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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas R. Keith Kelly, Circuit Court Judge

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Appellant Case No. 2022-001557
Civil Action Case No. 2016-CP-42-01854

____

Chandelle Property Owners Association, Respondent,

v.

James Douglas Armstrong, Jane Armstrong, Warren Johnson, Rhonda Johnson, John K. Payne, Ruth G. Payne, and Jane Van Wieren as Trustee of the Greer R.G. Irrevocable Property Trust dated October 25, 2006, Appellant.

____

INITIAL BRIEF OF APPELLANT

____

Respectfully submitted,

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN IGNORING THE FACT THAT THE CCR's PROHIBITED THE PLAINTIFF FROM INCURRING DEBT IN EXCESS OF $50,000.00 WITHOUT A VOTE OF THE ASSOCIATION AND THE FACT THAT THE CCR's ONLY ALLOWED THE ANNUAL ASSESSMENTS TO BE USED FOR SUBDIVISION MAINTENANCE?

2. DID THE TRIAL COURT ERR IN AWARDING BACK ASSESSMENTS AND MISAPPLY THE LAW THAT NEGATIVE RECIPROCAL EASEMENTS/COVENATS ARE TO BE APPLIED RETROSPECTIVELY AND NOT RETROACTIVELY?

3. DID THE TRIAL COURT ERR IN AWARDING BACK ASSESSMENTS CLAIMED IN A LEGAL DEBT COLLECTION CAUSE OF ACTION WHEN THE APPELLANTS HAD A RIGHT TO HAVE THIER COMPULSORY LEGAL COUNTERCLAIMS TRIED FIRST?

4. DID THE TRIAL COURT ERR IN AWARDING THE SUMS CLAIMED UNDER THE RESPONDENT'S DEBT COLLECTION ACTION IN THE HEARING FOR SUMMARY JUDGMENT ON RESPONDENT'S REQUEST FOR EQUITABLE RELIEF ON THE IMPLIED NEGATIVE COVENANT CAUSE OF ACTION SINCE THE RESPONDENTS ARE REQUIRED TO EXHAUST THEIR LEGAL REMEDIES PRIOR TO RESORTING TO EQUITABLE REMEDIES?

5. DID THE COURT ERR IN AWARDING BACK ASSESSMENTS WHILE DISCOVERY WAS NOT COMPLETE ON THE ISSUE OF THAT DEBT BEING INCURRED BY THE BOARD IN POTENTIAL VIOLATION OF THE RECORDED BYLAWS?

6. DID THE COURT COMMIT AN ERROR OF LAW IN AWARDING BACK ASSESSMENTS THAT WERE OSTENSIBLY ATTORNEY'S FEES GUISED AS "ASSESSMENTS" AND BECAUSE THE COURT DID NOT CONSIDER THE REQUISITE REQUIREMENTS OF JACKSON V. SPEED.

STATEMENT OF THE CASE

This case was originally commenced on May 16, 2016. Plaintiff's first Complaint appeared to assert causes of action against the developer, ("CSC"), the transferee of the runway, Chandelle Runway, LLC ("CR"), and various individuals that appeared to be connected with the promotion (the "Promoters") of the Chandelle subdivision ("Chandelle"). An Amended Complaint was filed on June 2, 2016 which appeared to assert the same causes of action against the developer, CSC Developers, LLC ("CSC"), the transferee of the runway, Chandelle Runway, LLC ("CR"), and the Promoters of Chandelle, but added a ninth (9th) cause of action against those parties for "Negative Reciprocal Easement[s]". The Appellants filed Motions to Dismiss for, *inter alia*, Failure to State a Claim. An Order was issued dismissing the Appellants on April 24, 2017. Plaintiff then filed a Second Amended Complaint on July 19, 2017 seeking a declaratory judgment that the Appellants and others were subject to the CCR's on the equitable theory of reciprocal negative easements. The Plaintiff also brought a quiet title action against Appellants, realleged a cause of action for Reciprocal Negative Easements and again various causes of action against CSC, CR and the alleged promoters of Chandelle. CR and CSC filed for Chapter 11 Bankruptcy on April 23, 2018 which was eventually converted to a Chapter 7. The Bankruptcy Trustee conveyed the Runway and other Common Areas to the Association by Deed dated February 26, 2020 and recorded March 6, 2020 in the Spartanburg County Register of Deeds Office. The Plaintiff filed the orders on the motions for relief from the bankruptcy stays on July 15, 2020. On November 3, 2020, the Plaintiff filed a Third Amended Complaint which included a cause of action against Appellants for a Declaratory Judgment that Appellants were encumbered by the CCR's, the Runway License Agreements were void and certain paving easements granted to Appellants were void as the easements were granted after the filing of a Lis

Pendens. Plaintiff also filed a fourth cause of action that was legal in nature claiming the Appellants breached the covenants and claiming for "collection of assessments" as a result of the breach. (2016-CP-42-01584 Third Amend. Complaint, pp. 23-25) It is important to note that this collection action was filed almost two (2) years after the deposition of the Plaintiff's Rule 30(b)(6) witness, Billy Israel. That deposition took place on January 25th, 2018. Plaintiff's counsel refused to allow the deposition of Billy Israel to be taken again which necessitated the deposition of the new treasurer, Jeff Cooper prior to the hearing. Plaintiff also filed an equitable cause of action asking for the imposition of reciprocal negative easements. (2016-CP-42-01854 Third Amend. Complaint pp. 22-23)

Appellants filed their Third Amended Answer, Counterclaim and Third-Party Complaint on November 24, 2020. The Answer asserted general denials, affirmative defenses of Laches, Statute of Frauds and Waiver, a Defense of Lack of Authority and Lack of Standing because all of the Board terms had expired in 2012 and Equitable Estoppel/Unclean Hands for, *inter alia*, failure to conduct votes to replace the Board and violation of the covenants. Appellants then averred counterclaims of Conversion for guising assessments as being for that purposes of maintenance while diverting money to its lawyers, a Breach of Fiduciary Duty and Bad Faith, Equitable Indemnity, Tortious Interference with Contractual Relations dealing with the Runway License Agreements, Fraud in guising assessments for common area maintenance and diverting funds to its lawyers, a Declaratory Judgment action for various issues, Self-Dealing, Negligence, Accounting and most importantly Breach of the CCR's/Breach of Contract alleging the Board's assessments violated the CCR's and By-Laws in assessing fees to pay for debt incurred in violation of the By-Laws. (2016-CP-42-01854 Third Amend. Answer, Counterclaim and Third-Party Complaint)

This appeal arises out of a grant of Respondent's Motion for Partial Summary Judgment; particularly, the entry of a monetary judgment for "back assessments" in conjunction with the hearing on the imposition of reciprocal negative easements. There were two motions for summary judgment heard simultaneously; the Plaintiff's Motion (Plaintiff's Motion for Partial Summary Judgment filed August 19, 2022) and the Plaintiff and Third Party Defendants' Motion for Summary Judgment seeking to dismiss the Counterclaims and Third Party causes of action (Plaintiff and Third Party Defendants' Motion for Partial Summary Judgment filed July 29, 2022). As all of the facts were pertinent to both motions, the court made no distinction as to which evidence applied solely to one motion or the other. At the beginning of the hearing, Appellants conceded that they would most likely be brought into the subdivision under the reciprocal negative easement theory, but that there were genuine issues of material fact surrounding the back assessments as those assessments were the product of the Plaintiff's violation of the By-Laws in incurring debt of greater than $50,000.00 without the requisite vote of the members of the association (By-Laws § 8.2(i)) and in that Annual Assessments were supposed to be for the purposes of subdivision maintenance only (CCR's §11.1(a)). (Tr. p. 2, line 21 - p. 3, line 22; p.9 line 7-13; p. 10, line 14-25.) The Order on appeal concerns the court's ruling that regardless of the provisions of the By-Laws and CCR's, the Appellants had to pay the assessments to satisfy the debt accumulated by the Plaintiff. All of the debt Plaintiff was seeking to recover was for the accumulated attorney's fees that were being carried by the Plaintiff's lawyers, McCabe, Trotter and Beverly, P.C.. There is evidence in the record that the law firm told the Board of Directors not to worry about those prohibitions in the By-Laws. (Israel Dep. p.111, line 10-18.) The Motion was heard on September 13, 2022 and the Order on appeal was filed October 29, 2022 (the

“Order”). The court ordered the Appellants to pay the back assessments in the amount of $145,250.00. The Appellants filed and served the Notice of Appeal on November 1, 2022.

FACTS

This case concerns the Chandelle Subdivision in Spartanburg County (“Chandelle”) which is a private aviation subdivision containing a private airstrip with many of the residents being active pilots housing their aircraft in privately owned hangars constructed on their lots along with their residences. From the inception of the subdivision, the residents had used and maintained the runway under license agreements with the developer, CSC Developers, LLC (“CSC”). The residents paid CSC fees to maintain and operate the runway. The case was originally filed in efforts to have the runway and other common areas conveyed to the Chandelle Property Owners Association and to impose the Declaration of Covenants, Conditions and Restrictions (“CCR’s”) on lots that were not properly bound for one reason or another. The community By-Laws were also filed with the CCR’s and empowered the Board of Directors “[t]o borrow funds to pay for any expenditure or outlay required pursuant to the authority granted by the provisions of the Declaration and these By-Laws and to authorized the appropriate officers to execute instruments evidencing such indebtedness as the Board of Directors may deem necessary; ***provided, however, that the Board shall not borrow more than Fifty thousand and no/100 ($50,000.00) Dollars or cause the Association to be indebted for more than $50,000.00 at any one time without the approval of a majority of votes of both classes of membership.”*** (By-Laws § 8.2(i)). The Board of Directors was issuing annual assessments to the members to pay debts in excess of the prohibitions of the By-Laws and in contravention of the purpose of Annual Assessments as set forth in the CCR’s. (emphasis added) (CCR’s § 11.1(a)) Appellants refused to pay any further assessments because of the lack of authority to incur the debt and

because annual assessments were to be for the purposes of the maintenance of the subdivision. The Board stopped maintaining any of the common areas or the runway in 2013. (Israel Dep. p.30, line 14-23) Prior to the institution of the action, Plaintiff called a meeting of the association wherein its attorney, Ryan McCabe, asked the lot owners to execute a document entitled "Consent Agreement and Ratification Addendum Chandelle Property Owners Association." (*See*, Joint Affidavit of James Douglas Armstrong, et. al., Exhibit 1, the "Consent Agreement"). The Appellants and a handful of other lot owners refused to sign the Consent Agreement as presented because of objectionable language such as; (1) "the Lot Owner(s) agree that this instrument shall bind the Subject Lot to the Declaration as explained herein, ***irrespective of any decision by a court of competent jurisdiction*** that the Declaration itself originally failed to bind the Subject Lot"; (2) "***the Lot Owner(s) ratify and approve of the past actions of the Board of Directors*** and the Association as it relates to levying assessments and enforcing covenants in good faith reliance on the applicability of the covenants at issue and actions taken to establish certainty regarding the restrictions applicable to the Property within Chandelle, ***including, <u>without limitation</u>, instituting lawsuits***; and (3) "the ***Lot Owner(s) agree to be bound by the outcome of any suit by and between the Association and the Declarant, in both their corporate and individual capacities, and/or any binding settlement agreement entered into by the Association through its Board of Directors relating to a suit*** with the Declarant and regarding the restrictions applicable to the Subject Lot to the Declaration in particular or the Association in general. Notwithstanding this provision, the Lot Owner(s) agree that this instrument shall bind the Subject Lot to the Declaration inasmuch it is voluntarily executed below. . .." (emphasis added).

This case has been a constant struggle to even get the Plaintiff to produce proof of the very debt it was trying to collect. Appellants filed a motion to compel on August 18, 2021 which

was heard on October 1, 2021. The court issued instructions on drafting its order by e-mail on November 10th, 2021 with no order being issued until February 10, 2022. Appellants filed another motion to compel on February 10, 2022 complaining that the Plaintiff had not complied with the previous discovery order in that Plaintiff had not produced the invoices of its attorney's fees which were the only debts the Appellants were being sued over. The court issued another order on July 22, 2022 which required the Plaintiffs to produce the attorney's billing records, but that such records were to be produced such that the attorneys did not have to disclose detailed information about the billing, but that the attorneys had to produce a summary of such billings. Plaintiff turned over those records on August 3, 2022, just two months before the scheduled trial date and approximately a year after the original motion to compel was filed. The Third Party Defendants filed a Motion for Partial Summary Judgment on July 26, 2022 and Plaintiffs filed their Motion for Partial Summary Judgment on August 19th, 2022. Jeff Cooper, the Plaintiff's Treasurer, was noticed for his deposition to be taken on August 23, 2022, but Plaintiff's counsel cancelled that deposition and would not produce that witness for a deposition until after the hearing on its August 19th Motion for Summary Judgment which was heard on September 13, 2022 (*See,* Tr. p. 8, line 7-17.) The Order under appeal ("Order") was filed on October 29, 2022. Jeff Cooper was produced for his Deposition on September 22, 2022 wherein it was discovered that the Plaintiff was still in debt to its attorneys for approximately $166,000.00 all of which was claimed to be attributable to these particular Appellants. (Cooper Dep. p.29, line 16-20). After the deposition of Jeff Cooper and prior to the issuance of the Order, Appellants filed a Motion for Partial Summary Judgment on the issue of the accumulation of debt. The issuance of the Order and necessity to appeal made that motion moot.

By the end of 2017, the Board had accumulated debt in the form of attorney's fees in the amount of $151,709.23. By the end of 2018, the Board had accumulated $252,126.00 in debt in the form of attorney's fees. By the end of 2019, the Board had accumulated 331,682.80 in debt in the form of attorney's fees. By the end of 2020, the Board was still carrying 147,814.70 in debt in the form of attorney's fees. Being limited by the records produced, it appears that as of July 15, 2022 the Board was still carrying $270,492.15 in debt in the form of attorney's fees.

The Motion for Summary Judgment for which the Order was granted, requested a determination that there was no genuine issue of material fact that Defendants were subject to the Restrictions and Covenants of the Chandelle Subdivision as originally filed an amended from time to time by the Declarant, CSC Developers, LLC ("CSC") and the Board of Directors that was originally appointed by CSC. (Plaintiff's Motion for Partial Summary Judgment) The Order found that the Appellants were bound by the CCR's since the inception of the Chandelle subdivision (a retroactive application of the CCR's) and entered judgment on the Appellants in a total sum of $145,250.00.

STANDARD OF REVIEW

In reviewing a grant of summary judgment, our appellate court applies the same standard as the trial court under Rule 56(c), SCRCP. *Quail Hill, LLC v. County of Richland,* 387 S.C. 223, 692 S.E.2d 499. Summary judgment is proper if, viewing the evidence and inferences to be drawn therefrom in a light most favorable to the nonmoving party, the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP; *Id*. at 505. Summary Judgment should be granted only if there is no genuine issue as to any material fact of the litigation. Rule 56, SCRCP. Summary judgment is not appropriate where

further inquiry into the facts of the case is desirable to clarify the application of the law. *Gadson v. Hembree,* 364 S.C. 316, 613 S.E.2d 533 (2005); *Montgomery v. CSX Transp., Inc.*, 362 S.C. 529, 608 S.E.2d 440 (Ct.App.2004). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Montgomery v. CSX Transp., Inc.,* 376 S.C. 37, 656 S.E.2d 20 (2007) (Shearouse Adv. Sh. No. 1 at 11); *Bargus v. Wessinger,* 303 S.C. 412, 401 S.E.2d 169 (1991); *Nelson v. Charleston County Parks & Recreation Comm'n,* 362 S.C. 1, 605 S.E.2d 744 (Ct.App.2004). The Court of Appeals reviews a grant of summary judgment using the same "yardstick" as the trial court: it views the facts in the light most favorable to the non-moving party, and draws all reasonable inferences in her favor. *Abdelgheny v. Moody* 432 S.C. 346, 852 S.E.2d 225 (S.C.App. 2020).

Generally, only a mere scintilla of evidence is required to defeat a motion for summary judgment when the burden of proof is by a preponderance of the evidence. Rules Civ.Proc., Rule 56(c). *Weston v. Kim's Dollar Store* (S.C.App. 2009) 385 S.C. 520, 684 S.E.2d 769, *rehearing denied, certiorari granted, affirmed and remanded* 399 S.C. 303, 731 S.E.2d 864. In cases where the burden proof is a preponderance of the evidence, typically, all an appellant needs to show to the appellate court is that it presented at least a mere scintilla of evidence to the lower court to withstand the motion for summary judgment. *See e.g.*, *Turner v. Milliman* 392 S.C. 116, 708 S.E.2d 766 (2011).

Summary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery; nonetheless, the nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is not merely engaged in a fishing expedition. *Dawkins v. Fields* 354 S.C. 58, 580 S.E.2d 433 (2003), *rehearing denied*.

ARGUMENT

1. THE TRIAL COURT ERRED IN THAT IT IGNORED THE FACT THAT THE BY-LAWS PROHIBITED THE PLAINTIFF FROM INCURRING DEBT IN EXCESS OF $50,000.00 WITHOUT A VOTE OF THE ASSOCIATION AND THE CCR's ONLY ALLOWED THE ANNUAL ASSESSMENTS TO BE USED FOR SUBDIVISION MAINTENANCE.

It is clear and unmistakable that the Article 8.2(i) of By-Laws prohibited the Plaintiff from incurring debt in excess of $50,000.00 without taking a vote of the members. (Complaint Ex. A, By-Laws, Article 8.2(i)). It is further clear that the assessments charged to these Appellants alone ($145,250.00) exceeded that limit. (Order p. 23). It was presented to the court that the Association President, Billy Israel, testified in his deposition that (1) the debt provision was exceeded; (2) the Board took no vote of the association; and (3) that the Board acted *ultra vires*. In his deposition, Billy Israel was asked, "[h]ave you applied or asked for a vote from the members of the association to accumulate more than $50,000 in debt? He answered, "[n]o." He was then asked,"[a]nd you have accumulated more than $50,000 in debt? He replied, "[y]e**s.** (Defendant's Memo. In Opp. To Plaintiff's Motion for Summary Judgment p.8-11;& Ex. A.; Israel Dep. p.110, line 22-25 – 111, line 2). Billy Israel further testified that he was told by his lawyers (the very folks getting paid through the wrongful acts) not to be concerned about the provisions of the By-Laws. He testified,

> "This -- this paragraph in the bylaws was a concern of ours, and the legal advice that we got was not to be concerned about it, that, you know, we're doing what we believe is the best thing to do. And, again, because of the adversaries that belong to the association, we have not shared all of this information about these legal fees with them, and -- and there's advice from my attorney that I can't discuss with you about that matter." (Israel Dep. p.111, line 10-18.)

The Appellants argued this issue to the court in the hearing. (Tr. p. 3, line 16-22) The court simply ignored the well-established law that "Restrictive covenants are to be construed most strictly

against the grantor and liberally in favor of the grantee; all doubts being resolved in favor of a free use of property and against restrictions." *Sprouse v. Winston,* 212 S.C. 176, 46 S.E.2d 874 (1948). Most importantly, Appellants brought a counterclaim and third-party complaint for a breach of the CCR's which is a contract between the Appellants and the Plaintiff. It was clear from the deposition of Billy Israel that the Board incurred greater than $50,00.00 in debt in violation of the By-Laws. (Israel Dep. p.109, line7-p. 110, line 2). The law is clear that the CCR's are contracts and that the terms are to be strictly construed and not enforced unless the obligations imposed are worded clearly and unambiguously. Even assuming, *arguendo*, that the lower court found the CCR's ambiguous and had to interpret them, the CCR's would have to be construed in favor of the Appellants. "Restrictive covenants are to be construed most strictly against the grantor and liberally in favor of the grantee; all doubts being resolved in favor of a free use of property and against restrictions." *Sprouse v. Winston,* 212 S.C. 176, 46 S.E.2d 874 (1948).

All assessments billed to Appellants were categorized as "Annual Assessments" and were billed out on a yearly basis. (Israel Dep. p.94, line 15-25). Those assessments were used to pay the debts owed to Plaintiff's attorneys. The CCR's provided that Annual Assessments were to be "for the purpose of funding the maintenance fund." (Complaint, Ex. A; CCR's, Section 11.1(a)).

In *Lovering v. Seabrook Island Prop. Owners Ass'n*, the Court opined,

> "As a matter of general law, a nonprofit corporation has the power to enforce the collection of dues and charges in accordance with the provisions of its by-laws. *See* Section 33–31–100, Code of Laws of South Carolina, 1976. ***In this case, however, neither the protective covenants nor the by-laws give the Association power to levy special assessments. The protective covenants and the by-laws authorize the Association to impose only an annual maintenance charge.*** The annual maintenance charge must be based on the assessed value of the property for tax purposes. It may be adjusted from year to year, but still must be based on assessed value for taxation. The moneys collected are to be used only for the purposes enumerated in the

> by-laws. Under the rules of construction outlined above, the specification of the power to levy an annual maintenance charge limits the power of the Association to impose other assessments on property owners within the Seabrook Island subdivision. It operates as an implied prohibition against the levying of special assessments. Therefore, the Association was without power to impose a special assessment, even if its object was to carry out a legitimate corporate purpose. ***A permissible purpose cannot be accomplished by a prohibited means***. *See Smith v. Cornelius,* 41 W.Va. 59, 23 S.E. 599 (1895)." *Lovering v. Seabrook Island Prop. Owners Ass'n*, 289 S.C. 77, 83–84, 344 S.E.2d 862, 866 (Ct. App. 1986), *overturned due to legislative action on a different issue, aff'd as modified*, 291 S.C. 201, 352 S.E.2d 707 (1987), *overturned due to legislative action on a different issue.* (emphasis added).

Furthermore, even if the lower court could somehow justify Annual Assessments to include the attorney's fees to bring this suit, the fact that the fees were debts of the Association greater than $50,000.00 and incurred without the requisite vote of the By-Laws clearly violated the provisions of the corporate documents of the Association. What makes it even worse is that the beneficiaries of the violations were the very attorney's that advised the Board to accumulate the debt and bill it out as annual assessments. (Israel Dep. p. 102; line 9-18).

Appellants certainly introduced more than a scintilla of evidence that there was a genuine issue of material fact that should be presented to a jury and the court ignored the well settled law regarding the construction and application of restrictive covenants. Moreover, the order denying Plaintiff and Third Party Defendants' Motion for Partial Summary Judgment entered by the court prior to the entry of the Order on appeal (the "First Order" dated October 19,2022), ruled that Defendants/Appellants presented sufficient evidence to withstand Plaintiff and Third Party Defendants' motion for summary judgment on all of Defendant's Counterclaims and Third Party Causes of action which is completely inconsistent with the Order on appeal. Again, these two motions were argued simultaneously with no distinction between who was arguing or when. In ignoring the well-settled contractual law regarding the application of restrictions, the court committed and abuse of discretion which should be reversed by this Court.

An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support. *Patel v. Patel,* 359 S.C. 515, 529, 599 S.E.2d 114, 121 (2004). The appellate court can reverse a lower court when the lower court commits an abuse of discretion. *See e.g., Cavalier v. R.N. Corley,* 247 S.C. 509, 148 S.E.2d 372 (1966). As such, this Court should reverse the lower court and remand for trial consistent with this opinion.

2. BECAUSE NEGATIVE RECIPROCAL EASEMENTS/COVENATS ARE TO BE APPLIED RETROSPECTIVELY AND NOT RETROACTIVELY, THE CIRCUIT COURT COMMITED AN ERROR OF LAW IN AWARDING BACK ASSESSMSNETS.

An action for the imposition of negative reciprocal easements is an action in equity. *See* e.g., *Bomar v. Echols*, 270 S.C. 676, 681, 244 S.E.2d 308, 310 (1978); citing *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976). "A legal question in an equity case receives review as in law." *Sloan v. Greenville County*, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003). In *Shipyard Prop. Owners' Ass'n v. Mangiaracina*, 307 S.C. 299, 309, 414 S.E.2d 795, 801–02 (Ct. App. 1992) the Court of Appeals wrote, "[h]ere, we think it important to examine the record for evidence whether at the time the last fixed assessment covenant was recorded there was in place a general scheme of covenants burdening the properties in the PUD with variable assessments. ***This is important because reciprocal negative easements are never retroactive***." *Citing, Sanborn v. McLean,* 233 Mich. 227, 206 N.W. 496 (1925) (emphasis added). Although the Appellants argued this law to the court, the judge found that the covenants were to be applied retroactively and awarded back assessments. (*See*, Tr. p. 24, line 10-12; p. 25, line 8-9) (*Al*so s*ee*, Appellant's Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment p. 6). Again, the court committed an error of law which should be reversed by this Court and remanded for future findings consistent with this ruling.

3. BECAUSE THE AWARD OF THE DEBT IN THE GRANTING OF SUMMARY JUDGMENT ON THE EQUITABLE ISSUE DEPRIVES THE APPEALANTS OF THEIR RIGHT TO HAVE THE COMPULSORY LEGAL COUNTERCLAIMS TRIED FIRST, THE AWARD OF THE DEBT IN THE MOTION FOR EQUITABLE RELIEF WAS AN ERROR OF LAW.

When a defendant in an equitable action asserts a compulsory counterclaim that alleges actions at law, both the plaintiff and the defendant have a right to have a jury trial on the issues raised by the compulsory legal counterclaim. *Johnson v. S.C. Nat'l Bank,* 292 S.C. 51, 54, 354 S.E.2d 895, 896 (1987). If there are factual issues common to both the legal and equitable claims, the legal claim, "absent the most imperative circumstances," must be tried, that is, disposed of, first. *Id.* at 56, 354 S.E.2d at 897 (internal quotation marks omitted). In such cases, the United States Supreme Court has cautioned that the discretion to try an equitable claim first "is very narrowly limited and must, whenever possible, be exercised to preserve jury trial." *Beacon Theatres, Inc. v. Westover,* 359 U.S. 500, 510, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959). Accordingly, the Court indicated that such discretion should only be exercised in the face of "irreparable harm" to the plaintiff if the legal claims were to be tried first. *Id.* "If there are no common factual issues, it is within the trial judge's discretion which claim will be tried first." *Johnson,* 292 S.C. at 56, 354 S.E.2d at 897. *Plantation Fed. Bank v. Gray*, 401 S.C. 507, 510, 737 S.E.2d 515, 517 (Ct. App. 2013).

In Plaintiff's Motion for Summary Judgment on the equitable claim of implied covenants, the lower court awarded Plaintiff back assessments from Appellants in a total sum of $145,250.00. Appellants, however, had pending legal compulsory counterclaims regarding the propriety of the assessments and argued to the court that the assessments were not assessed for the purposes enumerated by the CCR's. (Tr. p. 18, line 1-6). Plaintiff's counsel, Ely Grote, even told the court that the issue of the fees as assessments was a legal issue. His direct words were,

> . . . “[M]y understanding of their real disputes (referring to Appellants) is whether attorney’s fees - - whether you can assess for attorney’s fees. And I think that’s really a legal question based on the declaration, which is a part of the record. And our contention is, is that by law and by the declaration, the answer (sic) simply, yes.” (Tr. page 19, line 7-13).

The court even recognized early in oral argument that Appellants agreed to be bound by the original restrictions under the implied covenant theory, but that the real and separate issue was with how the assessments were to be used. (Tr. p. 10, line 14-21). Based on these comments, it should be assumed that the issue was a legal issue to be tried, but the court awarded the fees anyway.

Furthermore, Appellant’s Sixth Counterclaim for Declaratory Judgment asked for a finding regarding the following matters:

(a) Is it an improper action of the purported "Board of Directors" to use annual assessments to fund the current lawsuit ? (Restrictions and Covenants, Section 11.1(a) and 11.4); (b) Is it an improper action of the purported "Board of Directors" to levy special assessments for any other purpose, but for those enumerated in Section 11.1 (b) and 11.5of the Restrictions and Covenants?; (c) Even if implied negative or reciprocal easements are imposed on the Defendant, does that necessarily impose a burden to be governed by the Plaintiff Association, or does it simply impose an obligation to use and construct dwellings on the Defendant's property in accordance with the "common scheme" of development? ;(d) Even if implied negative or reciprocal easements are imposed on Defendant, is that imposition of restrictions retroactive or prospective as to the Defendant's imposed obligations? (e) Are the amendments to the restrictive covenants executed and filed by CSC Developers, LLC in Deed Books 72-G, Page 843 (recorded 7/10/2000) and Deed Book 88-H, Page 488 (recorded April 11, 2007) valid and enforceable? (f) Are the amendments to the restrictive covenants executed and filed by the Board of Directors in

Deed Books 99-L, Page 999 (recorded 11/02/2011) and Deed Book 101-Q, Page 96 (recorded 09/13/2012) valid and enforceable? (g) May the association impose "Annual Assessments" or "Special Assessments" for anything other than those purposes enumerated in the Protective Covenants? (h) Did the incompetent actions of the Plaintiff and/or TPD's violate the "business judgement rule" entitling Defendants to avoid the consequences of such decisions? (Defendants' Answer, Counterclaims and Third Party Complaint p. 13-14). The character, as legal or equitable, of an action is determined by the complaint in its main purpose, the nature of the issues as raised by the pleadings or the pleadings and proof, and the character of the relief sought under them. *Insurance Fin. Serv., Inc. v. South Carolina Ins. Co.,* 271 S.C. 289, 247 S.E.2d 315 (1978); *Bell v. Mackey,* 191 S.C. 105, 3 S.E.2d 816 (1939). Likewise, "A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Felts v. Richland County,* 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). *Sloan v. Greenville County*, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003). The rights to be determined in this case are contractual in nature so the character of the declaratory judgment action is legal.

The Appellants also had legal counterclaims for Negligence asserting that to the extent Appellants were found to owe assessments, that the Plaintiffs and Third Party Defendants ("TPD's") were the proximate cause of the damages and liable to Appellants for such amounts. Appellants also asserted a legal Counterclaim for a finding that the Plaintiff and/or TPD's violated the CCR's in violating the $50,000.00 debt limitation and using what was billed as "Annual Assessments" for purposes other than those enumerated in 11.1(a) of the Bylaws and/or imposing "special assessments" for purposes other than those enumerated in § 11.1(b) and § 11.5 of the Bylaws.

Appellants also asserted counterclaims and a third party complaint for Conversion, Tortious Interference with Contractual Relations, Breach of Fiduciary Duty/ Breach of Good Faith and Fraud. Conversion is a legal theory. *See e.g*., *Austin v. Independent Life and Acc. Ins. Co.* 296 S.C. 156, 162, 370 S.E. 2d 918, 922 (S.C. App. Ct. 1988). Fraud is a legal action. *See e.g*., Crew *v. Blackmon,* 289 S.C. 229, 233, 354 S.E. 2d 754, 756 (S.C. App. Ct. 1986). A breach of good faith is a legal action. *See e.g*. *Rushing v. McKinney,* 370 S.C. 280, 289, 633 S.E. 2d 917, 922 (S.C. App. Ct. 2006). Breach of Fiduciary Duty may be either legal or equitable and depends on the relief sought. Characterization of an action as equitable or legal, for purposes of the right to a jury trial, depends on the appellant's main purpose in bringing the action. *See e.g.* , *Verenes v. Alvanos*, 387 S.C. 11, 690 S.E.2d 771 (2010), Const. Art. 1, § 14. Appellants sought the relief of actual damages in the amount of sums paid as a result of the fraud along with pre-judgment interest thereby sounding as an action legal in nature. A Breach of Good Faith is an action in law. See e.g. *Rushing v. McKinney*, 370 S.C. 280, 289, 633 S.E.2d 917, 922 (Ct. App. 2006) ("Rushing asserted causes of action against McKinney and Block alleging breach of contract, fraudulent inducement, fraud, negligent misrepresentation, breach of good faith and fair dealing, and breach of fiduciary duty arising from this alleged contract. These are legal causes of action.").

What should have been the most obvious legal claim, however, is the Appellants' Breach of Covenants/Breach of Contract claims. Appellants' Tenth Counterclaim and Third-Party Complaint Cause of Action, based on these contractual circumstances alone, should have made it abundantly clear to the lower court that there were legal issues of material fact that should have been tried in the jury trial prior to entering a judgement for debt in the equitable cause of action. (Defendants' Answer, Counterclaim and Third Party Complaint pp. 14-17). By the circuit court's award of money damages under the Plaintiff's equitable claims and the Plaintiff, not

having shown irreparable harm, the court violated the holdings and procedural requirements of *Plantation Fed. Bank v. Gray* and the Appellate Court should reverse and remand the case for proceedings on the legal counterclaims prior an award of monetary damages, if any.

4. BECAUSE THE RESPONDENTS MUST EXHAUST THEIR LEGAL REMEDIES UNDER THEIR LEGAL DEBT COLLECTION CAUSE OF ACTION PRIOR TO RESORTING TO EQUITABLE REMEDIES, THE COURT COMMITTED AN ERROR OF LAW IN AWARDING THE DEBTS IN THE EQUITABLE CAUSE OF ACTION.

Plaintiff's Forth Cause of Action is "Breach of Governing Documents/Collection of Assessments and Other Allowable Charges." (Complaint p. 23-25). In essence, it is a legal action for breach of contract and collection of debt, however, the court awarded those debts through the equitable action at the summary judgment hearing.

> "Where a creditor applies for the aid of the Court of Equity against an equitable interest of his debtor, it is incumbent upon him to show that he has pursued his legal remedy to every available extent, and has failed-the mere allegation and proof of insolvency are not sufficient; it must be shown that the legal remedies have been exhausted." *See, e.g.*, *Kennedy v. Simons*, 13 S.C. Eq. 141 (S.C. App. Eq. 1838).

Because the court did not require Plaintiff to exhaust its legal remedies before awarding the money damages, it committed an error of law and the Court should reverse the lower court and remand for trial consistent with this opinion.

5. BECAUSE DISCOVERY WAS NOT COMPLETE ON THE ISSUE OF DEBT INCURRED BY THE BOARD AND THE DEBT STILL OUTSTANDNING, THE COURT COMMITTED AN ERROR OF LAW IN AWARDING BACK ASSESSMENTS THAT WERE A PRODUCT OF THE BOARD'S ACTIONS IN VIOLATION OF THE RECORDED BYLAWS.

"Summary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery; nonetheless, the nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and

that the party is not merely engaged in a fishing expedition." *Dawkins v. Fields* (S.C. 2003) 354 S.C. 58, 580 S.E.2d 433, *rehearing denied*.

Appellant argued to the court regarding the outstanding deposition of the relatively new Treasurer, Jeff Cooper. Jeff Cooper's deposition had been scheduled prior to the hearing, but Plaintiff's counsel cancelled that deposition. (*See* Tr. p. 18, line 7-15; *also see*, Appellant's Memorandum in Opp. to Plaintiff's Motion for Partial Summary Judgment pp. 3-4). Jeff Cooper's deposition was taken after the hearing and revealed that the Association was still in debt to its lawyers in the approximate amount of $166,000.00. (Cooper Dep., p. 29, line 6-20). This fact would have given Appellants more conclusive evidence that the Plaintiff and Board Members violated the prohibitions of the By-Laws prior to the institution of the lawsuit and had continued to violate the prohibitions of the By-Laws throughout the entire lawsuit. This fact would have also lent more credence to the Appellants' equitable defense of unclean hands and equitable estoppel. (*See* Appellant's Memorandum in Opp. to Plaintiff's Motion for Partial Summary Judgment p. 3-4). As such, the court committed an error of law and Appellants pray this Court reverse the award of back assessments and remand the case for trial in a manner consistent with these findings.

6. THE COURT COMMITTED AN ERROR OF LAW IN AWARDING BACK ASSESSMENTS THAT WERE OSTENSIBLY ATTORNEY'S FEES GUISED AS "ASSESSMENTS" AND BECAUSE THE COURT DID NOT CONSIDER THE REQUISITE REQUIREMENTS OF JACKSON V. SPEED.

The assessments claimed by Plaintiff were for attorney's fees incurred in all of the matters litigated in this action. Since 2013, the Board did not maintain any of the property in the Subdivision, yet collected dues. In his 2018 deposition, Billy Israel testified as follows:

14 Q. No, that's okay. Prior to 2013 when you delivered this
15 letter, what was the majority of the assessment paid
16 for? What did you use that money for?

17 A. Maintaining the grounds surrounding the runway and the
18 community. Mowing mostly, landscaping kind of things.
19 The majority was used for that.

20 Q. And after this letter, have you paid any money towards
21 that?

22 A. I don't believe we have, no. I'd have to look back to
23 be sure, but I don't believe we have.
(Israel Dep. p. 30, line 14-23)

Jeff Cooper testified that the Association still had outstanding legal debt of approximately $166,000.00 as of August 1, 2022. (Cooper Dep. p. 29, line 6- 24). The Association had no other debt. (Cooper Dep. 29, line 6-9). The only logical deduction one could make from those facts is that instead of relying on the prevailing party clause of the CCR's, the Board guised the attorney's fees as assessments and the court's award of the assessments was basically the award of attorney's fees. The "prevailing party" clause of Section 13.9 of the CCR's provides,

> "[i]f legal assistance is obtained to enforce any of the provisions of the Chandelle Documents, or in any legal proceeding (whether or not suit is brought) for damages or for the enforcement of the Chandelle Documents on the restraint of the violations, the prevailing party shall be entitled to recover all costs incurred by it in such action, including reasonable attorney's fees as may be incurred, or if suit is brought, as may be determined by the Court."

When testifying about guising the attorney's fees as Annual Assessments and hiding the information from the homeowners, Billy Israel testified,

19 Q. What about the burden that's going to be placed on the

20 homeowners association when you surprise them with what

21 their obligations are on debt to these outstanding

22 legal fees? What kind of burden is that going to

23 create?

24 A. I couldn't tell you what that's going to create in the

25 future. I have no idea.

1 Q. You're going to be obligated for that debt, and

2 obviously you know what your obligations are going to

3 be at the end of this litigation, whatever the fee is.

4 You are privy to what the bill is, but nobody else

5 knows.

6 MR. HARJEHAUSEN:

7 Object to the form of the question.

8 EXAMINATION RESUMED BY MR. HAWKINS:

9 Q. Correct? Nobody else knows but you and the board.

10 A. No, that's not correct.

11 Q. Okay. So maybe one guy on the architectural committee?

12 A. No, that's not correct either.

13 Q. Well, that's what you said earlier. You said you

14 didn't tell anybody. You haven't told anybody what---

15 A. I didn't say that I would know what that obligation was

16 at the end, and that's what you just asked me.

17 Q. You know that that obligation is building and building

18 and building, don't you?

19 A. I do know that, yes.

20 Q. And you don't feel like you should tell your

21 constituents what those obligations are?

22 A. I don't conduct my responsibilities and duties on the

23 way I feel. I do that based on a number of other

24 guidance that I can refer to, one being this

25 declaration, the other being my legal representatives.

1 Q. So you think it's more prudent to clandestinely

2 accumulate debt and just throw it on the homeowners at

3 the end? You think that's more prudent?

4 MR. HARJEHAUSEN:

5 Object to the form of the question.

6 MR. GROTE:

7 Object to the form.

8 EXAMINATION RESUMED BY MR. HAWKINS:

9 A. If you're saying that I'm clandestinely doing

10 something, you're going to have to get the definition

11 of that out before I can agree to that statement.

12 Q. Well, you're not telling your homeowners the amount of

13 debt that you're accumulating, are you?

14 MR. GROTE:

15 Object to the form.

16 MR. HARJEHAUSEN:

17 Object to the form of the question.

18 EXAMINATION RESUMED BY MR. HAWKINS:

19 A. I've already answered that question.

20 Q. I'm asking you the question again. You're not telling

21 them, are you?

22 A. No.

(Israel Dep. P. 102, line 19 – p.104, line 22)

It was clear that the CCR's had provisions for assessments that were separate and distinct from an award of attorney's fees to a prevailing party. Furthermore, notwithstanding the fact that the legal determination of who is in breach of the CCR's had not been determined, even if the court were to award these attorney's fees, the court must consider the factors of *Jackson v. Speed* which it did not do. In an award of attorney's fees, the court must consider the six factors of *Jackson v. Speed* and on appeal there must be sufficient evidence in the record to support each factor. In *Jackson v. Speed,* the Court wrote, . . .

> "the court should consider the following six factors when determining a reasonable attorney's fee: (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; and (6) customary legal fees for similar services. *Blumberg, supra.* Further, on appeal, an award for attorney's fees will be affirmed so long as sufficient evidence in the record supports each factor. *Jackson v. Speed*, 326 S.C. 289, 308, 486 S.E.2d 750, 760 (1997)

There is no evidence on the record that the lower court considered these factors and as such, the Court should reverse the award of these fees and remand the case for findings consistent herewith.

CONCLUSION

Based upon the preceding facts and argument, Appellant respectfully prays that the Court reverse the Order of the lower court for money damages and remand for further proceedings consistent with this opinion.

Respectfully submitted,

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