STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
Case No. 18-CVS-11280

ROBERT M. PITTENGER and wife, SUZANNE B. PITTENGER

Plaintiff,

V.

GLENEAGLES HOME ASSOCIATION, a North Carolina Nonprofit Corporation, RICHARD B. BOOTH, JR., as an Officer and Director of GLENEAGLES HOMES ASSOCIATION, KEVIN J. ROCHE, as an Officer and Director of GLENEAGLES HOMES ASSOCIATION, DWIGHT H. BERG, individually and as an Officer and Director of GLENEAGLES HOMES ASSOCIATION, and DOUG R. LEBDA (a/k/a DOUGLAS R. LEBDA) AND MEGAN GRUELING,

Defendant.

DEFENDANTS DOUG LEBDA AND MEGAN GREULING'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

NOW COME Defendants Doug Lebda ("Lebda") and Megan Greuling ("Greuling") (collectively "Defendants"), through counsel and submit this Memorandum of Law in support of their Motion for Summary Judgment under Rule 56 of the North Carolina Rules of Civil Procedure, filed contemporaneously herewith. Defendants' Motion should be granted based on the following:

1. No issues of material fact related to Robert M. Pittenger ("Robert") and Suzanne B. Pittenger's ("Suzanne") (collectively "Plaintiffs") request for a declaratory judgment that Lebda and Greuling violated four provisions of the restrictions at issue.

2. Plaintiffs' negligence claim fails because they have failed to assert facts that support essential elements of the claim and, more importantly, this is truly a breach of contract claim

where a negligence action cannot lie.

3. Plaintiffs can show no facts which rise to the level of gross negligence.

4. Plaintiffs can show no facts which rise to the level of willful or wanton conduct or that would justify the imposition of compensatory or punitive damages.

CASE OVERVIEW/PROCEDURAL HISTORY

The Plaintiffs allege claims against both the homeowners/next-door neighbors, Lebda and Greuling, along with Gleneagles Homeowners Association ("Association") Board of Directors and certain Architectural Review Committee ("ARC") members for their approval of building plans submitted and constructed at 7318 Baltustrol Lane, Charlotte, N.C. ("Lebda/Greuling Property"). Plaintiffs' claims center on Lebda and Greuling's home and its compliance with the covenants in the Original and Supplementary Declaration of Covenants, Conditions, and Restrictions for the Quail Hollow neighborhood. Plaintiffs seek a declaratory judgment that the Lebda/Greuling property violates the restrictive covenants, a preliminary and mandatory injunction that the building plans be revoked, and the property be reconfigured along with compensatory and punitive damages. Plaintiffs have not sought the issuance of a preliminary injunction, nor has the Court been asked to decide whether a preliminary injunction would have been appropriate.

The Plaintiffs filed their Complaint on June 6, 2018, in Mecklenburg Superior Court against the Association, related officers and directors, and Lebda and Greuling (ECF No. 3). Plaintiffs filed an Amended Complaint on June 20, 2018. (ECF No. 4). Plaintiffs have alleged these causes of action against Lebda and Greuling in their Complaint and Amended Complaint: (1) Declaratory Judgment that they violated the Covenants; (2) Negligence; (3) Gross Negligence; and (4) Punitive Damages. (ECF No. 3-4). The remaining causes of action are

alleged against the Association and Richard B. Booth ("Booth"), Kevin Roche ("Roche"), and Dwight Berg ("Berg"), who have all been sued individually and in their capacity as Officers and Directors of the Association. All Defendants have filed answers to both the Complaint and Amended Complaint. (ECF No. 9, 11-12). The parties have conducted extensive discovery, including depositions of both fact and expert witnesses.

On January 30, 2019, the Association, Booth, Roche, and Berg filed a 12(c) Motion for Judgment on the Pleadings. (ECF No. 28) That motion is pending before the court, along with Lebda and Greuling's Motion for Summary Judgment and any other dispositive motions filed by additional parties.

STATEMENT OF FACTS

Quail Hollow, Part 1, is a single-family residential community in Mecklenburg County, North Carolina, that is subject to a Declaration of Covenants, Conditions and Restrictions recorded on June 6, 1975, and a Supplementary Declaration of Covenants, Conditions, and Restrictions also filed on June 6, 1975. (ECF No. 3 ¶ 11) (collectively "Covenants"). Plaintiffs own Lot 9 in Section 1 of Quail Hollow. (ECF No. 3 ¶ 1). Lebda and Greuling own the adjacent lot 8. (ECF No. 3 ¶ 5). The remaining individual Defendants, Berg, Roche, and Booth, all own lots in Phase 1 of Quail Hollow.(ECF Bo. 3 ¶¶ 3,4 & ECF No. 4 ¶ 3(A)). Berg's lot is adjacent to the Lebda/Greuling property at Lot 7. (ECF No. 4 ¶ 3(A)). The Association is a North Carolina Nonprofit Corporation, whose primary duty is to administer all requirements in the Covenants. (ECF No. 3 ¶ 2).

The Covenants require that property owners obtain approval from the Board of Directors or the ARC before any construction or improvements take place on a lot within Quail Hollow Part 1. (ECF. No. 3 ¶ 15). Booth was the President of the Association, while both Roche and

Berg were members of the ARC. (ECF. No. 9 ¶¶ 3, 3a, and 4). The Plaintiffs, along with Lebda and Greuling, are not board members of the Association, nor do they hold positions on the ARC.

In June 2016, Lebda and Greuling purchased Lot 8 intending to build their dream home for their family. (Affidavit of Megan Greuling "Greuling Aff." ¶ 6 and Affidavit of Doug Lebda "Lebda Aff." ¶ 4). Lebda first hired Arcadia builders as the general contractor on the project. (Lebda Aff. ¶ 5). Arcadia recommended that Lebda and Greuling hire architect Harry Schrader ("Schrader") to design and oversee the project. (Lebda Aff.¶ 6). To give Schrader a sense of how the family functioned together, Lebda and Greuling invited Schrader and his family to their beach house to spend the weekend with them and to provide design inspiration to Schrader. (Lebda Aff. ¶ 7). Schrader interviewed each family member regarding their desires for the home to incorporate the entire family's vision into the finished product. (Lebda Aff. ¶ 7). Lebda specifically told Schrader he had no particular agenda for the home, but his primary requirement was that the house look as if it had been in the neighborhood for a very long time, in other words, to fit appropriately. (Lebda Aff. ¶ 8).

After discussing their overall goals for the home, Lebda and Greuling relied upon Arcadia and Schrader to spearhead the design and construction of the home, including obtaining any necessary permits or approvals required for construction to begin. (Lebda Aff. ¶¶ 10-11). On March 14, 2017, Schrader contacted Roche to find additional information about what was needed for the plans to be submitted to the ARC. ((Affidavit of Raboteau T. Wilder Jr.) ("Wilder Aff.") Exh. 1). On March 15, 2017, Schrader submitted his design packet to the ARC for the required approval. (Wilder Aff. Exh. 2). The ARC was unaware of the identity of Lebda/Greuling when the plans were reviewed and approved. (Wilder Aff. Exh. 3). The ARC issued its approval letter on March 21, 2017, and asked Schrader to provide the names and email

address of the homeowners so they could address any future correspondence to them. (Wilder Aff. Exh. 3-4). Lebda and Greuling had no conversations with the ARC or Association about the plans before they were submitted and approved. (Greuling Aff. ¶ 10 and Lebda Aff. ¶ 14).

Construction of the Lebda/Greuling property began on or around May 2017, when the property was staked, and all required permits and approvals had been obtained. (Wilder Aff. Exh. 5). Lebda and Greuling were unaware of any issues with the house until they received a letter from Attorney Kenneth Davies ("Davies"), on or about December 1, 2017. (Lebda Aff. ¶ 16). The letter advised that Plaintiffs objected to the Lebda/Greuling property because they had investigated and believed:

> 1.) The south wing of the new construction is three stories in height, in violation of the 2 ½ story Restrictive Covenant which encumbers the property; 2.) The new construction may infringe into the 10' side setback along the southern property line; 3.) The new construction will cause an invasion of the Pittengers privacy in their home and backyard; 4.) The new construction will create a nuisance, infringing upon the Pittengers' use and enjoyment of their property; and 5.) The garages have at least five (5) bays.
>
> (Wilder Aff. Exh. 6).

Lebda and Greuling were shocked to receive the letter and contacted their experts to discover what was going on. (Lebda Aff. ¶ 16 and Greuling Aff. ¶ 11).

To resolve the matter, Lebda contacted Robert and asked to meet at the Quail Hollow Club to discuss the letter. (Lebda Aff. ¶ 17). In this meeting, Robert told Lebda he could make this problem go away for one to two million dollars, which left Lebda stunned. (Lebda Aff. ¶ 17). Despite their meeting and other correspondence exchanged, no agreement was reached. Lebda had also contacted his architect and builder to get their input on the allegations in the Davies letter. (Lebda Aff. ¶ 18). Schrader and Acradia assured Lebda everything was compliant but would have a survey performed to ensure that was correct. (Wilder Aff. Exh. 8). Schrader also confirmed to Lebda and Greuling that the house followed the 2.5 story limitation in the

Covenants. (Affidavit of Harry Schrader "Schrader Aff." ¶ 14). Finally, at least one other home in the neighborhood possessed at least five garage bays. (Lebda Aff. ¶23 and Greuling Aff. ¶ 15) The ARC knew the Lebda/Greuling plans possessed five garage bays and agreed to waive that restriction. (Wilder Aff. Exh. 9, Exh. 10 at 44: 19-25 & 45: 1-15, Exh. 11 at 28: 1-16). After consulting with their experts, Lebda and Greuling believed they followed the Covenants and therefore continued with construction, which at this point was well underway. (Lebda Aff. ¶ 18 and Greuling Aff. ¶ 13).

Shortly after that, it was discovered that a portion of the southern wing of the home contained a cantilever bay or "bump-out," and the ARC maintained that the bump-out did encroach and needed to be removed to be compliant. (Wilder Aff. Exh. 12). Schrader opined that the bump-out did not encroach, given it was on the first and second level of the homes and not at ground level. (Wilder Aff. Exh. 13). Despite this contention, the ARC maintained that the bump-out needed to be removed and Lebda agreed to do so at a significant expense. (Lebda Aff. ¶ 19). Following the removal of the bump-out, it was discovered that a small portion of the limestone on a thin layer on the exterior of the home stuck out over the setback line by approximately two inches due to an unintentional surveying error. (Wilder Aff. Exh. 14). Given the de minimis nature of the encroachment and Lebda's cooperation with removing the bump-out, on April 18, 2018, the ARC granted Lebda and Greuling a waiver for the limestone encroachment, which the ARC had full authority to do under the Covenants. (Wilder Aff. Exh. 15).

To address Plaintiffs' privacy concerns, Lebda and Greuling modified their house plan. For instance, after receiving Davies' letter, Lebda instructed Schrader to change most windows on the southern wing of the home to transom windows. (Wilder Aff. Exh. 16). The transom

windows are smaller and are located higher on the walls to allow light to enter the rooms but to prevent occupants of the rooms from having a direct view out of the window. (Lebda Aff. ¶ 21). Lebda has also engaged in extensive landscaping around the property not only to protect his privacy but that of his neighbors, including Plaintiffs. (Wilder Aff. Exh. 17). The construction on the Lebda/Greuling property is complete. Lebda and Greuling began residing in the home in approximately May 2019 and currently live there with their family.

Following the December 1, 2017, Davies letter and informal settlement discussions between counsel, the Pittengers did nothing else to halt the construction at the Lebda/Greuling property. The Pittengers did not sue until June 2018, over six months after sending the first letter, mainly because Robert did not want to be engaged in a lawsuit while he was running for re-election to the United States House of Representatives and wanted to determine what the results of that election would be first. (Wilder Aff. Exh. 18 at 33:5-8)("Q: Well the answer is that you didn't file it because of the primary; right? You didn't file the suit until the primary was over—A: Exactly that.") During this time, a significant amount of money was expended, and major progress was completed on constructing the Lebda/Greuling property[1]. (Wilder Aff. Exh. 5).

The Plaintiffs first listed their house for sale on July 29, 2016, nearly a year before construction of the Lebda/Greuling property began. (Wilder Aff. Exh 19 p. 24). The original price of $7,250,000 was reduced several times down to $6,250,000, and the house was withdrawn from the market on October 2, 2017. (*Id.*) Plaintiffs received no substantive offers. (Wilder Aff. Exh. 27 at 9: 16-24, Exh. 18 at 14: 7-21). It was relisted on November 6, 2017, and

[1] This fact should preclude Plaintiffs from their request for injunctive relief. As noted earlier, despite their request in for injunctive relief, they have done nothing to seek such relief and even delayed in filing their Complaint for completely personal reasons. That type of delay and unclean hands should not be rewarded or condoned.

reduced to $5,250,000, and the property was withdrawn from the market on July 22, 2018. (Wilder Aff. Exh. 19 at 24). The Plaintiffs' property was then relisted on December 20, 2018 for online auction. (*Id*). The Plaintiffs rejected the highest bid of $2,870,000. (*Id.*). The listing price for the Plaintiffs' property was far above all but one property in the area in October 2017. (*Id.*) The Plaintiffs are still residing in their home, and it is not currently on the market.

LEGAL ARGUMENT

"The standard of review on a summary judgment motion is whether there is a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law." *Moss Creek Homeowners Ass'n. v. Bissette*, 202 N.C. App. 222, 227 (2010). "'In ruling on a motion, the court must consider evidence in the light most favorable to the nonmovant, who is entitled to the benefit of all favorable inferences which may reasonably be drawn from the facts proffered.'" *Id.* at 228 quoting *Averitt v. Rozier*, 119 N.C. App. 216, 218 (1995). "It is proper for a trial court to grant summary judgment for the moving party 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." *Parish v. Hill*, 350 N.C. 231, 236 (1999) quoting N.C.G.S. § 1A-1-Rule 56(c).

"Summary judgment may be properly shown by a party: '(1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense.'" *Moss Creek Homeowners Ass'n,* 202 N.C. App. at 228 quoting *Kinesis Adver, Inc. v. Hill*, 187 N.C. App. 1, 10 (2007).

I. LEBDA/GREULING ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' CLAIMS FOR A DECLARATORY JUDGMENT FOR VIOLATION OF THE COVENANTS

"Actions for declaratory judgment under the provisions of G.S. 1-253, *et seq.* will lie only in a case in which there is an actual or real existing controversy between the parties having adverse interests in the matter in dispute." *Branch Banking & Trust Co., v. Whitfield*, 238 N.C. 69, 72 (1953). "' It does not extend to the submission of a theoretical problem or 'mere abstraction.'" *Id.* at 73.

The Court of Appeals has held that "restrictive covenants are contractual in nature, and that acceptance of a valid deed incorporating covenants implied the existence of a valid contract with binding restrictions." *Moss Creek Homeowners Ass'n,* 202 N.C. App. at 228. "Restrictive covenants are to be strictly construed and "all ambiguities will be resolved in favor of the unrestrained use of land.'" *Id.* at 228 citing *Hobby & Son v. Family Homes*, 302 N.C. 64, 70 (1981). "Nonetheless, a restrictive covenant 'must be reasonably construed to give effect to the intention of the parties, and the rule of strict construction may not be used to defeat the plain and obvious purposes of a restriction." *Id.*at 228 *citing Black Horse Run Ppty. Owners Assoc. v. Kaleel,* 88 N.C. 83,85 (1987), cert denied, 321 N.C. 742 (1988).

A. The Lebda/Greuling Residence Is A Two-Story Home That Adheres to The Covenants

The Covenants set forth a height limitation that any single-family residence may not "exceed two and one-half stories in height above ground level." (Wilder Aff. Exh. 20 at 1 of the Supp. Decl.). There is no definition of story or ground level in the Covenants. Given that no definition exists, it is appropriate in this case to turn to the intention of the parties/original drafters of these Covenants to determine how they are construed. *See Moss Creek Homeowners Ass'n,* 202 N.C

at 228.

The N.C. Residential Building Code in effect in 1975 when the Restrictive Covenants were drafted defined a "story" as "that part of a building compromised between a floor and the floor or roof next above." (Wilder Aff. Exh 21 at 82). A basement was defined as "a story with 50 percent or more of its cubical contents below finished grade." (*Id.* at 79). Schrader calculated the cubical contents of the Lebda/Greuling lower level and found that over 50 percent of the lower level is below finished grade. (Schrader Aff. ¶ 24). Consequently, the Lebda/Greuling residence is a two-story house under the definition that was in effect when the covenants were originally drafted.

The definition of a basement changed as the N.C. Residential Building code evolved. In the 2012 version of the code in effect when construction of the Lebda/Greuling residence began, a basement is considered a story above grade if it meets any of these conditions: "(1) is more than 6' above grade plane, (2) is more than 6' above the finished ground level for more than 50 percent of the total building perimeter, (3) is more than 12' above the finished ground level at any point." (Allison Aff. Exh. A). It has been determined that the lower level of the Lebda residence meets none of the three criteria for a "story above grade" and is therefore considered a basement under the code in effect when the home was constructed. (Affidavit of Josh Allison "Allison Aff." ¶¶ 9-11; Schrader Aff. ¶¶ 22-23).

Additionally, the Mecklenburg County Tax Office has classified the Lebda/Greuling residence as a two-story residence. (Wilder Aff. Exh. 22).[2] Most importantly, the ARC determined that the Lebda/Greuling residence complied with this restriction[3]. (Wilder Aff. Exh.

[2] The Plaintiffs residence is classified as a two and half story residence by the Mecklenburg County Tax Office. (Wilder Aff. Exh. 23).

[3] Along these lines, the ARC also determined that the Lebda/Greuling property was harmonious with the neighborhood despite Plaintiffs' argument that the massing is out of scale. There is no consistent architecuture style

4). Members of the ARC noted that they analyzed the number of stories by viewing the home from the street level and compared other homes with a walk-out basement not considered a story in assessing the house's compliance. *See* (Wilder Aff. 10 at 37: 21-25 & 38:1-10). The ARC has consistently utilized the standard of evaluating the number of stories by viewing the structure from street level. (*See Id.*) The ARC is the body empowered by the Covenants to make this determination[4]. (Wilder Aff. Exh. 20 at 10-11).

B. Lebda/Greuling Obtained a Waiver from The ARC and Are Not in Violation of the Ten Foot Setback Requirement

After the bump-out was removed, the ARC granted Lebda and Greuling a waiver for the minor encroachment of the limestone veneer on April 18, 2018. (Wilder Aff. Exh.15). The ARC has specific authority under the Covenants to do this. In Paragraph 7 of the Supplementary Declaration to the Covenants, the Association is granted authority to waive, in writing, "any violation of the designated and approved building location line or either side lot line, horizontal measurement only, provided that such violation does not exceed ten (10%) percent of the applicable requirements and the violation thereof was unintentional." (Wilder Aff. Exh. 20 at 3 of Supp. Decl.). Numerous accounts in the record show that an unintentional surveying error occurred when the house was initially staked. (Wilder Aff. Exhs. 13-14). Given the unintentional surveying error and Lebda and Greuling's compliance with their request to remove the bump-out, the ARC lawfully provided the requisite waiver they needed to comply with this restriction.

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or massing requirement in the Quail Hollow Neighborhood. *See* (Wilder Aff. Exh. 31-32). The ARC, along with architectural experts, have opined that the house is harmonious with the style of the neighborhood and is in keeping with the character of the houses along Baltusrol and Seminole Lane, especially given the fact that there is no consistent architecture style or guideline for the neighborhood. *See* (Schrader Aff. ¶ 25, Allison Aff. ¶ 19, Wilder Aff. Exh. 31 at 42: 11-14).

[4] Plaintiffs expert agreed that the ARC is the gatekeeper of what fits and does not fit in within the neighborhood. *See* (Wilder Aff. Exh. 7 at 29: 20-24).

No remaining questions of fact relate to Lebda and Greuling's compliance with the 10-foot setback requirement. Discovery has shown there are no factual issues related to this issue asserted by Plaintiffs; therefore, this claim should be dismissed at the summary judgment stage.

C. The HOA Approved the Plans with Five Garage Bays by Granting a Waiver

Despite the limitation on the number of garage bays in the Covenants, there are other homes in the neighborhood that possess more than a four-car garage. (Wilder Aff. Exh. 9). Berg testified that he believed the ARC could waive the garage restriction given where the neighborhood was trending and that other homes in the neighborhood already had over four garage bays. (Wilder Aff. Ex. 10 at 45: 1-15). Roche testified, "I thought about the issue. I thought about the fit of the way that the garages were positioned with an interior motor court hidden from the street and overall scale of the house. That seemed to fit the scale of the house and seemed to be appropriate relative to what you could or couldn't see from the street, so it made sense," and he also waived that restriction. (Wilder Aff. Exh. 11 at 28: 1-16). Finally, Robert admitted during his deposition that the ARC had waived the garage restriction. (Wilder Aff. Exh. 18 at 36: 20-23). Given the ARC's ability and duty to approve plans within the neighborhood, the ARC considered the garage issue and waived that restriction. Primarily because the garage bays could not be seen from the street, the design fits the overall scale of the home, and there is at least one, possibly other homes, in the neighborhood which have already been allowed to construct their garages in this way.

D. The Lebda/Greuling Residence Is Not a Nuisance

The Covenants set forth a prohibition against nuisance: "No noxious or offensive activity shall be conducted upon any lot or in any dwelling nor shall anything be done thereon or therein which may be or may become an annoyance or nuisance to the neighborhood." (Wilder Aff.

Exh. 20 at 11). There is no evidence in the record to support the contention that the Lebda/Greuling property is a nuisance or that it is an offensive annoyance to the Pittengers or the neighborhood in general. When asked how the Lebda's house is a nuisance, Robert replied, "Well it is to us in that you have this super structure that, you know, hovers over our personal space." (Wilder Aff. Exh. 18 at 39: 13-17). Robert's opinion about what is considered a nuisance in the neighborhood is of no relevance to this inquiry[5]. Plaintiffs have a large home as well, which is undeniable. (Wilder Aff. Exh. 24). What matters is the intention of the drafters of covenants when assessing a purported violation. The home does not hover over the Plaintiff's personal space, and its height is compliant and was approved by both the ARC and the Building Inspectors. The Pittengers don't like the Lebda/Greuling Property, but that has nothing to do with proving they have violated the Covenants in any way.

If the Pittengers did not want to have a house built beside their home, they could have purchased the lot beside them that sat vacant for nearly a decade. The drafters of the Covenant appear to have been contemplating misconduct in the usage of homes rather than the design of homes in their definition of "nuisance." Lebda and Greuling had an impact study performed to assess the impact that their house had on the neighborhood. It was determined that their residence did not detrimentally affect the neighborhood, and in fact, helps to add to the value of the neighborhood. *See* (Wilder Aff. Exh. 25). Further, according to the Association's appraisal expert, the value of the Pittenger property increased after the Lebda/Greuling construction as complete. *See* (Wilder Aff. Exh. 19).

[5] The Plaintiffs have not set forth a separate nuisance cause of action at any time during the pendency of this case. They simply rely on the language of the Covenants and seek to expand that provision without any relevant basis to do so.

II. LEBDA/GREULING ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' CLAIMS FOR NEGLIGENCE

Summary judgment is appropriate in a negligence action when "there is no genuine issue of material fact, and the plaintiff fails to demonstrate one of the essential elements of the claim." *Parish*, 350 N.C. at 235. Given that restrictive covenants are contractual, there can be no action for negligence. When a breach of contract action is appropriate, a negligence claim does not lie. *Kaleel Builders, Inc. v. Ashby*, 161 N.C. 34, 43 (2003)("We acknowledge no negligence claim where all rights and remedies have been set forth in the contractual relationship.")[6] Essentially, what Plaintiffs have alleged is that they believe Lebda and Greuling have breached the Covenants, that bind all residents of the neighborhood. Consequently, a tort action is inappropriate given that restrictive covenants are contractual in nature and should be enforced as such. *See Moss Creek Homeowners Ass'n,* 202 N.C. App. at 228.

Even if the Court determines that a negligence claim may lie, Plaintiffs have established no factual basis to support essential elements for their negligence claim to survive. A prima facie case for negligence requires "the plaintiff must demonstrate that: '(1) the defendant owed the plaintiff a duty of care; (2) the defendant's conduct breached that duty; (3) the breach was the actual and proximate cause of plaintiff's injury; and (4) the plaintiff suffered damages as a result of the injury.'" *Hamby v. Thurman Timber Co., LLC* 818 S.E.2d. 318, 323 (2018) *quoting Vares v. Vares*, 154 N.C. App. 83, 87 (2002). Lebda and Greuling owe no independent duty of care to Plaintiffs[7]. Plaintiffs allege in their Complaint that this alleged duty arises from their "position

[6] "A tort action does not lie against a party to a contract who simply fails to perform the terms of the contract, even if that failure to properly perform was due to negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract. It is the law of contract and not the law of negligence which defines the obligations and remedies of the parties in such a situation." *Kaleel Builders, Inc,* 161 N.C at 43.

[7] Defendants can find not support for Plaintiffs' argument that Lebda and Greuling owe Plaintiffs a specific duty as an adjacent landowner to not build their home in the manner they did. Obviously, Lebda/Greuling owe a duty to persons entering onto their land under a premises liability theory, but that has nothing to do with this case. *See*

as adjacent landowners relative to Plaintiffs; their obligations to Plaintiffs and the other lots in Part 1 of Quail Hollow arising under the Declaration and Supplemental Declaration; and their prior communications with Plaintiffs." (ECF 3 ¶ 65). They have shown no evidence that supports their argument that someone being an adjacent landowner creates an independent duty of care when designing and building your dream home. Further, Lebda and Greuling are obligated under the Covenants to comply with those restrictions as set forth within the four corners of the document, but that is contractual responsibility, not an independent duty under tort law. The Plaintiffs have asked the court to determine Lebda and Greuling's compliance with those restrictions by issuing a declaratory judgment. That action does not support a separate tort remedy. Finally, sending a letter to someone does not create an independent duty of care.

Even if the Court found that Plaintiffs were owed an independent duty, they have failed to establish that Lebda and Greuling committed any breach of the alleged duty. The Lebda/Greuling residence plans were approved by the ARC as required by the Covenants. (Wilder Aff. Exh. 4). Don Duffy ("Duffy"), Plaintiffs' expert, agreed that it was reasonable for Lebda and Schrader to rely on the approval granted by the ARC in erecting the home. (Wilder Aff. Exh. 26 at 48:3-8). Further, it also agreed that it was reasonable for Lebda/Greuling to rely on their architect. (Wilder Aff, Exh. 26 at 12:6-21). Finally, after receiving the approval letter, Lebda and Greuling relied upon their builder and architect, both experts, who opined that they were not in violation. (Lebda Aff. ¶ 18 Greuling Aff. ¶ 13).

Further, Plaintiffs have failed to establish that they have suffered any damages. They

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Nelson v. Freeland, 349 N.C. 615, 617 (1998)("The standard of care a landowner owes to persons entering upon his land depends on the entrant's status, that is, whether the entrant is a licensee, invitee, or trespasser.") Further, Lebda and Greuling are required to keep their property in a safe condition. *Id.* at 632. However, these general duities of a landowner have nothing to do with the facts of this case. Plaintiffs have failed to set forth any evidence which shows what duty they contend Lebda and Greuling owed to them when designing their home.

have failed to set forth anything more than mere speculation as to why they cannot sell their home, and they have failed to prove that its value has somehow been diminished by the Lebda/Greuling residence. Specifically, discovery has shown that the value of their home has increased[8] after the Lebda/Greuling residence was constructed and that the overall impact of the construction on the neighborhood is positive. (Wilder Aff. Exh. 25). The Plaintiffs' home went on the market nearly a year before the Lebda/Greuling construction began, and they received no substantive offers they considered serious. (Wilder Aff. 18 at 14:7-21). That fact alone shows that the Lebda/Greuling residence has had nothing to do with Plaintiffs' ability to sell their home or use their home as they see fit. Further, Plaintiffs' former realtor, Susan May,[9] noted that once construction is complete on a home "there are no distractions" and that construction on a vacant lot does not result in the permanent decreased value of an adjoining lot. *See* (Wilder Aff. Exh. 27 at 12:20-25 & 13:1-5). Construction on a new residence can be somewhat of a distraction for those that live around the property. However, those inconveniences are fleeting and do not remain as permanent obstructions to those who live around the property.

Also, as noted above, Plaintiffs do not have a damage expert. Plaintiffs designated Susan May and Eugene Poore to serve as experts on the damages they have suffered in attempting to sell their home. Mrs. May is no longer serving an expert based upon her assertions during her deposition. *See* (Wilder Aff. Exh. 27 at 14:9-11). Further, Mr. Poore, who was designated by Plaintiffs to opine on "the diminutive value of the Lebda/Greuling property" has virtually disappeared. (Wilder Aff. Exh. 29). Defendants made numerous requests to depose Mr. Poore

[8] The Associations damage expert, Noeleen Griffin appraised the Pittenger residence at $3,400,000 as of December 31, 2017 and then appraised the property at $3,800,000 as of May 29, 2019.

[9] On February 28, 2019 Susan May was designated as an expert by Plaintiffs. She was expected to testify about the fair market value of the Plaintiffs' property before the Lebda/Greuling construction and the construction effect on buyer interest. She stated during her deposition that she did not intend to serve as an expert witness in this case. *See* Wilder Aff. Exh. 27 at 13: 16-25 14: 1-11).

and could not get service despite seeking his deposition for several months. It is Defendants' understanding that he also will not communicate with Plaintiffs' counsel regarding the matter. Plaintiffs have failed to set forth any evidence to support their contention that they have been damaged.

III. LEBDA/GREULING ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' CLAIMS FOR GROSS NEGLIGENCE

Gross negligence "has been defined as 'wanton conduct done with conscious or reckless disregard for the rights and safety of others." *Parish,* 350 N.C. at 239 *quoting Bullins v. Schmidt*, 322 N.C. 580, 583 (1988). Wanton conduct occurs "when it is done of wicked purpose, or when done needlessly manifesting a reckless indifference to the rights of others." *Id.* at 239 *quoting Foster v. Hyman*, 197 N.C. 189, 191 (1929). "Willful conduct is done with a deliberate purpose." *Sawyer v. Food Lion, Inc.* 144 N.C. App. 398, 403 (2001).

Given that the Court must find evidence to support an underlying claim for negligence to allow the gross negligence cause of action to stand, this claim should be dismissed for those reasons set forth above. However, even if the Court concludes that a negligence claim has been alleged, Plaintiffs have failed to set forth any evidence which rises to the level of willful and wanton conduct by Lebda and Greuling. The record is filled with examples of Lebda and Greuling relying on their experts to proceed with construction. Further, when asked to describe what conduct they deemed to be "willful and wanton" pertaining to this count, Plaintiffs failed to provide a response that could survive this summary judgment motion or create a legitimate issue of fact as to Lebda and Greuling's conduct.

> **Q: All right. In the fifth cause of action where you allege that the—Mr. Lebda and Mrs. Greuling acted with gross negligence. Remember that?**
> **A: Yes.**
> **Q: Okay. You say they acted with willful and wanton actions. What willful and**

wanton actions did they take?
A: Not readjusting the home.
Q: And what about that was willful and wanton?
A: They continued with the plans.
(Wilder Aff. Exh. 28 at 23:17-25 & 24:1).

Q: Okay. Are you aware that the architectural review committee approved the plans?
A: Yes.
Q: So what was it they did that was willful and wanton?
A: Give me a minute.
Q: Ok.
A: The architectural review committee made a decision to break the rules.
Q: What did that have to do with the Lebdas doing something that was willful and wanton?
A: I can't address that.
(Wilder Aff. Exh. 28 at 24: 10-25).

Q: Okay. Despite the fact that they went to the architectural review committee and got permission to build the house as they build it; right?
A: I don't know that. Okay? I just don't know that. I don't have minutes on any of that in the neighborhood so I can't address that.
(Wilder Aff. Exh. 28 at 25:9-14).

Q: What is it you think they did that was willful and wanton?
A: You know sir, I would never do to a neighbor what he did to us. I would have been respectful of a neighbor. We built our dream house, but we did it in a thoughtful way. And the way that he's built it, intentionally, you know, the Berg property on the other side of our property- on the other side of his property where he has his bedroom now is wide open, and its all grass there. . . He could have frankly switched sides, but the bedroom on the other side. I think he intentionally built the house the way he wanted and didn't give a flip of the outcome to us."
(Wilder Aff. Exh 18 at 47:21-25 &48:1-12).

The Plaintiffs' primary complaint is that they don't like the design of the house. They have adduced no evidence to support their contentions that Lebda and Greuling exhibited willful and wanton behavior. To the contrary, Lebda and Greuling made modifications, voluntarily and with no obligations to do so, to accommodate the privacy of the Plaintiffs such as changing the approved windows for transom windows. The Plaintiffs dislike the fact that the Lebda/Greuling bedroom is on the side of the house facing the Pittenger lot instead of the Berg lot and further

think that the house is closer to the Plaintiff's lot than to the Bergs. Neither concern is actionable, and the reality is that the house is not closer to the Berg lot—the Bergs bought part of the lot now owned by Lebda and Greuling to insulate them from a house being located too close to them. The Lebda/Grueling house is as close to the Berg side of their lot as it is to the Pittenger side. The record shows that Lebda, Greuling, and the entire family just described their general wants and desires for the home. (Lebda Aff ¶¶ 7-8 & Greuling Aff. ¶ 7). Schrader was the actual designer of the home and chose where certain features of the house would be situated on the lot. There is no evidence to support the notion that Lebda and Greuling did anything other than rely on their architect to design the home to accommodate their desires. There is nothing wanton and willful about that.

IV. LEBDA/GREULING ARE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' CLAIMS FOR PUNITIVE DAMAGES

Plaintiffs' are not entitled to punitive damages from Lebda or Greuling. "Punitive damages may be awarded only if the claimant proves that the Defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded: (1) Fraud, (2) Malice, (3) Willful or Wanton Conduct." N.C. Gen. Stat. § 1D-15(a). "The claimant must prove the existence of an aggravating factor by clear and convincing evidence." *Id.* at (b). Willful and wanton conduct means more than gross negligence and is defined as "the conscious and intentional disregard of and indifference to the rights and safety of others, which the defendant knows or should know is reasonably likely to result in injury, damage, or other harm." N.C. Gen. Stat. § 1D-5(7). "Under N.C. Gen Stat. § 1D-45, a claim for punitive damages is 'frivolous' where its proponent can present no rational argument based upon the evidence or law in support of it." *Kings Harbor*

Homeowners Ass'n v. Goldman, 2018 N.C. App. LEXIS 1008 *19 (N.C. Ct. of App., October 16, 2018) citing *Phillips v. Pitt Cnty. Mem'l Hosp., Inc.*, 242 N.C. App. 456, 458 (2015). N.C. Gen. Stat § 1D-45 allows for a court to award "attorneys' fees, resulting from the defense against the punitive damages claim, against a claimant who files a claim for punitive damages that the claimant knows or should have known to be frivolous or malicious. The Court shall award reasonable attorneys' fees against a defendant who asserts a defense in a punitive damage claim that the defendant knows or should have known to be frivolous or malicious." N.C. Gen. Stat § 1D-45[10].

Plaintiffs' have produced no evidence supporting their contention they are entitled to compensatory damages from Lebda and Greuling. As noted above, the value of the Plaintiffs' home has increased. *See* (Wilder Aff. Exh. 19). The Plaintiffs' home went on the market nearly a year before the Lebda/Greuling construction began, and they received no real offers. They have produced no evidence which points to the Lebda/Greuling home having damaged them.

Q: What egregiously wrong actions did they take that requires them to be punished?
A: Not abiding by what the neighborhood had set up.
Q. The neighborhood set up an architectural review committee, didn't it?
A: Obviously
Q: And the Lebdas went to the architectural review committee—
A: I'm not privy to what the Lebdas did. I'm not privy to what went on between the two of them.
(Wilder Aff. 28 at 25: 21-25 & 26:1-6), *also see* (Wilder Aff. 18 at 50: 7-22).

The only thing both Plaintiffs' can point to is that they don't like the Lebda/Greuling house as it was constructed and believe that the moment Defendants received the Davies letter on December 1, 2017, they should have halted construction. This conclusion does not provide a factual basis to support a punitive damage claim. The ARC approved Lebda and Greuling's

[10] Based on the frivolous nature of Plaintiffs' punitive damage claim, Lebda and Greuling certainly intend to file a motion seeking attorneys' fees under this statutory provision.

plans, they consulted with experts after receiving the notice, and they also took measures to address the concerns raised by the Pittengers. There is not a shred of evidence to support the allegation that anything that Lebda and Greuling did was anything outside the conduct of a typical homeowner. Nothing in the record supports the assertion that Lebda and Greuling acted with fraud, malice, or engaged in conduct that was willful and wanton. Also, given that Lebda and Greuling maintain that a tort action is not appropriate here, punitive damages are not recoverable in this case.

Finally, awarding punitive damages in this matter would be bad public policy. Lebda and Greuling bought a lot and wanted to build a dream home for their family. They relied on approval from the ARC and their experts for their compliance with restrictions surrounding the neighborhood. Not only have the Plaintiffs produced no evidence they have been damaged, but they have failed to articulate one thing that Lebda and Greuling have done wrong. Plaintiffs should not be rewarded monetarily or otherwise for sitting on their hands for nearly six months to see how a political race panned out before deciding if pursuing litigation was necessary or beneficial to them. That is an untenable position on their part to justify the imposition of damages.

CONCLUSION

For the foregoing reasons, Mr. Lebda and Mrs. Greuling respectfully request that the Court enter an Order Granting their Motion for Summary Judgment and that all claims asserted against them be dismissed with prejudice.

This the 30th day of September 2019.

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BUSINESS COURT RULE 7.8 CERTIFICATION

Undersigned counsel certifies that this brief complies with the word limit set forth in Rule 7.8 of the General Rules of Practice and Procedure of the North Carolina Business Court.

This the 30th day of September 2019.

/s/Raboteau T. Wilder, Jr.
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was filed with the Court on the date set forth below via the Court's electronic filing system, which sends notice to all counsel of record:

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This the 30th day of September 2019.

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