

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cynthia Graham Howe, Master in Equity

Case No. 2004-CP-26-2075
Appellate Case No. 2012-212773

John Musick,.....Respondent,

vs.

Thomas L. Dicks and Robert E. Dicks, Jr.,.....Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Respondent John Musick instituted this action in Horry County on April 12, 2004 against Appellants, Thomas Dicks and Robert Dicks, asserting that a re-subdivision plat recorded by Appellants which purported to subdivide their lot into seven lots violated restrictive covenants governing Long Bay Estates. Appellants answered and counterclaimed, denying the applicability of restrictive covenants to the subject property and seeking a declaratory judgment that they had not violated any restrictions, covenants, or orders encumbering the property. Cross-motions for summary judgment were heard by the Honorable J. Stanton Cross, Jr., Master-in-Equity for Horry County, on August 16, 2006. By Order dated March 6, 2007, Judge Cross granted Respondent's motion for summary judgment, finding that restrictive covenants applied to Appellants' property and that, therefore, Appellants were required to return the property to its original condition as one lot and were prohibited from subdividing the property.

Appellants' post-trial motion to alter or amend the final order was denied by order dated July 19, 2007. Appellants filed notice of appeal on September 6, 2007.

The Court of Appeals heard the case and remanded it for a full hearing, over-ruling the decision by Master-in-Equity, Judge Cross, finding that in the light most favorably to Dicks, the case should be tried.

In April, 2011, the trial was held and all evidence from both parties was heard and entered into the record. Significantly, Appellant's own lawyer and expert testified that he had found the covenants and was aware that the property was one lot as did the previous owners, as did Attorney Dusenbury as well as Attorney Mumford, all who were fully aware of the circumstances. Thereafter, Judge Howe ruled at the fourth hearing concerning these restrictive covenants that they were valid. Therefore, Judge Winston Vaught, in 1972, Judge Stan Cross in 1998, Judge Stan

Cross in 2004 and Judge Cynthia Graham Howe in 2011 have all held that the 1958 Restrictive Covenants are valid and applicable to Appellants' lots.

Appellants filed their Notice (of intent) To Appeal on August 20, 2012.

COUNTER STATEMENT OF THE ISSUE PRESENTED ON APPEAL

- I. THE MASTER CORRECTLY HELD THAT THE 1958 RESTRICTIVE COVENANTS APPLY TO APPELLANTS' PROPERTY AND THAT APPELLANTS HAD BOTH ACTUAL AND CONSTRUCTIVE NOTICE OF THE 1958 RESTRICTIVE COVENANTS.

- II. THE MASTER CORRECTLY HELD THAT THE SHELTER RULE DOES NOT PROVIDE APPELLANTS ANY FREEDOM TO SUBDIVIDE THEIR LOTS, BECAUSE APPELLANTS, NOR THEIR PREDECESSOR IN TITLE QUALIFY AS "BONA FIDE PURCHASERS FOR VALUE."

STATEMENT OF THE FACTS

This is a dispute about whether restrictive covenants apply to a piece of property owned by Thomas L. Dicks and Robert E. Dicks, Jr. (collectively Appellants) in Long Bay Estates Subdivision in Myrtle Beach, South Carolina. The subdivision was created in the 1950's by the Lewis Family. (R. p. 600 and separately filed map) Attached to the 1955 map of the subdivision recorded at the Horry County Courthouse on May 5, 1958 in Plat Book 25, Page 22, is a list of restrictions which, by their terms, apply to Blocks 1 through 27 as shown on the plat. (R. p. 600 and separately filed map) The restriction pertinent to this litigation states that no lot shall be subdivided but that "as to all unsold lots, the Grantor reserves the right to change the boundary lines and building lines thereof." (R. p. 600 and separately filed map) Thereafter, in two separate lawsuits, one in 1972 commenced by the Grantors against all property owners in the subdivision, and the other in 2007, orders were issued which stated that the restrictions applied to Blocks 1-27, 30, 32, 34, and the remaining portions of "old" Blocks 28 and 29. (R. p. 22 and p. 48) According to the Amended Complaint filed by Respondent, John Musick¹ on May 31, 2005, Thomas Dicks purchased a 2.67 acre parcel of property in Long Bay Estates on May 19, 2003, and, in contravention of the restrictive covenants, subdivided the parcel into seven lots, with Thomas Dicks owning four of the lots and Robert Dicks owning three of the lots. Appellants answered and counterclaimed, admitting that Robert Dicks owns three lots and Thomas Dicks owns four lots, asserting their property was not encumbered by any restrictive covenants, and seeking a

¹ Musick owns Lot 4 of Block 24 in Long Bay Estates Subdivision. (R. p. 22 and p. 78)

declaratory judgment that by owning the subject property as seven lots, Appellants had not violated any alleged restrictions, covenants, or orders that allegedly encumbered the property. Further, Appellants alleged that neither the order issued by the Honorable Winston Vaught in 1972 nor the order issued by the Honorable Stanton Cross in 2000 were in the Appellants' chain of title and therefore, does not impact this litigation.

This matter was referred to the Honorable J. Stanton Cross, Jr., Master-in-Equity for Horry County. Cross-motions for summary judgment were filed, and by Order dated March 6, 2007, Judge Cross granted summary judgment in favor of Respondent holding that: (1) the 1958 Restrictive Covenants apply to the subject property and only the Grantor had the right of revision to subdivide the property; (2) Appellants were on notice, both actual and constructive, of the 1958 Restrictive Covenants; (3) Appellants did not have the right to subdivide the property and there is no indication the property was subdivided by the Grantor; and, (4) the 1958 Restrictive Covenants are fully enforceable against Appellants by any or all property owners within Long Bay Estates Subdivision. (R. pp. 21-35) By Order dated July 19, 2007, Judge Cross denied Appellants' post trial motions. An appeal followed.

The Court of Appeals heard the case and remanded it for a full hearing, over-ruling the decision by Master-in-Equity, Judge Cross, finding that in the light most favorably to Dicks, the case should be tried. (R. pp. 59-66)

In April, 2011, the trial was held and all evidence from both parties was heard and entered into the record. Significantly, Appellant's own lawyer and expert testified that he had found the covenants and was aware that the property was one lot as did the previous owners, as did Attorney Dusenbury as well as Attorney Mumford, all who were fully aware of the circumstances. Thereafter, Judge Howe ruled at the fourth hearing concerning these restrictive covenants that they

were valid. (R. pp. 10-17) As such, Judge Winston Vaught, in 1972, Judge Stan Cross in 1998, Judge Stan Cross in 2004 and Judge Cynthia Graham Howe in 2011, have all held that the restrictive covenants are valid and applicable to Appellants' lots.

ARGUMENT

There are really only two issues in this case and they are: (1) whether the Master correctly ruled in favor of the Respondents in finding that the 1958 Restrictive Covenants apply to the lots owned by Appellants, and (2) whether the Master correctly ruled that the Shelter Rule is not applicable in this situation because neither the Appellants nor the previous lot owners qualify as *bona fide* purchasers for value. Appellants have set forth eight issues in their brief, many of which are confusing and do not focus on the true issues on appeal. However, for purposes of clarity, Respondent has chosen to re-frame the issues and arguments in its brief, while first addressing each of Appellant's eight issues, in a very brief manner.

RESPONSE TO APPELLANTS ARGUMENTS:

1. The Master did not err in holding that only the Grantors had the right to change the lot lines. The Master Howe expressly found in her Order that the 1972 Order issued by Judge Winston Vaught applied. (R. pp. 10-17) Her decision was based on the circumstances set forth at the hearing, the Order issued by Judge Vaught, testimony at the hearing, and all documents introduced at the hearing. Moreover, it is imperative to note that the original restrictions stated that, "No lot shall be subdivided...and as to all unsold lots, the Grantor reserves the right to change the boundary lines and the building lines thereof." (R. p. 600 and separately filed map) It is undisputed that these restrictions applied to Blocks 1 through 27 and that the restrictions meant that they could not subdivide those lots. Judge Vaught's Order in 1972 simply clarified, based on the litigation, that the restrictions also applied to the remaining portions of "old" Blocks 28 and 29, which included the parcel owned by Appellants. (R. p. 49) Therefore, the Master found that Judge Vincent's Order was clear and specific, that the original restrictions, which prohibit subdivision of the lots, apply to Appellant's lots as well. Judge Vaught's order is clear and

unambiguous that only the Grantor retained the right to change the boundary lines and building line...and only as to any unsold lots. (R. p. 49) As such, the Master did not err in holding that only the Grantors had the right to change the lot lines.

2. The Master did no err in holding that Carmen F. Ward and Gene F. Lewis were the “Grantors” contemplated in the 1972 Order. There has never been an issue raised by either Counsel as to who the Grantor’s were. It has been assumed by all parties and counsel throughout the numerous years of litigation that the 1972 Order refers to Carmen F. Ward and Gene F. Lewis as the original “Grantors”. It doesn’t make sense that any other person could be considered the “Grantor” as used in the 1972 Order. Master Howe used her common sense and her understanding of the plain meaning of the Order to determine that the only possible persons who could be the “Grantors” are Carmen F. Ward and Gene F. Lewis. Carmen F. Ward and Gene F. Lewis are the only persons who owned the subject property from the time of the creation of Long Bay Estates until 1997 when Carmen Ward sold a parcel to David and Leigh Ammons Meese. Therefore, there isn’t any other person who could be considered a “Grantor”, since in 1972, when the Order was issued, no one else owned a lot at Long Bay. As such, the Master did not err in holding that Carmen F. Ward and Gene F. Lewis were the “Grantors” contemplated in the 1972 Order.

3. The Master properly held that the language of the 1972 Order was clear and unambiguous. The 1972 Order, when read in conjunction with the original restrictions, which is imperative since the 1972 Order extends the original restrictions to additional lots, is clear that only the Grantors were given the right of revision. The original 1958 Restrictive Covenants state in relevant part: “[A]s to all unsold lots, the Grantor reserves the right to change the boundary lines and building lines thereof.” (R. p. 600 and separately filed map) The first Finding of Fact in the

1972 Order acknowledges that: “The restrictions expressly reserve the right to the Grantors to change the boundary and building lines of unsold lots.” The pertinent language in the 1972 Order is: “In like manner the remaining portions of ‘old’ Blocks 28 and 29 . . . are subject to such residential restrictions, but with right of revision of the lot arrangement.” Further, the Order states: “The restrictions uniformly used in this area . . . reserved to Grantor the right to change boundary lines and building lines as to any unsold lot in any event.” (R. p. 49)

In light of this clear expression of intent, the Master held that only the Grantors had the right of revision of the lot arrangement. This is the only reasonable interpretation of the language used in both the 1958 Restrictive Covenants and the 1972 Order, and there is no evidence to suggest otherwise. Appellants’ attempt to utilize the principle that any ambiguity in restrictive covenants should be construed in favor of the unrestricted use of land is a perversion of that rule.

Respondent acknowledges that restrictive covenants are subject to the rules of contract construction, and that any doubt or ambiguity in the covenants is to be resolved in favor of the free and unrestricted use of land. Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891, 893 (1987); Hyer v. McRee, 306 S.C. 210, 212, 410 S.E.2d 604, 605 (Ct. App. 1991). Nevertheless, the Master did not find the covenants at issue ambiguous; therefore, the principle of construction argued by Appellants is inapplicable. The Master correctly held that the language in the 1972 Order concerning the right of revision applied solely to the Grantors and not the Appellants.

4. The Master correctly held that the subject property in questions had always been sold as one lot. Respondent’s argument is misleading under this circumstance. It is clear from the testimony that the Meeses bought the property as one lot. (R. p. 391, Lines 13-20) It is also clear that they sold it as one lot. (R. p. 427, lines 11-24) Other than the original Grantor, Carmen

F. Ward, no one else has ever sold or owned the property, except the Meeses. Therefore, since Carmen Ward sold it as one lot, and the Meeses sold it as one lot, it is an undisputed fact that the property in question had always been sold as one lot. Moreover, Appellants' argument as to the unpublished opinion of the Court of Appeals is over-reaching. The Court of Appeals did not make any findings of fact in its' opinion; it simply reversed and remanded for a full hearing, finding that it was error for the lower court to grant summary judgment because there did exist an issue of fact as to the intent to subdivide. (R. pp. 59-66) Master Howe heard the testimony of all parties and witnesses, along with the arguments of counsel and reviewed all exhibits, and determined that the property in question had always been sold as one lot. This is an undisputed fact in the transcript.

5. The Master did not err in finding that Carmen Ward had a right to subdivide the subject property. It is clear from the original Restrictive Covenants and the 1972 Order, that the original Grantors had the right to alter the lot lines. However, this argument is not relevant and makes no difference in terms of whether or not Appellants have a right to subdivide their lots.

6. The Master had a right to consider all circumstances and evidence that was properly brought before her at the hearing. Counsel for Appellants did not object to the introduction of information concerning the wetlands, therefore Respondents assert that this particular issue is not preserved for the Court's review. Conley v. Rowe, 280, S.C 338, 312 S.E.2d 720 (Ct. App) 1984. (Where putative father failed to object to admissibility of blood test results at trial, he would not be heard to complain on appeal about the trial judge's consideration of that evidence in reaching a decision). Moreover, Appellants introduced exhibits concerning the wetlands issue as part of the presentation of their case. Certainly Appellants are not contending that the Master erred in considering their own evidence!

7. The Master was correct in holding that the property in question was one lot, had always been one lot and therefore should remain one lot. This issue has already been addressed somewhat in issue number four; however, it is clear from the testimony that the lot had always been sold as one lot. This is to preserve the residential nature of the neighborhood, as set forth by the original owners and Grantors. Furthermore, Appellant testified that it was his intention when he purchased the lot to use it as one lot and build a home on it. (R. p. 305, lines 5-7) It was only thereafter, when he had gotten a good price on the lot that he tried to divide it into seven lots and destroy the residential nature of the neighborhood. (R. p. 326, line 12-p. 327, line 25)

8. The Master correctly ruled that based on the testimony presented at the hearing the documents presented, including previous orders and the original restrictions, that Appellants had actual notice, in more than one instance as to the fact that the subject property was one lot, and that it could not be subdivided. Appellants' own real estate lawyer, Mr. Wayne Mumford, testified that he had a copy of the 1972 Order (R. p. 247, lines 8-20) as did Appellant prior to the closing of his lot. (R. p. 323, line 22-p. 324, line 1) The Meeses never considered sub-dividing the property; had owned it as one lot; bought it as one lot; and never had any intention of doing anything else with the lot. (R. p. 390, lines 9-14) Appellant's erroneously focus on the Shelter Rule. The Shelter Rule is not applicable to an action to enforce restrictive covenants, and Appellants have not provided the Court with any case law suggesting otherwise. The so called "Shelter Rule" has been applied where a *bona fide* purchaser for value obtains property without notice of an unrecorded mortgage or lien and thereafter conveys the property to another. Cases have held in that situation; that the good title acquired by the *bona fide* purchaser can be passed on to a subsequent purchaser. Nothing in the Shelter Rule mentions restrictive covenants, and it is simply not applicable to restrictive covenants.

Moreover, there is a long line of authority which holds that a covenant is enforceable against a subsequent Grantee, even if not in the Grantee's deed, if the Grantee has actual or constructive notice of the covenants. (This point will be addressed in greater detail in Respondent's argument section). It is clear from the transcript that both the Meeses and Appellants had knowledge of the Restrictive Covenants. As such, the Master did not err in failing to apply the Shelter Rule.

ARGUMENT

I. THE MASTER CORRECTLY HELD THAT THE 1958 RESTRICTIVE COVENANTS APPLY TO APPELLANTS' PROPERTY AND THAT APPELLANTS HAD BOTH ACTUAL AND CONSTRUCTIVE NOTICE OF THE 1958 RESTRICTIVE COVENANTS.

Appellants' argument that the Restrictive Covenants do not apply to the subject property by their express terms is an attempt at obfuscation and borders on the disingenuous. The pertinent restriction attached to the 1955 map of Long Bay Estates Subdivision, created by the Lewis Family (Grantors) states: "No lot shall be subdivided As to all unsold lots, the Grantors reserve the right to change the boundary lines and the building lines thereof." (R. p. 600 and separately filed map) It is clear and unambiguous that the restriction prohibits subdividing any lots, except for those that are unsold, and if a lot is unsold, only the Grantor, who are Carmen F. Ward and Gene F. Lewis, have the right to change the boundary lines or building lines thereof. It is undisputed that the original language of the covenants stated they applied only to Blocks 1 through 27. Thereafter, in litigation commenced by the Grantors against all the property owners, an order signed by then Master Winston Vaught, clarified the scope of the restrictions and stated they applied to Blocks 1 - 27, 30, 32, and 34, and the remaining portions of "old" Blocks 28 and 29, which included Appellants' parcel. (R. pp. 48-49) This identical issue was addressed in a second lawsuit which culminated in an order issued by the present Master Stan Cross, which incorporated the 1972 Order of Judge Vaught. (R. p. 22)

Respondent has never taken the position that the 1958 Restrictive Covenants specifically included Appellants' property, but rather has consistently argued that the subsequent litigation,

which culminated in an agreement between the Grantors and all property owners as expressed in the 1972 Order, clarified the extent of the original restrictions, stating that the remaining portions of “old” Blocks 28 and 29, which includes Appellants’ 2.67 acre tract, are subject to the restrictions. After a full hearing, Master Howe ruled, “It is the finding of the Court that Judge Vaught intended that once Blocks 28 and 29 were sold, no other person had any right to change the boundary lines or building lines, that right being reserved to the original “Grantor”. (R. p. 13) The order is clear and unambiguous on its face that only the “Grantors” had the right to change the boundary lines, and they did not exercise this right. **In fact, as Master Howe** found, the lot was owned and sold as one lot with one building consistently, until Appellants purchased the lot and learned they might be able to get a good price on subdividing and selling off seven lots instead on one. (R. pp. 14-15) Moreover, Jay Dusenbury, the attorney of record representing the Meeses (previous owners to Appellants) testified that although he did not find the 1972 Vaught Order in the chain of title, he and the Meeses both knew there were restrictions on the Long Bay Estates property. (R. p. 369, lines 7-22) He further testified that he knew there existed a strong possibility that those restrictions did apply to Blocks 28 and 29 and that he conveyed that information to Appellant at the time he purchased the property. (R. p. 369, line 12-p. 370, line 12) He further testified that in fact at the time Appellants signed the contract to purchase the property from the Meese’s Appellants signed a stand-alone document stating that the restrictions could apply. (R. p. 370, lines 13-17) As such, it is clear that both the Meeses and the Appellants had actual or constructive knowledge of the restrictions.

It is important to note that the Master’s finding that the 1958 Restrictive Covenants apply to all the lots in the Long Bay Estates Subdivision was not issued in isolation; rather, this was the fourth time the Horry County Court System had dealt with the question of the applicability of the

covenants. In ruling that the restriction against the subdivision of lots applied to Appellants' property, the Master relied on not only the language of the original Restrictive Covenants, but also on the three ensuing court orders. Judge Cross also found that the Grantors, which included Carmen F. Ward and Gene F. Lewis, owned the subject property from the time of the creation of Long Bay Estates until 1997 when Carmen Ward sold the parcel to Appellants' predecessors in title, David and Leigh Ammons Meese. (R. p. 25) Now, Master Howe has also found that the Grantors which included Carmen F. Ward and Gene F. Lewis, owned the property from the time of creation of Long Bay Estates until 1997 when Carmen F. Ward sold the parcel to Appellant's predecessors in titled, David and Leigh Ammons Meese.

Accordingly, the subject parcel was bound by the restriction against subdividing, not only as originally contained in the Restrictive Covenants, but as agreed upon and explained by the two lawsuits wherein both the Grantors and Appellants' predecessors in title were parties. If Appellants' argument was accepted, Appellants would be treated differently from all other persons similarly situated in that they would not be bound by the original restriction against subdividing despite the fact their predecessors in title received the property directly from the Grantors, who were parties to the earlier litigation. The Master thus, correctly and consistently, ruled that Appellants' property is bound by the 1958 Restrictive Covenants.

II. THE MASTER CORRECTLY HELD THAT THE SHELTER RULE DOES NOT PROVIDE APPELLANTS ANY FREEDOM TO SUBDIVIDE THEIR LOTS, BECAUSE APPELLANTS, NOR THEIR PREDECESSOR IN TITLE QUALIFY AS “BONA FIDE PURCHASERS FOR VALUE”

That Master Howe found that based on her opportunity to judge the credibility of the witnesses, and all testimony presented, that the Meeses had notice that Blocks 28 and 29 were subject to the restrictions against subdivision, or at least had knowledge that they most likely were subject to the restrictions. Ms. Meese testified that she was aware of the 1972 order, if only vaguely so. (R. p. 399, lines 17-23) However, she mentioned subdividing was not important to her because she only intended to purchase the property to build a house on it and live there. (R. p. 390, lines 9-14) Therefore, Ms. Meese had no intention of subdividing the property when she purchased it. Likewise, Appellant did not have any intentions of subdividing the property when he purchased it. The Meeses’ attorney, Jay Dusenbury, learned that the 1972 Order was mis-indexed when the Meeses bought the lot and advised Appellants at the time they purchased the lot that there was a strong possibility that the restrictions applied to the lot. (R. p. 369, lines 7-22)

Moreover, Appellant’s real estate closing attorney Wayne Mumford, testified that even though he was not able to locate the 1972 Order in the chain of title, he had a copy of it prior to closing. (R. p. 323, line 22- p. 324, line 1) This constitutes actual notice. Further, he advised his client that there was an issue as to subdivision of the property. Thus, the Master found that Appellants had both constructive notice of the applicability of the Restrictive Covenants through the 1972 Order as well as actual notice of the restrictions. Indeed, counsel for Appellants at the hearing before the Master conceded his clients had actual notice of the restrictive covenants. (R.

p. 13) Nevertheless, Appellants seek to escape the effect of their actual notice by arguing their lack of constructive notice and asserting they are protected under the “Shelter Rule”. Respondent asserts this rule is not applicable to an action to enforce restrictive covenants and, even assuming it does apply to such an action, it is inapplicable on the facts of this particular case.

The so-called “Shelter Rule” has been applied in situations where a *bona fide* purchaser for value obtains property without notice of an unrecorded mortgage or other lien and thereafter conveys the property to another. Cases have held that the good title acquired by the *bona fide* purchaser for value can be passed on to the subsequent purchaser, even if he had notice of the defect. Foster v. Bailey, 82 S.C. 378, 382, 64 S.E. 423, 424 (1909) (Whenever in a succession of purchasers you reach one who is innocent and purchases in ignorance, the title is thenceforth sanctified.) Goodwin v. Harrison, 231 S.C. 243, 258, 98 S.E.2d 255, 258 (1957) (Where a motor company acquired title to a vehicle without actual notice of a prior unrecorded mortgage, it became owner of the vehicle free of the lien of the mortgage and subsequent purchasers succeeded to its rights); Liberty Loan Corporation of Darlington v. Mumford, 283 S.C. 134, 140, 322 S.E.2d 17 (Ct. App. 1984) (Where a lien was not properly indexed at the time of its purchase by a *bona fide* purchaser for value, its successors in interest stood in the shoes of the *bona fide* purchaser for value even if they had notice of the lien). None of the cases employing this rule deals with restrictive covenants, and Respondent asserts it is inapplicable to the case at hand. Appellants have not cited any case law wherein the “Shelter Rule” is applied to restrictive covenants. It is clear from the authorities appellants have cited, that the “Shelter Rule” protects the passing of “good title”. As such, the “Shelter Rule” is not applicable to restrictive covenants. Indeed, the rule would seem to have no application to restrictive covenants given the line of authority which holds that a covenant is enforceable against a subsequent grantee, even if not in the grantee’s deed,

if the grantee has actual or constructive notice of the covenant. See Harbison Cmty. Assoc., Inc. v. Mueller, 319 S.C. 99, 103, 459 S.E.2d 860, 863 (Ct. App. 1995); Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 370, 626 S.E.2d 902, 918 (Ct. App. 2006); 20 Am.Jur. (2d), Covenants, Conditions and Restrictions §26 (1965). Thus, Appellants' counsel's admission that his clients had actual notice of the restriction against subdivision should end the matter, and Appellants' argument that the Master erred in holding they were on notice of either the 1958 Restrictions or the 1972 Order should be dismissed as manifestly without merit.

However, even assuming without deciding that the "Shelter Rule" does apply to restrictive covenants in contravention to the authority cited above, it would not provide protection to Appellants because the Meeses were not *bona fide* purchasers for value without notice. The Master found that the Meeses had both actual and constructive notice of the existence and applicability of the restrictive covenants to the subject property. (R. pp. 15- 16) At the very least, they had constructive notice, thus defeating any protection Appellants could claim under the shelter rule.

Leigh Ammons Meese, an attorney herself, testified that she had no recollection of any discussions or concern about restrictions on the property at the time of its purchase in 1977. (R. p. 400, line 22-p. 401, line 8) At best, Ms. Meese's testimony regarding her knowledge of the restrictive covenants at the time of purchase was equivocal: "I don't know what point I became aware of what questions." (R. p. 401, lines 1-3) This statement alone should be sufficient to deprive her of *bona fide* purchaser without notice status, a prerequisite for application of the "Shelter Rule".

Even if Ms. Meese did not have actual notice of the restrictions at the time of purchase, she

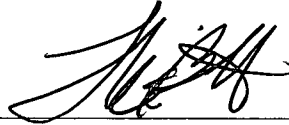
certainly became very well acquainted with them thereafter, particularly once the 2000 litigation started, which involved her family, and she made no effort to attempt to claim *bona fide* purchaser without notice status and avail herself of subdividing the property. It is clear that she and her husband purchased the 2.67 acre parcel as a single lot and they sold it as a single lot to Appellant.

David Meese, a CPA, likewise was unsure what he knew about possible restrictions on the property at the time of its purchase, primarily because any restrictions were irrelevant since his intent was to build a single family home on it. (R. p. 390, lines 3-14) He also conceded that he had received a copy of the Covenants and Restrictions at the time he purchased the 2.67 acre tract, thus confirming he had actual notice of the restrictions. Accordingly, Master Howe was correct in finding that Appellants' predecessors in title, Leigh and David Meese, had both actual and constructive notice of the restrictive covenants. Thus, the "Shelter Rule", even if it were applicable, affords no protection to Appellants because the Meeses do not qualify as *bona fide* purchasers for value without notice.

CONCLUSION

The Master's decision finding in favor of Respondent and to uphold the applicability of the restrictive covenants which govern Long Bay Estates Subdivision should be affirmed.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
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Cynthia Graham Howe, Master-In-Equity

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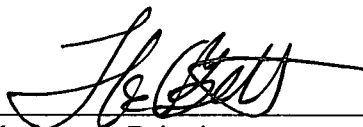
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v.

Thomas L. Dicks and Robert E. Dicks, Jr.,.....Appellants.

CERTIFICATE OF COUNSEL

I hereby certify that Respondent's Final Brief complies with Rule 211(b) of the South Carolina Appellate Court Rules.



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