

**THE STATE OF SOUTH CAROLINA  
In The Court of Appeals**

68622

**APPEAL FROM SPARTANBURG COUNTY  
COURT OF COMMON PLEAS FOR SPARTANBURG COUNTY  
The Honorable Gordon G. Cooper, Master-in-Equity**

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**APPELLATE CASE NO. 2012-209866**

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**KATHERYNA MULHOLLAND-MERTZ,.....APPELLANT,**

**v.**

**CORIE CREST HOMEOWNERS ASSOCIATION OF SPARTANBURG,  
INC., RICHARD T. BIGGS, KATHLEEN A. BIGGS, JAMES HANNAH,  
AND ELIZABETH A. HANNAH,.....RESPONDENTS.**

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**PETITION FOR REHEARING**

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Pursuant to Rule 221(a) SCACR, the appellant Katheryna Mulholland-Mertz respectfully requests a rehearing upon Issues One, Two, Three, and Four of the decision filed by this Honorable Court on May 22, 2013.

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## **ISSUE 1**

The Appellant herein respectfully requests a hearing by this Honorable Court because it overlooked the specific evidence presented that the Respondent Association amended Section 2 and 7 of the restrictive covenants of the subdivision after pretrial motions were heard by the Court of Common Pleas that granted a temporary restraining order to Appellant and denied the motion for summary judgment to Respondents.

The Appellant presented more than a prima facie case to show that the amendment to the Restrictions were made to put Respondents Biggs and Hannah in conformity with their structures placed on their property prior to the amendments. Alternatively, with the amendment to the Restrictions, the purpose of the Respondent Association was to make Sections 2 and 7 free of ambiguous and conflicting interpretation. The only reasonable inference that can be drawn from the amendments made to the Restrictions was the belief of the Respondents that Section 2 and 7 needed to be changed so as to clear up the ambiguous language of those two sections, after the temporary order of the lower court filed June 15, 2010. Appellant filed her action for an injunction to enforce the restrictive covenants, claiming specific violations of certain sections and prior to any amendments. Throughout her testimony, she stated that the construction of the descriptive structures constructed by Respondents Biggs and Hannah clearly violated the restrictions.

Appellant's testimony, the testimony of other property owners and the efforts to amend and record the Restrictions made by the Respondents

constituted material and conflicting evidence that overcame the standard of a prima facie case that required an evidentiary defense from the Respondents.

### **ISSUES 2, 3, and 4**

The Appellant herein respectfully requests a rehearing by the Honorable Court because it overlooked the clear meaning of Section 41 of the restrictive covenants.

This Court cited the Supreme Court case of Taylor v. Lindsey, 332 S.C. 1, 498 S.E.2d 863, in affirming the decision of the lower court. This Court's reasoning was found upon a recited phrase quoted in Taylor, p. 863, *supra*; "Words of a restrictive covenant will be given the common, ordinary meaning attributed to them at the time of their execution."

The Court should have addressed the fundamental meaning of the most important section of the restrictive covenants. The language and the purpose of Section 41 prohibited any amendments of the covenants, conditions, easements and restrictions until October 1, 2040. The Respondents violated this section when it recorded amendments on August 26, 2010 at the Register of Deeds for Spartanburg County. They made this amendment because Section 2 and Section 7 unduly restricted the meaning and interpretation of the words "building and structure" and had placed Respondents Biggs and Hannah in jeopardy for construction of their structures. Therefore, they replaced those words with the word "outbuildings", a definition for a broad interpretation.

Section 41 has a strong correlation to the preamble of the restrictive covenants which was made clear by the Developer at the time of the execution of

this document. The developer wanted Corie Crest to be a residential community with the express desire to provide for preservation of values, amenities and for maintenance of common facilities. In subjecting his property to restrictive covenants, he emphasized a specific time period so present and future property owners could know and find comfort that their home and subdivision would not be invaded by extraneous structures.

This Court should have also considered that the lower court incorrectly ruled that the restrictive covenants could be changed with two-thirds vote any time but not terminated until October 1, 2040. That finding is clearly contrary to the words and meaning of Section 41 of the restrictions.

Finally, this Court should have considered that Section 41 had amendment provisions that were clear as to definite duration and extensions. In strictly construing the amendment provisions, this Court overlooked the denial of all property owners to vote to change certain sections of the restrictions. Since there existed a definite date for the restrictive covenants to end and definite time periods to change the restrictive covenants with a certain percentage of property owners' approval, the absence of such provisions prior to those expiration and amendment dates could only occur, if then, with the agreement of not less than 100% of the voters. This rationale was propounded by a lower court in the opinion of Hardy v. Aiken, 369 S.C. 160, 631 S.E.2d 539 (2006), in which our Supreme Court affirmed the trial judge's interpretation of the amendment provision on duration of that restrictive covenant. By analogy with this case, the denial of opportunity of all property owners to vote to change the restrictions

caused the amendments of Corie Crest Subdivision to become unenforceable and void.

For the foregoing reasons, the appellant petitions this Court for a rehearing on Issue One and Issues Two, Three, and Four, independently or jointly, in this matter.

Respectfully submitted,

  
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**MAY 31, 2013**