

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 17, 2013 Session

**RCK JOINT VENTURE, (A JOINT COMPRISED OF RIVER ROAD
CONSTRUCTION, LLC, CREATIVE HOMES, LLC AND KEYSTONE
HOMES OF TN, INC.) V. GARRISON COVE HOMEOWNERS
ASSOCIATION, A TENNESSEE NONPROFIT CORPORATION**

**Appeal from the Chancery Court for Rutherford County
No. 071586CV Robert E. Corlew, III, Chancellor**

No. M2013-00630-COA-R3-CV - Filed April 22, 2014

RICHARD H. DINKINS, J., dissenting.

I respectfully dissent from the holding of the majority. I do not believe that the fact that fees are available to the Pattons requires that they be awarded under the particular facts and circumstances of this case.

The basis of the attorneys fees sought in this case is Paragraph 23 of the restrictive Covenants, which allows for such an award to the prevailing party in an action to enforce the covenants. The record abundantly supports the trial court's finding that the Pattons did not incur attorney fees in their defense of the third party complaint.¹ The record is also clear that RCK's counsel was the Pattons' counsel² and all fees were paid by RCK.³ The fees are being

¹ In the opinion denying the Pattons' application for fees, the trial court noted that the Pattons' attorney "is not looking to them for payment of those fees, and, in fact, an award in favor of Mr. and Ms. Patton shifting the burden of payment of counsel fees actually shifts that burden from the Plaintiffs, RCK and others, to the Homeowners Association.

² The record shows that Attorney Jack Gritton filed the original certiorari petition on behalf of RCK in October of 2007; Mr. Gritton also filed the "Answer to Third Party Complaint" in October of 2008, the preamble of which stated:

Comes now your Petitioners, RCK JOINT VENTURE, (a joint venture comprised of River Road Construction, Inc., Creative Homes, LLC, Keystone Homes of TTN, Inc.), River Road Construction, Inc., Creative Homes, LLC, and Keystone Homes of TN, Inc., and Defendants ROBERT S. PATTON and MELINDA N. PATTON, by and through counsel and for

awarded for the time spent by counsel for RCK, which is not a party to the restrictive covenants and not otherwise entitled to such an award. While the majority leaves the determination of the appropriate amount of fees to be awarded to the trial court on remand, I believe that the record before us is clear that an award is not proper.

RICHARD H. DINKINS, JUDGE

Answer to the Complaint filed against them would respectfully state to the Court as follows.

Attorney Gilbert Anglin, current counsel for the Pattons, filed an affidavit in support of the application for fees, which recites that he first expended time in this matter on November 6, 2008 when he met with Mike Hudson and that an attorney-client agreement was signed on November 17; that on November 18 a motion and order to withdraw was prepared and faxed to Mr. Gritton and adversary counsel and filed; that the first entry of time in which the Pattons are mentioned is November 5, 2009 (draft motion to amend answer). There is no indication that either Mr. Gritton or Mr. Anglin signed retainer agreements with the Pattons.

³ Included in the record is the affidavit of Ms. Patton which states in pertinent part:

4. We became involved in this litigation because the Garrison Cove Homeowners Association sued us and we were forced to defend ourselves.
5. I have not paid attorney fees to L. Gilbert Anglin, Attorney. However, it was agreed from day one that RCK Joint Venture would pay any attorney fees we incurred.
6. This agreement was communicated to Mr. Anglin and we asked that he bill RCK Joint Venture Directly for any fees incurred.
7. In accordance with our request, Mr. Anglin has done just that.

At a hearing on November 23, 2009, Mr. Patton testified as follows:

Q. Is RCK/ the RCK group paying your attorney's fees in this case?

A. Yes

Q. You haven't paid any attorney's fees, is that right?

A. No, no.