Foxrun Lot Owners, both current and future, who own Non-Lake Lots should not be required to contribute toward the cost to maintain or repair the lake(s), ponds or dams within the Foxrun Subdivision.
27. An interpretation and determination of the application of the Replat Covenants and Restrictions by this Court, in the form of a declaratory judgment, would terminate and remove the uncertainty of liability for the cost of maintenance and repair of the lake(s), ponds and dams on current and future Foxrun Lot Owners and would alleviate the insecurity of prospective Foxrun lot purchasers.

Appellant's App. p. 46. Sadler requested the trial court to issue an order declaring that the Foxrun covenants and restrictions: (1) are applicable to all Foxrun lot owners; (2) are clear and unambiguous; (3) require that the cost of all maintenance and repair of the lakes, ponds, and dams be prorated equally among the owners of lake lots; and (4) provide that the owners of non-lake lots shall not bear any of the cost of maintenance or repair of any of the lakes, ponds, or dams.<sup>1</sup>

On July 14, 2006, Sadler and other defendants who subsequently joined in the action<sup>2</sup> filed a motion for summary judgment, alleging that they were entitled to judgment as a matter of law because Foxrun's covenants and restrictions clearly state that the costs of maintaining the lakes, ponds, and dams are the responsibility of the landowners whose lots are adjacent to those particular bodies of water. Sadler maintained that "any attempt by [the appellants] to rely on alleged verbal and written representations, including the Foxrun brochures that may be contrary to the clear language of the replat covenants and restrictions to oppose summary judgment, is misplaced." Id. As a result, Sadler and the joining defendants asserted that they were entitled to summary judgment.

Following a hearing on June 14, 2007, the trial court entered findings of fact and conclusions of law and granted Sadler's motion for summary judgment. In relevant part, the order provided that

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<sup>1</sup> At approximately the same time that this action commenced, the Huffs conveyed their lots to WJH Real Estate, LLC, which was owned by the Huffs, and the Stipcaks conveyed their lots to GCS Real Estate, LLC, a company that they owned.

<sup>2</sup> The defendants who joined in Sadler's motion for summary judgment are all lot owners in Foxrun. Tr. p. 89.

2. The Foxrun Replat and Replat Covenants and Restrictions before the Court are valid, applicable to all Foxrun Lot Owners (both present and future), are clear and unambiguous and require: a) that only the owners of Lake Lots shall be responsible pro rata for the costs of maintaining and repairing the lakes, ponds and dams which their lots adjoin; and b) the owners of Non-Lake Lots are not required to contribute toward the cost to maintain or repair the lakes, ponds and dams within the Foxrun Subdivision.

Tr. p. 37. This appeal ensued.

## DISCUSSION AND DECISION

### I. Standard of Review

When reviewing summary judgment, this court views the same matters and issues that were before the trial court and follows the same process. Estate of Taylor ex rel. Taylor v. Muncie Med. Investors, L.P., 727 N.E.2d 466, 469 (Ind. Ct. App. 2000). We construe all facts and reasonable inferences to be drawn from those facts in favor of the non-moving party. Jesse v. Am. Cmty. Mut. Ins. Co., 725 N.E.2d 420, 423 (Ind. Ct. App. 2000). Summary judgment is appropriate when the designated evidence demonstrates that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Ind. Trial Rule 56(C). The purpose of summary judgment is to terminate litigation about which there can be no material factual dispute and which can be resolved as a matter of law. Zawistoski v. Gene B. Glick Co., 727 N.E.2d 790, 792 (Ind. Ct. App. 2000). The construction of a written contract containing restrictive covenants is a question of law for which summary judgment is particularly appropriate. Grandview Lot Owners Ass'n, Inc. v. Harmon, 754 N.E.2d 554, 556 (Ind. Ct. App. 2001).

We note that the trial court entered findings and conclusions in support of its order on summary judgment. Although we are not bound by the trial court's findings and conclusions, they aid our review by providing reasons for the trial court's decision. Ledbetter v. Ball Mem'l Hosp., 724 N.E.2d 1113, 1116 (Ind. Ct. App. 2000). If the trial court's entry of summary judgment can be sustained on any theory or basis in the record, we must affirm. Id.

## II. The Appellants' Claims

As set forth above, the appellants argue that summary judgment was improperly granted for Sadler because the Foxrun covenants allegedly contain latent ambiguities that require the introduction of extrinsic evidence to determine their meaning. Specifically, the appellants claim that the ambiguities include: (1) whether Big Lake is a common area; (2) who is responsible for the maintenance of a lake that is common area; (3) who is responsible for the maintenance of a platted street that is a dam; and (4) whether Big Lake is a lake as defined by the Foxrun covenants and plat.

We note that the same rules of construction that apply to contracts apply to restrictive covenants. Renfro v. McGuyer, 799 N.E.2d 544, 547 (Ind. Ct. App. 2003).

With regard to ambiguity:

Indiana follows the four corners rule, namely, that extrinsic evidence is not admissible to add to, vary, or explain the terms of a written instrument if the terms of the instrument are susceptible of a clear and unambiguous construction. A document is not ambiguous simply because parties disagree about a term's meaning. Language is ambiguous only if reasonable people could come to different conclusions as to its meaning.

Cook v. Adams County Plan Comm'n, 871 N.E.2d 1003, 1007 (Ind. Ct. App. 2007), trans. denied.

In this case, it is apparent that the appellants are claiming that because Big Lake does not appear on the Foxrun replat and since Cruse allegedly represented that the lake is—or will be—a common area, the covenants are ambiguous with regard to who must maintain the lake and dam. Notwithstanding this contention, the appellants seemingly ignore the plain language of the covenants. Even though Big Lake is not recorded on the replat, the covenants specifically state that the repair and maintenance requirements imposed therein apply to all “lakes and ponds (constructed or proposed).” Tr. p. 143-44. The covenants were drafted and recorded in 2000 before portions of the Foxrun subdivision were completed. Id. at 28. Therefore, the covenants were intended to encompass not only all existing lakes and ponds, but prospective ones as well. Put another way, the fact that Big Lake is not depicted on the Foxrun replat is irrelevant because there is nothing in the covenants that limits the lakes and ponds contemplated to the lakes and ponds identified on the replat. In essence, the appellants are impermissibly attempting to insert additional terms into the covenants.

Additionally, the appellants contend that they purchased their lots in reliance upon Cruse’s promotional brochures and oral assurances that Big Lake would be a “common area.” Id. at 183, 194. However, the brochures attached to the appellants’ affidavits show Big Lake as a lake to be constructed on the lots they own. Hence, the appellants’ claim that they were unaware that Big Lake was a proposed lake that would be governed by the Foxrun covenants is belied by the evidence.

The appellants also rely on Adams v. Reinaker, 808 N.E.2d 192 (Ind. Ct. App. 2004), in support of their contention that the covenants are ambiguous. In Adams, the issue was whether the parties to an easement agreement requiring Adams to bear the costs of maintaining a driveway contemplated that the driveway would later be used by multiple parties. Id. at 196. Based on “changed circumstances,” i.e., that numerous individuals began to use the driveway, this court held that an ambiguity existed regarding the intended duty to maintain and repair the driveway. Id. at 197.

Unlike Adams, there are no changed circumstances here that render the maintenance and repair obligation for Big Lake ambiguous. As noted above, the covenants plainly state that owners of lake lots shall bear the cost, on a pro rata basis, of maintaining and repairing any lake or dam that their lot adjoins. Moreover, the covenants specifically contemplate “proposed” lakes. The easement in Adams required Adams alone to bear all costs of maintenance and repair, whereas the Foxrun covenants apportion maintenance and repair obligations to all lot owners that adjoin a particular lake, pond, or dam. As a result, we find Adams is inapposite here because the two driving forces behind that decision—unfairness to Adams due to changed circumstances and his sole obligation to bear the costs—are not present here.

Also, the appellants claim that Cruse told them that Big Lake was a common area, a representation that they claim was repeated in brochures that Cruse prepared. However, nothing that Cruse said or included in a brochure alters the terms of the existing Foxrun covenants or creates new restrictions. Indeed, our Supreme Court has clearly defined the procedure that must be followed in adopting restrictive covenants: “There are two

methods of creating restrictions upon the use of property. One is by express covenants contained in the deed, and the other is by a recorded plat of the subdivision [when] a purchaser buys lots in the subdivision with reference to the plat.” Wischmeyer v. Finch, 107 N.E.2d 661, 664 (Ind. 1952). Moreover, modification of a restrictive covenant contains a similar requirement: “[I]f the owner of an entire plat of land desires to modify such plat before the sale of any lot therein, he must do so by a written instrument declaring the modifications, and such instrument must be executed, acknowledged and recorded in like manner as deeds of land.” Id.

In light of the above, Cruse’s alleged representations cannot modify the covenants because the representations were not duly recorded and were not expressed in the deeds to the appellants. Also, while Cruse’s alleged representations might result in a cause of action against him, those representations do not provide any legal basis for rewriting the covenants. Therefore, the appellants’ claim that an ambiguity existed in the Foxrun covenants based on Cruse’s alleged representations fails.

Finally, the appellants assert that there is an ambiguity in the covenants about who must repair the dam because the covenants require the Foxrun Landowners Association (LOA) to maintain interior roadways while lake lot owners must maintain any adjacent dam. Therefore, the appellants assert that a roadway—Pine Song Drive—and the dam “are one and the same improvement.” Appellants’ Br. p. 13.

The appellants did not raise this argument on summary judgment, and it was not until the motion to correct error that that the appellants argued, for the first time, that the roadway was both a dam and a road under the covenants. Tr. p. 225-32. Therefore, the

issue is waived. See Criss v. Bitzegaio, 420 N.E.2d 1221, 1225 (Ind. 1981) (holding that an issue raised for the first time in a motion to correct error is waived).

Waiver notwithstanding, the designated evidence established that the road to which the appellants are referring has not even been constructed. Moreover, the “roadway” is merely a hiking trail and it is not conducive to vehicular traffic. Indeed, a log barricade precludes that possibility. Tr. p. 274, 276-77. Even more compelling, the fact that the roadway is platted to cross a dam on Big Lake at some unknown time in the future does not mean that the roadway is the same as the dam. Although the roadway might someday use the dam on Big Lake as its support mechanism, the appellants have failed to show that the roadway is synonymous with the dam itself. As a result, the appellants’ claim fails.

### CONCLUSION

In conclusion, the trial court correctly found that the Foxrun covenants unambiguously require the owners of lake lots to pay for the costs of maintenance and repair for the particular lake and dam that their lot adjoins. As a result, the trial court properly declined to consider extrinsic evidence, including the information contained in the brochures. As discussed above, while Cruse’s statements and representations in the brochure may have created a cause of action against him, those alleged representations do not provide a legal basis for rewriting the covenants. We therefore conclude that the trial court properly granted Sadler and the joining defendants’ motion for summary judgment.

The judgment of the trial court is affirmed.

RILEY, J., and ROBB, J., concur.