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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Brian L. Boger, Special Referee

Appellate Case No. 2022-000947

Lisa Cruz,..……..……..…...…...Respondent,

v.

Heyward Bouknight and Kathy Bouknight……...……Appellants.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES

I. Did the lower court err reversibly in granting summary judgment against Appellants for the ostensible violation of a restrictive covenant prohibiting the use of a trailer as a residence when the Appellants' house is a manufactured home that is not a vehicle equipped to be towed on a street or highway?

II. Did the lower court err reversibly in ordering Appellants to remove their home from their property?

STATEMENT OF THE CASE

This is an appeal of an order directing the Appellants, Heyward and Kathy Bouknight (hereinafter "the Bouknights") to remove their prefabricated manufactured home from their property, on the grounds that the Bouknights are violating a restrictive covenant that prohibits a "trailer" from being used as a residence. (R. pp. ___; order of judgment.)

The Respondent, Lisa Cruz (hereinafter "Cruz"), brought this action seeking injunctive relief requiring the Bouknights to remove their home from their property, with Cruz contending that the Bouknights are violating restrictive covenants through their use of their house, a manufactured home, as a residence. (R. pp. ___; order of judgment; summons and complaint; amended complaint.) The covenants, executed and recorded in 1954, state that "[n]o trailer, basement, tent shack, garage, or barn shall at any time be used as a residence, either temporary or permanent[,]" at property subject of the covenants. (R. pp. ___; covenants.) The Bouknights answered and denied that they are violating the covenants. (R. pp. ___; answer.)

The case was initially referred by consent to the Master-in-Equity for Lexington County. (R. pp. ___; order of reference to master-in-equity.) After the master determined he had a conflict of interest, he recused himself, and the case was referred to a special referee. (R. pp. ___; order of recusal; order of reference to special referee.)

The Bouknights moved for summary judgment, and Cruz also moved for summary judgment. (R. pp. ___; Defendants' motion for summary judgment; Plaintiff's motion for summary judgment.) The special referee held a hearing on the motions, requested proposed orders from the parties' counsel, and, after some time, issued an order that granted Cruz's motion and denied the Bouknights'. (R. pp. ___; transcript summary judgment hrg p. 18 ln. 4-7; order of judgment.)

The special referee found that this case "concerns a prefabricated house [that] was delivered by tractor-trailer, truck-bed or similar over-the-road vehicle to the Bouknights' lot[.]" (R. pp. ___; order of judgment p. 3.) He determined "there is no genuine issue of material fact in this case as to whether the Bouknights' manufactured home was intended to be and is covered by the Brookgreen Terrace subdivision's ban on using 'trailers' on lots in the subdivision[.]" (R. pp. ___; order of judgment p. 18.) His order directed the Bouknights "to, at their own expense and within 60 days of issuance of this Order, to remove their manufactured home or trailer from their lot in the Brookgreen Terrace subdivision." (R. pp. ___; order of judgment p. 18.)

The special referee ruled that South Carolina statutes and cases "suggest that the terms 'manufactured home', 'mobile home', 'house trailer' and 'trailer' are used and treated interchangeably" and that "the essential characteristics of a mobile home, trailer, and manufactured home are the same, as is evident from the prior as well as current statutory definitions." (R. pp. ___; order of judgment p. 11.) He wrote that "it is clear that the South Carolina Legislature and courts in South Carolina and elsewhere do not offer any material distinction between 'manufactured home', mobile homes, and 'trailers', such that a 'manufactured home' would escape coverage of a subdivision restrictive covenant that bans 'trailers'." (R. pp. ___; order of judgment pp. 11-12.) The special referee stated that decisions in and out of this state "clearly, plainly, and unmistakably hold that manufactured homes, mobile homes, and trailers are interchangeable and synonymous, for purposed of applying and enforcing subdivision restrictive covenants that ban 'trailers'." (R. pp. ___; order of judgment p. 12.) He found that "[t]here can be no question that when the Brookgreen Terrace subdivision restrictive covenants were authored, the developer intended that the term 'trailer' would cover

other types of synonymous prefabricated housing, such as manufactured or mobile homes, like [the Bouknights']." (R. pp. ___; order of judgment p. 12.)

The Bouknights moved to reconsider, and the special referee held a hearing on the motion to reconsider. (R. pp. ___; motion to reconsider; transcript hrg on motion to reconsider.) The special referee denied the motion to reconsider. (R. pp. ___; order denying motion to reconsider.)

This appeal followed.

STATEMENT OF FACTS

The Bouknights' prefabricated manufactured home is not and never has been a trailer. The home was built off-site and brought to the Defendants' property on the bed of a truck. (R. pp. ___; Depo. of Kathy Bouknight p. 31 ln. 12 through p. 32 ln. 7.) There is no evidence in the record to the effect that the home has ever had wheels or a tongue or has otherwise been equipped to be hauled on streets or highways, but there is evidence that it never had wheels, a tongue, or other parts needed for towing down roads. (R. pp. ____; Depo. of K. Bouknight p. 31 ln. 12-24; Def. proposed order p. 2.) There is no evidence in the record to the effect that the Bouknights' home meets *any* of the definitions of *trailer* found by the parties or the special referee.

The special referee stretched far to reach the conclusion that the Bouknight's house is a trailer. It is not. The special referee stretched farther than the law allows.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). That standard is that:

> summary judgment may be rendered only when 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 the moving party is entitled to judgment as a matter of law. Additionally, it must be shown that further inquiry into the facts of the case is not desirable to clarify the application of the law.

Folkens v. Hunt, 290 S.C. 194, 196, 348 S.E.2d 839, 841 (Ct. App. 1986).

"All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." Nelson v. Charleston County Parks & Recreation Comm., 362 S.C. 1, 5, 605 S.E.2d 744, 746 (Ct. App. 2004). If "the parties vehemently dispute the inferences and conclusions to be drawn form the undisputed facts, . . . that simply establishes that summary judgment is not appropriate[.]" Montgomery v. CSX Transp., Inc., 656 S.E.2d 20, 29 (2008).

> When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual issues.

Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 133-34, 659 S.E.2d 496, 498 (2008).

In 2009, the South Carolina Supreme Court clarified earlier confusion about whether a scintilla of evidence is sufficient to defeat summary judgment. See Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 802-03 (2009). In Hancock, the Court held that "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Id. at 330, 673 S.E.2d at 803. More than a scintilla is required

only in cases requiring heightened burdens of proof or applying federal law. Id. at 330-31, 673 S.E.2d at 803.

ARGUMENT

I. South Carolina law requires a narrow construction of the covenants.

"A restriction on the use of property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property." Hamilton v. CCM, Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980) (citations omitted). "Restrictive covenants are to be construed most strictly against the grantor and persons seeking to enforce them, and liberally in favor of the grantee, all doubts being resolved in favor of a free use of the property and against restrictions." Stanton v. Gulf Oil Corp., 232 S.C. 148, 151, 101 S.E.2d 250, 251 (1957) (internal quotation marks omitted). "It is still the settled rule in this jurisdiction that restrictions as to the use of real estate should be strictly construed and all doubts resolved in favor of free use of the property." Taylor v. Lindsey, 332 S.C. 1, 4, 498 S.E.2d 862, 864 (1998).

Our Supreme Court has noted that "[i]t follows, of course, that where the language of the restrictions is equally capable of two or more different constructions that construction will be adopted which least restricts the use of the property." Id. When more than one logical interpretation of a restriction is possible, a court must adopt the interpretation that is the least restrictive. Id.; see Anderson v. Buonforte, 365 S.C. 482, 617 S.E.2d 750, 758 (Ct. App. 2005).

"The court may not limit a restriction in a deed, nor, on the other hand, will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms even to accomplish what it may be thought the parties would have desired had a situation which

later developed been foreseen by them at the time when the restriction was written." Forest Land Co. v. Black, 216 S.C. 255, 57 S.E.2d 420, 424 (1950).

Even if one could reasonably construe the term "trailer" in these 1954 covenants to embrace the more modern idea of a manufactured home, which is unlikely, but one could also reasonably construe the term trailer *not* to include a manufactured home, the "settled rule" in South Carolina required the special referee to adopt the construction "which least restricts the use of the property." Taylor, 332 S.C. at 4. Here, that means a construction of *trailer* that does not include the Bouknights' manufactured home.

As discussed below, the special referee chose not to follow these foundational principles in reaching his decision. This was reversible error.

II. This house does not meet any definition of *trailer*.

Between them, the parties' counsel and the special referee probably found every definition of *trailer*, *mobile home*, and *manufactured home* that has been set out in a statute or reported case in the state of South Carolina. (R. pp. ___; order of judgment pp. 5-11; transcript hrg on motion to reconsider p. 4 ln. 19-22; Def. memorandum concerning motions for summary judgment pp. 1-3; Plaintiff memorandum in support of motion for summary judgment pp. 6-8.) The Bouknights' house does not meet any legally recognized definition of *trailer*. (R. pp. ___; motion to reconsider; Def. memoranda; argument at hearings; Def. proposed order.)

The covenants prohibit use of a "trailer" as a residence. (R. pp. ___; covenants.) The Merriam-Webster dictionary defines "trailer" as follows:

> 1 : a nonautomotive vehicle designed to be hauled by road: such as
>
> > a : a vehicle for transporting something, a boat trailer especially : semi-trailer sense 1

> b : a vehicle designed to serve wherever parked as a temporary dwelling or place of business
>
> c : mobile home
>
> 2a: a selected group of scenes that are shown to advertise a movie : preview sense 3 a theatrical trailer
>
> b: a short blank strip of film attached to the end of a reel
>
> 3 : one that trails
>
> 4 : a trailing plant

(Emphasis added.)

Under South Carolina statutory law, "'[t]railer' means every vehicle with or without motive power, other than a pole trailer, designed for carrying persons or property and for being drawn by a motor vehicle and constructed so that no part of its weight rests upon the towing vehicle." S.C. Code Ann. § 56-19-10(34) (emphasis added).

> "House trailer" means:
>
> (a) a trailer or semitrailer which is designed, constructed, and equipped as a dwelling place, living abode, or sleeping place, either permanently or temporarily, and is equipped for use as a conveyance on streets and highways; or
>
> (b) a trailer or a semitrailer whose chassis and exterior shell is designed and constructed for use as a house trailer, as defined in subitem (a) of this item, but which is used instead permanently or temporarily for the advertising, sales, display, or promotion of merchandise or services or for another commercial purpose except the transportation of property for hire or the transportation of property for distribution by a private carrier.

S.C. Code Ann. § 56-19-10(10) (emphasis added).

Cruz argued that the Bouknights' home is, or effectively is, a mobile home. (R. pp. ___; Plaintiff memorandum in support of motion for summary judgment; argument at hearings.) The special referee agreed, reasoning that a manufactured home and a mobile home

are the same thing. (R. pp. ___; order of judgment.) The statutory definitions of "mobile home" and "manufactured home" point to a different conclusion.

> "Mobile home" means every vehicle which is designed, constructed, and equipped principally as a permanent dwelling place and is equipped to be moved on streets and highways, but which exceeds the size limitations prescribed in Section 56-3-710 and which cannot be licensed and registered by the Department of Motor Vehicles as a "house trailer."

S.C. Code Ann. § 56-19-10(39) (emphasis added).

A manufactured home has a different statutory definition:

> "Manufactured home" means a structure, transportable in one or more sections which, in the traveling mode, is eight body feet or more in width or forty body feet or more in length or when erected on site is three hundred twenty or more square feet and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities and includes the plumbing, heating, air conditioning, and electrical systems contained in it.

S.C. Code Ann. § 40-29-20(9). That definition contains nothing about being equipped to be moved on streets and highways. Id.

The special referee also relied on repealed former S.C. Code § 31–17–20(a), which defined a "manufactured home" as a "mobile home," and a case that quoted from it. (R. pp. ___; order of judgment pp. 6, 11; motion to reconsider.) That statute was repealed by 1989 Act No. 128, § 6, well before the manufacture and placement of the Bouknights' home. (R. pp. ___; order of judgment p. 1-2.) That statute is not the law. Id. The special referee also based his decision on other non-law authority, as in the "S.C. Revenue Advisory Bulletin" cited on page 9 of the order, treating it as though it were legal authority. (R. pp. ___; order of judgment p. 11.)

The special referee also seemed to put some weight on the fact that the manufactured home was brought to the Bouknights' property on the bed of a truck. (R. pp. ___; order of judgment.) There is a stark difference between something being designed to be transported on the bed of a truck and something designed to be a vehicle itself, "designed for carrying persons or property and for being drawn by a motor vehicle and constructed so that no part of its weight rests upon the towing vehicle." S.C. Code Ann. § 56-19-10(34). The latter is what a *trailer* is. Id. As noted below, "[a]ny object could be put on a flatbed and hauled. This table's not a trailer, but it could be put on a flatbed and hauled." (R. pp. ___; transcript hrg on motion to reconsider p. 13 ln. 9-11.)

All of the evidence in the record is to the effect that the Bouknights' home has never been designed or equipped to carry persons and property or to be pulled behind another vehicle on streets and highways. (R. pp. ___; argument at hearings; memoranda; motion to reconsider; depo of K. Bouknight.) The Bouknights' house has never had wheels, a tongue, or other parts needed for towing down roads. (R. pp. ____; Depo. of K. Bouknight p. 31 ln. 12-24; Def. proposed order p. 2.) The Bouknights' prefabricated dwelling house is not and never has been equipped for use as a conveyance. (R. pp. ___; argument at hearings; memoranda; motion to reconsider; depo of K. Bouknight.) The record is devoid of any evidence to the contrary. (R. pp. ___; argument at hearings; memoranda; motion to reconsider; depo of K. Bouknight.) The differences between the definitions of "trailer" and "manufactured home," in light of the evidence in the record to the effect that the manufactured home was not and is not "designed for carrying persons or property and for being drawn by a motor vehicle and constructed so that no part of its weight rests upon the towing vehicle[,]" indicate that the Bouknight's home is not a trailer. S.C. Code Ann. § 56-19-10(34).

The special referee grounded his order in the idea that the terms *manufactured home, mobile home, house trailer*, and *trailer* have no material differences in meaning. (R. pp. ___; order of judgment pp. 11-12; motion to reconsider.) But that conclusion runs afoul of the principle that "[a] statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." In re: Decker, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995). The General Assembly did not adopt different definitions for these terms only for those definitions to be superfluous in light of the terms' identical "real" meanings. See id. In South Carolina law, the terms *manufactured home, mobile home, house trailer*, and *trailer* are ***not*** used and treated interchangeably. (R. pp. ___; motion to reconsider.) They have *different* definitions, not the same definition. (R. pp. ___; motion to reconsider.) There are indeed material distinctions in the law between the meanings of these terms. (R. pp. ___; motion to reconsider.) The General Assembly *did* make important distinctions in the meanings of these words. See id.; (R. pp. ___; motion to reconsider.)

Nothing in the definition of *manufactured home,* S.C. Code Ann. § 40-29-20(9), means that a manufactured home necessarily meets the definition of a *mobile home,* S.C. Code Ann. § 56-19-10(39), much less a *trailer*. S.C. Code Ann. § 56-19-10(34). There is no evidence in the record that the Bouknights' house is a "vehicle with or without motive power, other than a pole trailer, designed for carrying persons or property and for being drawn by a motor vehicle and constructed so that no part of its weight rests upon the towing vehicle." Id. All the evidence is to the contrary. It is not a trailer under any definition of *trailer* recognized by the law.

The special referee erred reversibly in determining the Bouknights' home violates the covenants and in granting Cruz's motion.

III. Heape does not support the special referee's ruling. If anything, the definition of *trailer* in it further reveals the error in the special referee's reasoning.

Cruz relief heavily on Heape v. Broxton, 293 S.C. 343, 360 S.E.2d 157 (Ct. App. 1987), for the proposition that, as a matter of law, a manufactured home is a mobile home and a mobile home is a trailer, so the Bouknights' manufactured home must be a trailer. (R. pp. ___; argument; memorandum.) The special referee appears to have adopted Cruz's view of Heape. (R. pp. ___; order of judgment pp. 6-8.)

Thankfully, that is not what Heape actually says. (R. pp. ___; memoranda; argument; motion to reconsider.) Heape dealt with a covenant provision that prohibited a "trailer," a term which the Heape court held embraced the double-wide mobile home at issue in that case. Id. at 344-45. This court in Heape concluded that a mobile home met the definition of trailer, which the court defined as "a nonautomotive highway vehicle designed to be hauled by a tractor, truck, or automobile." Id. at 345.

The definition of a mobile home is indeed consistent with that definition of trailer. Id. at 345-46; see S.C. Code Ann. § 56-19-10(39). A mobile home is, by definition, a "vehicle which . . . is equipped to be moved on streets and highways." S.C. Code Ann. § 56-19-10(39). As discussed above, the Bouknights' house does not meet the definition of *mobile home*, nor does it meet the Heape definition of *trailer*.

That Heape does not stand for what Cruz contended it stands is shown by how this court has applied the Heape decision. Four years after its decision in Heape, this court decided the case of Henry v. Chambron, in which the court reversed the trial court's decision that a modular home ran afoul of covenants that prohibited the use of a "mobile home" or a "trailer" as a residence. 304 S.C. 351, 354 n. 1, 404 S.E.2d 518, 520 n. 1 (Ct. App. 1991). The Henry plaintiffs, citing Heape as their authority, argued "that the structure has the appearance of a

mobile home and that the restrictions were designed to prevent structures with such an appearance in the subdivision." Henry, 304 S.C. at 353. This court declined to interpret Heape so broadly, reasoning as follows:

> Even if his home were to resemble a mobile home, a structure having the mere appearance of a mobile home is not necessarily prohibited by a general restriction against mobile homes. Instead, a restriction on the use of property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property.
>
> . . .
>
> The restriction could have prohibited modular homes by a simple expression of the intent to do so. . . . Even if modular homes were not contemplated at the time the restriction was filed, there is no evidence in the record that the property owners were prevented from amending the restriction to include modular homes at a later date.

Id. at 353, 354, 355 (internal citations and quotation marks omitted).

In Henry, this court appears to have accepted without question that a modular home is not a trailer, seeing no need to analyze that issue. Id. at 353-55. This court in Henry was also deliberate in applying the principles of South Carolina law that "a restriction on the use of property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property." Id. at 353. In accordance with these principles, the court rightly chose not to expand the words of the covenant to bring an unmentioned type of housing within the ambit of the covenant language, even if the covenants might have been written to prohibit that kind of housing had they been written more recently. Id. at 353, 354, 355. To the extent that Heape had departed from these bedrock principles of South Carolina covenant law, the Court of Appeals reined in its jurisprudence in Henry, perhaps functionally overruling Heape to the

extent that Heape went as far as the Henry plaintiffs contended it did – or as far as Cruz or the special referee maintained here that it did. (R. pp. ___; order of judgment pp. 6-8; plaintiff's argument; memorandum.)

This court does not need to overrule Heape in order to find for the Bouknights here, since Heape does not contain anything to the effect that the Bouknights' manufactured home is a trailer. The Heape court defined "trailer" as "a nonautomotive highway vehicle designed to be hauled by a tractor, truck, or automobile[,]" and it concluded that mobile homes, because their definition put them squarely within that definition of trailer, could not help but be trailers. 293 S.C. at 345. The Heape court also emphasized that the mobile home seller there "*towed* the structure in two sections" and that each of the sections was "equipped with a chassis, a tongue, axles, and wheels[.]" Id. at 344 (emphasis added). In contrast, the prefabricated manufactured home at issue here never had wheels or a tongue. (R. pp. ____; Depo. of K. Bouknight p. 31 ln. 12-24.)

Unlike the mobile home at issue in Heape, the Bouknights' manufactured home does not meet the definition of *trailer* stated in that case, as discussed above. Accordingly, there is nothing inconsistent between Heape and this court's reversal of the special referee's erroneous decision. Indeed, since the Bouknights' home does not meet the Heape definition of *trailer*, Heape is more authority that supports reversal. Id. at 345. Heape set out a definition of "trailer" as "a nonautomotive highway vehicle designed to be hauled by a tractor, truck, or automobile[,]" id., and the Bouknight house is not that. (R. pp. ____; Depo. of K. Bouknight p. 31 ln. 12-24.)

IV. The special referee's use of a specifically prohibited interpretation analysis illustrates the danger of abandoning the rules of covenant construction.

The special referee's order seems to be predicated on the non-evidenced assumption that the term "trailer" somehow just *must* include prefabricated dwellings like the Bouknights' home. (R. pp. ___; order of judgment pp. 11-12; motion to reconsider.) He even found that "[t]here can be no question that when the Brookgreen Terrace subdivision restrictive covenants were authored, the developer intended that the term 'trailer' would cover other types of synonymous prefabricated housing, such as manufactured or mobile homes, like [the Bouknights']." (R. pp. ___; order of judgment p. 12.) The record contains no evidence – none – of the intentions of the covenants' author, other than what the words of the covenants say. (R. pp. ___; covenants; motion to reconsider.)

It would be beyond a stretch to reasonably construe the term "trailer" in these mid-20th century covenants to embrace the more modern idea of a manufactured home. But even if one *could* do that, one could also certainly construe the term trailer *not* to include a manufactured home – indeed, that is the only reasonable construction. (R. pp. ___; memorandum; Def. proposed order.) Under the "settled rule" in South Carolina, the fact that the word "trailer" in the covenants could reasonably be construed not to include a manufactured home means that the court must adopt the construction "which least restricts the use of the property" – here, the construction that means Cruz's case fails. Taylor, 332 S.C. at 4.

This is borne out by Supreme Court precedent that, consistently with this settled principle, deliberately refused to expand the definition of the term "trailer." In Vickery v. Powell, 267 S.C. 23, 225 S.E.2d 856 (1976), the Court upheld a ruling that a structure that was purposefully designed to look like a mobile home was neither a mobile home nor a trailer and was thus not prohibited by covenants that prevented trailer homes and mobile homes.

The restrictions at issue in the instant case do not mention manufactured homes. (R. pp. ___; covenants.) A restrictive covenant may not "be enlarged or extended by construction or implication beyond the clear meaning of its terms even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written." Forest Land, 57 S.E.2d at 424. Similarly to the situation addressed by this court in Henry, here, "[t]he restriction could have prohibited [manufactured] homes by a simple expression of the intent to do so[,]" and, "[e]ven if [manufactured] homes were not contemplated at the time the restriction was filed" – as, in 1954, they were not – "there is no evidence in the record that the property owners were prevented from amending the restriction to include [manufactured] homes at a later date." Henry, 304 S.C. at 354, 355. They did not so amend, and nothing in the covenants prohibits a dwelling such as the Bouknights'. (R. pp. ___; covenants.)

The special referee's decision expressly did what is prohibited. Forest Land, 57 S.E.2d at 424. Operating in a vacuum of evidence, the special referee decided that, if prefabricated dwellings like the Bouknights' had been around when the covenants were drafted, the drafter surely would have prohibited them; thus, the special referee reasoned, the term "trailer" was somehow "meant" to include them – even though such dwellings are not within any definition of "trailer." (R. pp. ___; order of judgment p. 12; motion to reconsider.) This is exactly the sort of decision the Supreme Court held in Forest Land was untenable, since a restrictive covenant may not "be enlarged or extended by construction or implication beyond the clear meaning of its terms even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written." Id.

The special referee undertook to stretch the definition of "trailer" beyond its breaking point and decided to adopt a broad construction of the term when a narrower, reasonable one is available that is less restrictive of the use of the property. (R. pp. ___; order of judgment pp. 11-12; motion to reconsider.) To do these things violated South Carolina covenant interpretation law. Taylor, 332 S.C. at 4; Forest Land, 57 S.E.2d at 424. This the special referee was not permitted to do. It is reversible error.

V. Even if the house were actually a trailer, the special referee's order to remove it would still go beyond what the covenants say.

The covenants provide that "[n]o trailer, basement, tent shack, garage, or barn shall at any time be *used as a residence*, either temporary or permanent[,]" at property subject of the covenants. (R. pp. ___; covenants (emphasis added).) The special referee ordered the Bouknights to *remove* their house from the property. (R. pp. ___; order of judgment p. 18.) The covenants do not prohibit a trailer from being on the property. (R. pp. ___; covenants; transcript hrg motion to reconsider p. 3 ln. 22 through p. 4 ln. 12.) The covenants prohibit a trailer from being used as a residence on the property. (R. pp. ___; covenants; transcript hrg motion to reconsider p. 3 ln. 22 through p. 4 ln. 12.) Even if this court otherwise affirms – which would be the wrong decision – the relief ordered needs to be adjusted. (R. pp. ___; covenants; transcript hrg motion to reconsider p. 3 ln. 22 through p. 4 ln. 12.) Even if the special referee were right about the Bouknight's house being a trailer, the remedy would be an order to stop using it as a residence, not an order directing the Bouknights to pay to have the structure removed. (R. pp. ___; covenants; transcript hrg motion to reconsider p. 3 ln. 22 through p. 4 ln. 12.)

VI. To affirm the special referee here would leave the future harsh and uncertain for tomorrow's neighbors.

The special referee wanted very much to see the house at issue and appeared to decide the case largely on how the house looked to him. (R. pp. ___; order of judgment; hearing transcripts.) Though the Bouknights' counsel pointed out Vickery, 267 S.C. at 23, and noted that the way the house looks has nothing to do with whether it is a trailer, id., the referee ignored this – ignored the law – and did his own thing. (R. pp. ___; order of judgment; hearing transcripts.)

Affirming the special referee's decision here would result in the definition of *trailer* being so vague that it may be weaponized by any angry neighbor who does not like the look of a house in a subdivision where trailers are prohibited – regardless of whether that house structure was ever equipped to be towed on streets or highways. Perhaps the most dangerous thing about the special referee's order is its trailer-is-in-the-eye-of-the-beholder approach. (R. pp. ___; order of judgment.) Far from settling interpretive questions or even providing guidance, the special referee's reasoning encourages would-be covenant litigants to take a shot and see what happens. This runs counter to policy and to good sense. See Watson v. Goldsmith, 205 S.C. 215, 31 S.E.2d 317, 319 (1944) ("*interest reipublicae ut sit finis litium* (it is the interest of the state that there should be an end of litigation)").

CONCLUSION

The Bouknights' house is not a trailer. The decision below depends upon the Bouknights' house being a trailer and there being no other way to see the record. This court should reverse the lower court and remand this case for further proceedings consistent with that reversal.

Respectfully submitted,

/s/ Andrew S. Radeker
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January 3, 2023

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Brian L. Boger, Special Referee

Appellate Case No. 2022-000947

Lisa Cruz,..……..……..…...…...Respondent,

v.

Heyward Bouknight and Kathy Bouknight……...……Appellants.

PROOF OF SERVICE

I certify that I have served the foregoing initial brief on the date given below by emailing it to counsel for the Respondent at the address(es) noted below.

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January 3, 2023

Respectfully submitted,

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