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Finally, we note that the CFLA did not include a severability clause when it was passed in 1992.[106] "Such a clause is an aid to interpretation, and is a declaration of the intent of the Legislature that it would have passed the act with the invalid parts omitted."[107]

[10] The Legislature specifically found that campaign finance limits, disclosure of the sources of funding, and the provision of public funds were all necessary to achieve its goals in passing campaign election reform.[108] The unconstitutional portions of the CFLA are not severable from the remaining portions, and therefore, the entire act is unconstitutional.

## VI. CONCLUSION

Based upon the decision of the U.S. Supreme Court in *Bennett*, the CFLA, §§ 32-1602 through 32-1613, violates the First Amendment and is unconstitutional in its entirety.

JUDGMENT FOR RELATOR.

WRIGHT and MILLER-LERMAN, JJ., not participating.

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[106] See L.B. 556 (operative Jan. 1, 1993).

[107] See *State ex rel. Meyer v. Duxbury*, 183 Neb. 302, 310, 160 N.W.2d 88, 94 (1968).

[108] See § 32-1602(2).

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# FARMINGTON WOODS HOMEOWNERS ASSOCIATION, INC., APPELLEE, V. GLEN WOLF AND RHONDA WOLF, HUSBAND AND WIFE, APPELLANTS.

817 N.W.2d 758

Filed August 3, 2012. No. S-11-970.

1. **Summary Judgment: Appeal and Error.** An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. ____: ____. In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was

granted, and gives that party the benefit of all reasonable inferences deducible from the evidence.

3. **Summary Judgment.** Summary judgment proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute.
4. ____. Where reasonable minds differ as to whether an inference supporting the ultimate conclusion can be drawn, summary judgment should not be granted.
5. **Restrictive Covenants: Waiver.** The right to enforce restrictive covenants may be lost by waiver or acquiescence in the violation of the same. Whether there has been such a waiver or acquiescence depends upon the circumstances of each case.
6. ____: ____. Generally, mere acquiescence in the violation of a restrictive covenant does not constitute an abandonment thereof, so long as the restriction remains of any value, and a waiver does not result unless there have been general and multiple violations without protest.
7. **Restrictive Covenants: Waiver: Proof.** In order to prove a waiver of a restrictive covenant, a defendant must prove that a plaintiff has waived the covenant through substantial and general noncompliance.
8. **Restrictive Covenants: Intent.** The enforcement of valid restrictive covenants may be denied only when noncompliance is so general as to indicate an intention or purpose to abandon the condition.
9. **Restrictive Covenants: Waiver.** The criteria for determining whether a waiver of a restrictive covenant has occurred include, but are not limited to, whether those seeking to enforce the covenants had notice of the violation and the period of time in which no action was taken, the extent and kind of violation, the proximity of the violations to those who complain of them, any affirmative approval of the same, whether such violations are temporary or permanent in nature, and the amount of investment involved.
10. **Equity: Estoppel.** The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, the elements are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice.
11. **Laches.** Laches occurs only if a litigant has been guilty of inexcusable neglect in enforcing a right and his or her adversary has suffered prejudice.
12. **Equity.** Under the doctrine of unclean hands, a person who comes into a court of equity to obtain relief cannot do so if he or she has acted inequitably, unfairly, or dishonestly as to the controversy in issue.
13. **Equity: Words and Phrases.** Generally, conduct which forms a basis for a finding of unclean hands must be willful in nature and be considered fraudulent, illegal, or unconscionable.

14. **Evidence: Appeal and Error.** Generally, the control of discovery is a matter for judicial discretion, and decisions regarding discovery will be upheld on appeal in the absence of an abuse of discretion.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Reversed and remanded with directions.

Jason M. Bruno and Thomas D. Prickett, of Sherrets, Bruno & Vogt, L.L.C., for appellants.

Larry R. Forman and Ryan Baldridge, Senior Certified Law Student, of Hillman, Forman, Childers & McCormack, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, and MILLER-LERMAN, JJ.

STEPHAN, J.

The issue in this appeal is whether a homeowners' association may enforce a covenant prohibiting "business activities of any kind whatsoever" against homeowners who have operated a daycare in their home for a period of 12 years. We conclude that the covenant is generally enforceable, but that the district court erred in granting summary judgment in favor of the homeowners' association because there are genuine issues of material fact with respect to an affirmative defense raised by the homeowners.

## I. BACKGROUND

In December 1994, a "Declaration of Covenants, Conditions, Restrictions and Easements for Farmington Woods in Douglas County, Nebraska" (declaration), was filed with the Douglas County register of deeds. The declaration is applicable to all lots in the Farmington Woods subdivision. The declarant was listed as R.S. Land, Inc., and the declaration was signed by Ronald E. Smith as president of R.S. Land. Included in the declaration was a restrictive covenant providing that "no business activities of any kind whatsoever shall be conducted on any Lot."

In November 1998, Glen Wolf and Rhonda Wolf purchased a lot in Farmington Woods and subsequently built a home.

Ralph Marasco was their real estate agent, and because he was selling other lots in the subdivision, the Wolfs believed that Marasco owned all of the lots. The Wolfs told Marasco and their homebuilder that they intended to operate a daycare from the new home, and neither told them a daycare would not be allowed on the property. Marasco has no legal relationship with R.S. Land or Smith.

The Wolfs both testified that they did not read the declaration, but they acknowledge its 1994 filing. The declaration provided that after either 10 years or the "closing of eighty (80%) percent of the lots to independent third party homeowners," the right to enforce the covenants would transfer to the Farmington Woods Homeowners Association, Inc. (FWHOA). In approximately 2000, the FWHOA formed and became the enforcer of the covenants. The Wolfs continued to operate their daycare from and after 2000.

In 2010, the Wolfs and one of their neighbors became involved in a dispute regarding drainage on their respective properties. The neighbor filed a complaint with FWHOA, alleging the Wolfs were violating the covenant prohibiting business activities by operating a daycare. Through its attorney, FWHOA gave written notification to the Wolfs that operating a daycare violated the covenant. FWHOA then filed suit to enjoin the Wolfs from operating the daycare.

After the complaint and answer were filed, both parties moved for summary judgment. At a hearing on the motions, FWHOA presented evidence that the "no business activities" covenant was in effect in 1994 and that the Wolfs purchased their lot subject to the covenant in 1998. Evidence was also offered that showed FWHOA's unwritten policy was to act on an alleged covenant violation only after a complaint had been filed. No complaint had been filed with respect to the Wolfs' or any other homeowners' business activities prior to the 2010 complaint. The Wolfs presented evidence that at least two members of FWHOA were aware as early as 1998 that the Wolfs operated a daycare out of their home. The Wolfs also presented evidence that at least one member of FWHOA knew of the operation of another daycare in Farmington Woods

sometime between 2000 and 2010 and took no action to enforce the "no business activities" covenant. In addition, the Wolfs presented evidence that a number of home-based businesses had operated "openly and notoriously" in Farmington Woods, with no action by FWHOA. And, finally, the Wolfs presented evidence that the president of FWHOA had operated businesses from his home since 2000, with the knowledge of at least one other FWHOA member, and that no action was taken to enforce the "no business activities" covenant against him prior to 2010.

The district court granted summary judgment in favor of FWHOA, finding that the Wolfs had at least constructive knowledge of the "no business activities" covenant. Without detailed analysis, the district court determined that the Wolfs' defenses had no basis as a matter of law. The Wolfs filed this timely appeal.

## II. ASSIGNMENTS OF ERROR

The Wolfs assign, restated, that the district court erred in (1) finding their operation of a home daycare violates the "no business activities" covenant; (2) failing to apply the defenses of waiver, estoppel, and laches; (3) failing to find FWHOA was barred from receiving relief by the doctrine of unclean hands; (4) failing to hold FWHOA in contempt for discovery violations; and (5) granting FWHOA's motion for summary judgment.

## III. STANDARD OF REVIEW

[1,2] An appellate court will affirm a lower court's granting of summary judgment if the pleadings and admitted evidence show that there is no genuine issue as to any material facts or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[1] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment was granted, and gives that

[1] *In re Estate of Cushing*, 283 Neb. 571, 810 N.W.2d 741 (2012); *Doe v. Board of Regents*, 283 Neb. 303, 809 N.W.2d 263 (2012).

party the benefit of all reasonable inferences deducible from the evidence.[2]

## IV. ANALYSIS

### 1. Enforceability of Covenant Against Daycare

The Wolfs argue that their daycare does not violate the "no business activities" covenant because its operation does not infringe on the neighborhood. We rejected a similar argument in *Southwind Homeowners Assn. v. Burden*,[3] decided during the pendency of this appeal. In that case, we held that operation of an in-home daycare violated a covenant which provided that "'[n]o business activities of any kind whatsoever shall be conducted on any Lot'" in the residential subdivision.[4] We reasoned that the covenant was unambiguous and found that the residents were operating their home-based daycare in violation of the terms of the covenant. The language of the covenant at issue in this case is identical to the covenant we held to be enforceable in *Southwind Homeowners Assn.*, and it is undisputed that the Wolfs are operating a daycare business from their home. Thus, the Wolfs are in violation of the covenant unless there is merit to one or more of their affirmative defenses.

### 2. Affirmative Defenses

[3,4] In their answer, the Wolfs alleged that FWHOA was barred from enforcing the covenant by the doctrines of waiver, estoppel, laches, and unclean hands. In disposing of these affirmative defenses, the district court found that "there is no question of fact relating to whether or not the defendants were prejudiced by the delay in bringing this action" and that "as a matter of law" the defenses did not exist. In reviewing the district court's order, we are mindful that summary judgment

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[2] *Doe v. Board of Regents, supra* note 1; *Alsidez v. American Family Mut. Ins. Co.*, 282 Neb. 890, 807 N.W.2d 184 (2011).

[3] *Southwind Homeowners Assn. v. Burden*, 283 Neb. 522, 810 N.W.2d 714 (2012).

[4] *Id.* at 524, 810 N.W.2d at 716.

proceedings do not resolve factual issues, but instead determine whether there is a material issue of fact in dispute.[5] Where reasonable minds differ as to whether an inference supporting the ultimate conclusion can be drawn, summary judgment should not be granted.[6]

(a) Waiver

[5-8] In *Pool v. Denbeck*,[7] this court recognized that the right to enforce restrictive covenants may be lost by waiver or acquiescence in the violation of the same. Whether there has been such a waiver or acquiescence depends upon the circumstances of each case.[8] Generally, "mere acquiescence in the violation of a restrictive covenant does not constitute an abandonment thereof, so long as the restriction remains of any value, and . . . a waiver does not result unless there have been general and multiple violations without protest."[9] Thus, in order to prove a waiver, a defendant must prove that a plaintiff has waived the covenant through substantial and general noncompliance.[10] The enforcement of valid restrictive covenants may be denied only when non-compliance is so general as to indicate an intention or purpose to abandon the condition.[11]

[9] The criteria for determining whether a waiver of a restrictive covenant has occurred include, but are not limited to,

> whether those seeking to enforce the covenants had notice of the violation and the period of time in which no action was taken; the extent and kind of violation; the proximity of the violations to those who complain of them; any affirmative approval of the same; whether such violations

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[5] *Conley v. Brazer*, 278 Neb. 508, 772 N.W.2d 545 (2009); *Sweem v. American Fidelity Life Assurance Co.*, 274 Neb. 313, 739 N.W.2d 442 (2007).

[6] *Sweem, supra* note 5; *Riesen v. Irwin Indus. Tool Co.*, 272 Neb. 41, 717 N.W.2d 907 (2006).

[7] See *Pool v. Denbeck*, 196 Neb. 27, 241 N.W.2d 503 (1976).

[8] See *id.*

[9] 20 Am. Jur. 2d *Covenants, Etc.* § 229 at 755 (2005).

[10] 21 C.J.S. *Covenants* § 75 (2006).

[11] *Id.*

are temporary or permanent in nature; and the amount of investment involved.[12]

Viewed in the light most favorable to the Wolfs, the record shows that FWHOA (1) was aware of the Wolfs' daycare by at least 2000 and took no action to enforce the "no business activities" covenant until 2010; (2) knew sometime after 2000 but prior to 2010 of another daycare in the neighborhood and took no action to enforce the "no business activities" covenant; (3) knew as early as 2000 that its president was operating a business from his home but took no action to enforce the covenant; and (4) should have known of the existence of other "openly and notoriously" operated business operations in the neighborhood, yet took no action to enforce the covenant. The evidence also shows that from its inception, FWHOA's unwritten policy has been to take action to enforce an alleged covenant violation only when it receives a complaint, formal or informal. And the evidence further shows that no complaint of business activity was made to FWHOA prior to the instant one.

Whether waiver occurred depends on consideration of all these relevant facts. And based on these facts, we cannot conclude as a matter of law that waiver did not occur. Thus, there are genuine issues of material fact on the issue of waiver which precluded summary judgment as to this defense.

(b) Estoppel

[10] The Wolfs also alleged that FWHOA is estopped from enforcing the covenant against them. The elements of equitable estoppel are, as to the party estopped: (1) conduct which amounts to a false representation or concealment of material facts, or at least which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts. As to the other party, the elements are: (1) lack of knowledge and

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[12] *Pool, supra* note 7, 196 Neb. at 34, 241 N.W.2d at 507. Accord *Hoff v. Ajlouny*, 14 Neb. App. 23, 703 N.W.2d 645 (2005).

of the means of knowledge of the truth as to the facts in question; (2) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (3) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his or her injury, detriment, or prejudice.[13]

Here, the Wolfs argue that a genuine issue of material fact exists on their defense of equitable estoppel because they "relied, in good faith, upon the inaction, silence, and active condoning of the daycare by the FWHOA."[14] They assert that FWHOA cannot now enforce the covenant against them because it did not do so previously and the Wolfs relied to their detriment on FWHOA's inaction. But even if FWHOA's inaction can be considered conduct which amounts to a false representation or concealment of material facts, the record does not support any reasonable inference that the Wolfs lacked knowledge of or the means of discovering the truth. The Wolfs purchased their lot subject to the declaration, and thus at all times, they were operating their daycare with at least constructive knowledge that it violated the "no business activities" covenant. There also is no evidence that the Wolfs detrimentally changed their position or status in reliance on FWHOA's nonenforcement of the covenant. Rather, the Wolfs benefited from the long period of nonenforcement. We find there is no genuine issue of material fact on the affirmative defense of estoppel.

(c) Laches

[11] The Wolfs also alleged that FWHOA is barred from enforcing the covenant by the doctrine of laches. The defense of laches is not favored in Nebraska.[15] Laches occurs only if a litigant has been guilty of inexcusable neglect in enforcing a right and his or her adversary has suffered prejudice.[16]

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[13] See *Olsen v. Olsen*, 265 Neb. 299, 657 N.W.2d 1 (2003).

[14] Brief for appellant at 16.

[15] *Dutton-Lainson Co. v. Continental Ins. Co.*, 271 Neb. 810, 716 N.W.2d 87 (2006).

[16] See *id.*

Even if FWHOA is guilty of inexcusable neglect, an issue we do not decide, the Wolfs have not been prejudiced. They argue enforcement of the covenant prejudices them because if the daycare is shut down, they could lose a large portion of their income and could be forced out of their home. But this argument focuses on what prejudice would occur in the future if the covenant were enforced, which is not the appropriate legal timeframe.

Laches does not result from the mere passage of time, but from the fact that *during the lapse of time*, circumstances changed such that to enforce the claim would work inequitably to the disadvantage or prejudice of another.[17] Here, there is no evidence that in the 12 years preceding enforcement of the covenant, circumstances changed such that to enforce the covenant would prejudice the Wolfs. Rather, the Wolfs benefited from the long period of nonenforcement. We conclude there is no genuine issue of material fact on the defense of laches.

(d) Unclean Hands

[12,13] Under the doctrine of unclean hands, a person who comes into a court of equity to obtain relief cannot do so if he or she has acted inequitably, unfairly, or dishonestly as to the controversy in issue.[18] Generally, conduct which forms a basis for a finding of unclean hands must be willful in nature and be considered fraudulent, illegal, or unconscionable.[19] Although there is evidence that FWHOA knew of other violations of the "no business activities" covenant but did not seek to enforce it, there is no evidence to support a reasonable inference that FWHOA's failure to do so was so inequitable or unfair that it should deny it from seeking relief in this court. As noted, FWHOA is not equitably estopped from enforcing

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[17] *Id.*; *Fritsch v. Hilton Land & Cattle Co.*, 245 Neb. 469, 513 N.W.2d 534 (1994).

[18] *Burns v. Nielsen*, 273 Neb. 724, 732 N.W.2d 640 (2007).

[19] *Richardson v. Anderson*, 8 Neb. App. 923, 604 N.W.2d 427 (2000). See, also, *State on behalf of Pathammavong v. Pathammavong*, 268 Neb. 1, 679 N.W.2d 749 (2004).

the covenant against the Wolfs. In addition, FWHOA presented evidence that its failure to enforce the covenant was based upon its policy of not acting until a complaint was filed. On these facts, no reasonable fact finder could find that FWHOA is barred by the doctrine of unclean hands, and the district court did not err in granting FWHOA summary judgment on this defense.

### 3. Discovery Violation

During discovery, the Wolfs served interrogatories on FWHOA. One interrogatory asked FWHOA to "set forth the name and address of each and every person or resident that currently conducts any business activities within Farmington Woods, and include the type of business activity conducted by each." FWHOA's answer, which was verified by its president, was "None other than Rhonda Wolf Daycare."

During the president's deposition, however, he admitted that he had operated businesses out of his home from approximately 2000. The Wolfs also obtained evidence "from other sources showing numerous other business activities within Farmington Woods that the FWHOA either knew or should have known about."[20] The Wolfs therefore filed an application for contempt and a motion for sanctions, asking the district court to sanction FWHOA for its answers to the interrogatories. The court took evidence on the motion and ultimately overruled it.

[14] Generally, the control of discovery is a matter for judicial discretion, and decisions regarding discovery will be upheld on appeal in the absence of an abuse of discretion.[21] FWHOA's president clarified in his deposition that when he answered the interrogatory, he answered it in light of FWHOA's policy to not seek out covenant violations, but instead to act only when a complaint was filed. In light of this explanation, the district court did not abuse its discretion in neither finding FWHOA in contempt nor imposing sanctions.

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[20] Brief for appellant at 23.

[21] *Schropp Indus. v. Washington Cty. Atty.'s Ofc.*, 281 Neb. 152, 794 N.W.2d 685 (2011); *Podraza v. New Century Physicians of Neb.*, 280 Neb. 678, 789 N.W.2d 260 (2010).

## V. CONCLUSION

We affirm the district court's order to the extent it found that the Wolfs' daycare violated the "no business activities" covenant and to the extent it granted summary judgment on the defenses of estoppel, laches, and unclean hands. But as to the Wolfs' affirmative defense of waiver, we reverse the district court's grant of summary judgment and remand the cause with directions to conduct further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

MCCORMACK, J., not participating.