

In the State of Georgia  
Court of Appeals

Michael D. Peck on )  
Behalf of Himself and )  
All Homeowners )  
Adjacent to Lanier ) Appeal Case Number  
Golf Club f/k/a ) A10A0745  
Canongate on Lanier )  
Golf Club, )  
Plaintiff/Appellant, )  
v. )  
Lanier Golf Club, Inc., )  
Defendant/Appellee. )

---

Reply Brief of Appellant

---

Robert P. McFarland, Sr.  
McFarland & McFarland, P. C.  
309 Pirkle Ferry Road  
Suite B-400  
Attorney for Appellant  
Cumming, Georgia 30040  
State Bar Number: 491250  
(770) 889-2522

Comes Now Michael D. Peck ("Appellant") and submits his reply brief and shows the court as follows:

## Part II: Reply to Argument and Citation of Authorities

The Appellee claims that the Appellant made the assumption that just because he bought a lot next to a 177-acre golf course, his lot should be considered as a golf course lot: "Quite the opposite, Appellant simply assumed he had a golf course lot because there was a golf course next to his lot."<sup>1</sup> On the other hand, what person would ever buy a lot on a golf course and not naturally assume that it is a golf course lot?

The Suggested Pattern Jury Instructions<sup>2</sup> assume that persons use their common sense: "In general, slight diligence or care is the degree of care that persons of common sense, however inattentive they may be, use under the same or similar

---

<sup>1</sup> Appellee's Brief, Page 13, ¶2.

<sup>2</sup> 60.030 Torts; Gross Negligence (Slight Diligence).

circumstances."<sup>3</sup> Should we require any less use of common sense in this situation. Clearly, a golf course lot is a lot next to the golf course.

In the next paragraph<sup>4</sup>, the Appellee claims that if this court rules for the Appellant, it would somehow give everybody that abutted property an implied easement in that property. However, that is not the purpose of this class action civil lawsuit. The Appellant's limited purpose is to give the same rights to owners of golf course lots in the golf course as lakefront property owners have in the lake.

## 2. Commonality:

The Appellee attempted to distinguish the instant case with the holding in *Ute Park Summer Homes Ass'n*<sup>5</sup>, by claiming that the

---

<sup>3</sup> Also see *T. J. Morris Co. v. Dykes*, 197 Ga. App. 392, 395-396(4) (1990).

<sup>4</sup> Appellee's Brief, Page 13, ¶3.

<sup>5</sup> *Ute Park Summer Homes Ass'n v. Maxwell Land Grant Co*,  
(continued...)

Lanier Golf Course was never a "...part of any tract or plan." Once again, it defies logic to assume that any developer would build a golf course and not consider the added revenue that he would receive from the sale of golf course lots. With respect to the record in this case, there is tangible, solid evidence that this was the plan of UniCity, Inc.

Exhibit 2<sup>6</sup> is a Golf Course Operating Agreement which has been on file in the Forsyth County Deed Records since 1974. The document was signed by the original developer, UniCity, Inc. UniCity, Inc. was the owner of the Golf Course which was titled under their wholly-owned subsidiary corporation, Canongate, Inc. UniCity, Inc. was also the owner of all the property around the Golf Course which was to be developed. The surrounding property was titled in UniCity, Inc.'s wholly-owned subsidiary corporation, Habersham-on-Lanier, Inc.

---

<sup>5</sup>(...continued)  
N.M., 83 N.M. 558, 494 P.2d 971 (1972),

<sup>6</sup> Each Exhibit mentioned herein was attached to the transcript of the hearing on April 16, 2008 which was filed on June 6, 2008.

Exhibit 2 was executed by just one person, Jake William "Billy" Martin for all three corporations. Mr. Martin was the President of UniCity, Inc., President of Habersham-on-Lanier, Inc., and the Vice-President of Canongate, Inc. This document contained a statement on the first page that clearly set forth that the purpose of the Golf Course was to enhance the sale of residential lots adjacent to the course: "WHEREAS, the presence and availability of the Golf Course enhances the residential development being constructed by Habersham, and the Lenders have therefore required that such presence and availability be assured by contractual arrangement."

Exhibit 3 is a Golf Course Lease Agreement which is likewise recorded in the Deed Records. It was similarly executed by Mr. Martin as Exhibit 2 and contains a provision that is similar to the statement in Exhibit 2.

Exhibit 4 is comprised of six plats. While these ancient plats are somewhat difficult to read, they do show a common scheme of development of the Golf Course and the surrounding property. Exhibits 9 & 10 are also plats that support this common scheme of development. Exhibit 11 is a current plat depicting the

increased property values of the persons in the proposed class as compared to other property owners who are not adjacent to the Golf Course. All these documents that are in the Forsyth County Records relate to a time when Mr. Martin's company was developing these hundreds of acres close to Buford Dam.

The Appellant attempted to obtain the deposition of Mr. Martin on September 10, 2009 to further explain this vast development.<sup>7</sup> However, the Appellee objected to this testimony and filed a Motion to Quash this notice.<sup>8</sup> Clearly, the Appellee does not want any further evidence in the record of this "tract or plan."

The Appellee is forced to admit that the recent decision of the Supreme Court of Nebraska in *Skyline Woods Homeowners Association, Inc.*,<sup>9</sup> does support the Appellant's theory of implied restrictive covenants in a golf course. However, the Appellee goes back and plays that "same ole song" that there is no common

---

<sup>7</sup> R-15.

<sup>8</sup> R-26.

<sup>9</sup> *Skyline Woods Homeowners Association, Inc., et al., v David A. Broekemeier, et al.*, 276 Neb. 792 (2008).

grantor in this case and that there is no evidence in the record for a plan of development.<sup>10</sup> Yet, the Appellee never once attempts to explain in any manner the common plan clearly displayed in Exhibits 2, 3, 4, 9, 10, & 11 that are all in the record.

### 3. Typicality:

The Appellee argues that there is a typicality requirement in this case that all 122 persons around the Golf Course must have their claims based solely on two items: (1) their lots are adjacent to the Golf Course and (2) they purchased their lots at a premium price: "In order for Appellant's position to be typical of the other adjacent property owners, their claims must also be based solely on their lots' [sic] being adjacent to the Golf Course and purchased at a premium price."<sup>11</sup> No authority is cited for this position by the Appellee; therefore, this reasoning

---

<sup>10</sup> Appellee's Brief, Page 22, ¶1.

<sup>11</sup> Appellee's Brief, Page 23, ¶3.

should not be considered by this court.<sup>12</sup>

#### 4. Adequacy of Representation.

The first paragraph of the Appellee's argument on this last requirement of O.C.G.A. § 9-11-23 can be summed up in five simple words: "no claim, no class representative." The sole witness called by the Appellee at the hearing on April 16, 2008,<sup>13</sup> was one of its owners, attorney John P. Manton. Mr. Manton stated over and over again that Mr. Peck should not be the class representative for one single reason, he has no cause of action:

Q. Do you think that he's [Mr. Peck] not qualified to be the class representative?

A. I don't personally think he's qualified to be the representative of the class because I don't personally think

---

<sup>12</sup> "Any enumeration of error which is not supported in the brief by citation of authority or argument may be deemed abandoned." Court of Appeals Rule 25.

<sup>13</sup> Other than a title examination attorney to report on the status of the title.

he has a cause of action.<sup>14</sup>

...

THE COURT: His [Manton] bottom line response is he doesn't think he [Peck] has a cause of action<sup>15</sup>.

In the next paragraph,<sup>16</sup> the Appellee claims that the Appellant himself has made some type of admission that he is not a member of the class that he wants to represent. However, the Appellee fails to list where exactly in the record any such remarks were made. It is not this Court's responsibility to comb through the records in an attempt to guess which statements of the Appellant, the Appellee is referencing.<sup>17</sup> The truth is that

---

<sup>14</sup> Transcript, Page 238, Lines 4-8.

<sup>15</sup> Transcript, Page 246, Lines 4-5.

<sup>16</sup> Appellee's Brief, Page 25, ¶2.

<sup>17</sup> "It is not this Court's responsibility to comb through the medical records in an attempt to guess which statements Roberts is referring to and then compare such statements to the victim's entire trial testimony to see if there is any

(continued...)

the Appellant has never said he should not be the class representative.

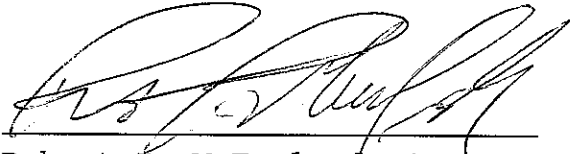
Finally, there is one common, typical problem that Appellant and the other 121 owners have and it can be summed up in just one word: bulldozers. Bulldozers were the central theme of the Brief of the Appellant. He listed the word, bulldozers, five separate times. However, the Appellee elected to simply stick their head in the sand and avoid any discussion of this common problem.

Appellant has argued over and over again that there is no difference in the Appellant's situation and the situation of any of the other 121 owners when the bulldozers come out and destroy the Golf Course in their back yard. The reason that the Appellee has failed to address this argument is simple; there is absolutely no difference in the 122 adjacent property owner's

---

<sup>17</sup>(...continued)  
inconsistency. *Roberts v. State* 229 Ga. App. 783, 785 (1997).

situation when the bulldozers arrive and destroy the Golf Course!



Robert P. McFarland, Sr.  
Attorney for Appellant  
State Bar Number: 491250  
(770) 889-2522

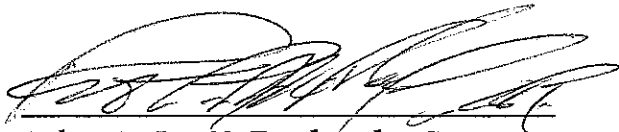
McFarland & McFarland, P. C.  
309 Pirkle Ferry Road  
Suite B-400  
Cumming, Georgia 30040

## Certificate of Service

This is to certify that Robert P. McFarland, Sr. has this day duly served opposing counsel with a true and accurate copy of the Brief of the Appellant in a manner prescribed by law by depositing a copy of same in the United States Mail, postage prepaid, addressed as follows:

G. Douglas Dillard  
Ms. Andrea Cantrell Jones  
Law Offices of Dillard & Galloway, LLC  
Suite 760  
3500 Lenox Road  
Atlanta, Georgia 30326

This January 22, 2010.

A handwritten signature in black ink, appearing to read 'Robert P. McFarland, Sr.', written over a horizontal line.

Robert P. McFarland, Sr.