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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Brian L. Boger, Special Referee

Case No. 2022-000947

Lisa Cruz, ... Respondent,

vs.

Heyward Bouknight and Kathy Bouknight, ... Appellants.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Table of Authorities 2

Statement of Issues on Appeal 4

Argument 5

Factual Background 5

Standard of Review 7

Analysis 7

I. The special referee properly granted summary judgment in favor of Respondent where there was no genuine issue of material fact as to whether Appellants' home was a trailer for the purposes of the restrictive covenant 7

II. The special referee properly ordered the removal of the manufactured home and Appellants failed to preserve any argument to the contrary. 15

Conclusion 17

TABLE OF AUTHORITIES

Cases

Bibco Corp. v. City of Sumter, 332 S.C. 45, 504 S.E.2d 112 (1998) 12–13

Buffington v. T.O.E. Enters., 383 S.C. 388, 680 S.E.2d 289 (2009).......... ...7, 16

Dawkins v. Fields, 354 S.C. 58, 580 S.E.2d 433 (2003) 7

First Sav. Bank v. McLean, 314 S.C. 361, 444 S.E.2d 513 (1994).......... 15

Heape v. Broxton, 293 S.C. 343, 360 S.E.2d 157 (Ct. App. 1987).......... ....9, 13

Henry v. Chambron, 304 S.C. 351, 404 S.E.2d 518 (Ct. App. 1991).......... 14

Hickman v. Hickman, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990) 15

Penny Creek Assocs., LLC v. Fenwick Tarragon Apartments, LLC,
375 S.C. 267, 651 S.E.2d 617 (Ct. App. 2007).......... 8

Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 363 S.E.2d 891 (1987)..........7–8, 16

Stevens & Wilkinson of S.C., Inc. v. City of Columbia,
409 S.C. 568, 762 S.E.2d 696 (2014) 7

Taylor v. Lindsey, 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998)..........8

State Statutes

S.C. Code Ann. § 23-43-20(5)..........8

Manufactured Home Park Tenancy Act, S.C. Code Ann. §§ 27-47-10 – 620 8

S.C. Code Ann. § 31-17-20 8

S.C. Code Ann. § 31-17-310..........8

S.C. Code Ann. § 40-29-20 ....8, 11, 12, 13

S.C. Code Ann. § 40-29-340 10

S.C. Code Ann. § 56-19-10 9

S.C. Code Ann. § 56-19-210 8

S.C. Code Ann. § 56-19-500 8

S.C. Code Ann. § 56-19-510 14

S.C. Code Ann. § 56-3-710 9

Federal Statutes and Regulations

24 C.F.R. § 3280.904 11

2 U.S.C. § 5402(6) 12, 13

State Court Rules

Rule 56(c), SCRCP 7

Rule 59(e), SCRCP 15

Other Sources

Housing and Development Act of 1980, Pub. L. No. 96–399, 94 Stat 1614........9

Housing and Community Development Act of 1974, Pub. L. No. 93–383, 88 Stat 633 10

Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary 9

COUNTERSTATEMENT OF ISSUES ON APPEAL

I. The special referee properly granted summary judgment in favor of Respondent where there was no genuine issue of material fact as to whether Appellants' home was a trailer for the purposes of the restrictive covenants.

II. The special referee properly ordered the removal of the manufactured home and Appellants failed to preserve any argument to the contrary.

ARGUMENT

Factual Background

Brookgreen Terrace, a subdivision in Lexington County, is subject to restrictive covenants recorded October 1, 1954. (R. 132). The covenants include a variety of prohibitions and restrictions on the use of the land and the homes erected on it, including:

> (1) No trailer, basement, tent shack, garage, or barn shall at any time be used as a residence, either temporary or permanent.
>
> (2) …
>
> (3) Dwellings erected shall be of modern design and construction and shall have curtain walls of masonry or brick underneath the building on all sides.
>
> (4) Dwellings shall have not less than five (5) average size rooms exclusive of bathroom, porches, and terraces, or the equivalent floor space of five average size rooms exclusive of bathroom, porches, and terraces, and shall have a value not less than $7,000 based on 1954 values.
>
> (5) No noxious or offensive trade, business, or vocation shall be operated or practices on any of said lots, nor shall anything whatsoever be done on the premises which may be or may become an annoyance to the neighborhood, or may injure the value of any other lot or lots in the area.

(R. 132). Aware of these restrictive covenants, Appellants Kathy and Heyward Bouknight purchased a manufactured home for their parcel within Brookgreen Terrace for use as their residence. (R. 59, 65). As part of the process, Appellants submitted a Mobile Home Affidavit for Lexington County, which included the assertion that the parcel had no other mobile homes "not count[ing] the mobile home pertaining to [that] request" and that Appellants did not own additional mobile homes. (R. 135). Despite recognizing their manufactured home qualified as a mobile home necessitating a Mobile Home Affidavit, Appellants ignored the prohibition against trailers and affixed their manufactured home to the parcel. (R. 74). Respondent Lisa Cruz, a

Brookgreen Terrace homeowner, filed the underlying complaint seeking to enforce the restrictive covenants and ordering Appellants to remove the structure from their property. (R. 30–32).

Both parties moved for summary judgment, with the central argument being whether a manufactured home was a trailer for the purposes of the restrictive covenants. (R. 44–45; 111–120). A hearing was held before the special referee June 3, 2020. (R. 154). By order filed January 27, 2022, the special referee granted summary judgment in favor of Respondent, citing caselaw, state statutes, and administrative opinions showing how the common usage of the trailer, mobile home, and manufactured home consistently reflects their synonymity. (R. 1–18). He therefore concluded that "the developer intended that the term 'trailer' would cover other types of synonymous prefabricated housing, such as manufactured or mobile homes" and Appellants were in violation of the restrictive covenant.[1] (R. 12). The special referee therefore ordered Appellants to remove their home from their lot in Brookgreen Terrace. (R. 18).

Appellants moved for reconsideration arguing the special referee's conclusion that the manufactured home was prohibited by the restrictive covenant against trailers was based on unsupported assumptions and improper application of the legal inquiry required. (R. 138–141). The special referee conducted a hearing and for the first time Appellants suggested that the proper relief was not removal of the home but cessation of use as a residence. (R. 175–76). The special referee took the matter under advisement and denied ultimately the motion by order filed June 23, 2022. (R. 19). Appellants then filed the instant appeal.

[1] The special referee also rejected Appellants' equitable defenses of abandonment and waiver, finding no evidence in the record to indicate the prohibition on trailers in Brookgreen Terrace has been abandoned or waived by the residents. (R. 17). Appellants have not appealed this holding.

Standard of Review

Summary judgment is designed to expedite disposition of cases do not require the services of a fact finder. *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003). When reviewing a grant of summary judgment, the Court applies the same standard applied by the circuit court pursuant to Rule 56(c), SCRCP and will affirm where the pleadings, depositions, affidavits, and discovery prove there is no genuine issue of material fact, and the movant must prevail as a matter of law. *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 576, 762 S.E.2d 696, 700 (2014). "In determining whether summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party." *Dawkins*, 354 S.C. at 69, 580 S.E.2d at 439.

Analysis

I. The special referee properly granted summary judgment in favor of Respondent where there was no genuine issue of material fact as to whether Appellants' home was a trailer for the purposes of the restrictive covenants.

The special referee did not err in concluding that Appellants' home violated the restrictive covenant against trailers. Trailer, as the developer meant in 1954, encompassed mobile homes, which are more modernly called manufactured homes. The fluidity with which these terms are commonly used is evident in the law and even in Appellants' testimony. The order of the special referee should therefore be affirmed.

"A restriction on the use of the 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." *Buffington v. T.O.E. Enters.*, 383 S.C. 388, 392, 680 S.E.2d 289, 291 (2009). Nevertheless, the rule of strict construction should "not be used to defeat

the clear express language of the covenant." *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987). "A restrictive covenant will be enforced if the covenant expresses the party's intent or purpose . . .." *Id.* "Restrictive covenants are contractual in nature, and thus, the language used in the restrictive covenant is to be construed according to its plain and ordinary meaning." *Penny Creek Assocs., LLC v. Fenwick Tarragon Apartments, LLC*, 375 S.C. 267, 271, 651 S.E.2d 617, 620 (Ct. App. 2007). "Words of a restrictive covenant will be given the common, ordinary meaning attributed to them at the time of their execution." *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998).

Appellants argue that "manufactured home" is more than mere euphemism or rebranding of a mobile home or trailer. In support of their argument, they spend significant time working to parse language in various statutory definitions; however, the question at issues is not so much statutory construction as it is the plain meaning of the words. The statutes and caselaw reflect that the ordinary use of those words has long been to use them interchangeably and that they are understood to be synonymous.[2] Manufactured home is simply the updated term for a mobile home

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[2] The unity of the terms manufactured home and mobile home can be observed throughout the code. *See generally* S.C. Code Ann. § 23-43-20(5) ("Mobile home" or "manufactured home" means any residential dwelling unit constructed to standards and codes as promulgated by the United States Department of Housing and Urban Development."). Title 56 requires a certificate of title for sale or mortgage of a "mobile home" under section 56-19-210 but describes the retirement of a title certificate of a "manufactured home" in section 56-19-500. In section 31-17-310, "mobile home" is stated to be defined by now-repealed 31-17-20; an Editor's Note directs the reader to the definition of "manufactured home" in section 40-29-20. Accepting the premise that the General Assembly recognizes a "manufactured home" as some distinct structure separate from "mobile home" or trailer would produce illogical results. For example, our General Assembly enacted established the Manufactured Home Park Tenancy Act, to govern the leasing of land in those home parks. S.C. Code Ann. §§ 27-47-10 – 620. Under Appellants' analysis, the Act would not apply to a "trailer park" or "mobile home park," or perhaps this would simply mean that the term trailer park is synonymous with a manufactured home park, and though the language may be legally updated, the common usage persists.

or trailer.

As this Court has already recognized, "trailer" is not an ambiguous term and "clearly includes a 'mobile home' within its meaning." *Heape v. Broxton*, 293 S.C. 343, 345, 360 S.E.2d 157, 159 (Ct. App. 1987). The two terms have been used synonymously for decades, including at the time the covenants were recorded. *See* "House trailer" *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/house%20trailer (defining "house trailer" to mean "mobile home" and noting the first known use of the term with that meaning was in 1921; *see also* "Trailer park" *Merriam-Webster.com Dictionary*, *id.* at https://www.merriam-webster.com/dictionary/trailer%20park (defining "trailer park" as "an area equipped to accommodate mobile homes" and noting the first known use of the term with that meaning was in 1937).[3]

The incorporation of the use of the term "manufactured home" in the mix came from Congress's modification of the United States Code to change the phrase "mobile home" to "manufactured home" in the Housing and Development Act of 1980, Pub. L. No. 96–399, 94 Stat 1614. *E.g., id.* ("Title VI of the Housing and Community Development Act of 1974 // 42 USC 5401 // is amended by striking out 'Mobile Home' each place it appears, other than in section 601 [where it is replaced with Manufactured Housing], and inserting in lieu thereof 'Manufactured

[3] The definitions cited by Appellants from Title 56 do not contradict this assertion. Section 56-19-10 of the South Carolina Code defines "mobile home" as "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'" and "house trailer" as "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 . . .." So both are vehicles equipped for transportation on streets and highways that are designed for use as a dwelling.

Home' and by striking out 'mobile home' each place it appears and inserting in lieu thereof 'manufactured home'."). Under the previous version, "mobile home" had been defined as "a structure, transportable in one or more sections, which is eight body feet or more in width and is thirty-two body feet or more in length, 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 therein." Pub. L. No. 93-383, 88 Stat 633. Congress changed only the words "mobile home" to "manufactured home," but the actual structure referenced remained the same. Structures referred to as mobile homes (or colloquially trailers) before 1976 are now called manufactured homes pursuant to the Department of Housing and Urban Development's (HUD) regulations.[4] But a change in parlance does not change the character of the thing. A rose is a rose and was always a rose. The modern flight attendant is different from a stewardess in name only, with the renaming embraced in a move to shift the public perception. Congress attempted to do the same by legislative enactment.

Therefore, Appellants' attempt to distinguish a trailer from a mobile home from a manufactured home is no more than a flawed semantics argument. Even Appellant's deposition testimony reflects the interchangeability of the words. When asked whether there was "anyone else with a manufactured home" in the development, Ms. Bouknight responded that "there is a single wide mobile home" around the corner from Respondent. (R. 66). When distinguishing the

[4] *See also* S.C. Code Ann. § 40-29-340 ("No person may sell or offer for sale a manufactured home manufactured after June 15, 1976, unless its components, systems, and appliances meet the criteria of compliance with the Construction and Safety Standards Act and have been properly certified by the Department of Housing and Urban Development.").

"trailer" she had previously sought to place in Brookgreen Terrace from the manufactured home, she said the difference was just the implementation of HUD regulations. (R. 63). Furthermore, Ms. Bouknight recognized the need to file a mobile home affidavit with the county. (R. 135). So federal law may have decided to call it something else, but elsewhere, including in the minds of Appellants, trailer, mobile home and manufactured home are terms that pass synonymously.

Nevertheless, Appellants work to draw distinction to the fact that their manufactured home was carried, not towed, to the location and from this fact assert the home "has never had wheels, a tongue, or other parts needed for towing down roads." App. Br. 10. Suggesting the manufactured home was never intended to be road-worthy is not in line with the basic elements of manufactured homes.[5] HUD's regulations include extensive specification as to the necessary components of the required transportation system and plainly envision the home being towed. *See* 24 C.F.R. § 3280.904 ("The transportation system must be designed and constructed as an integrated unit which is safe and suitable for its specified use. In operation, the transportation system must effectively respond to the control of the towing vehicle tracking and braking, while traveling at applicable highway speeds and in normal highway traffic conditions."). Furthermore, even the statutes referenced by Appellants specifically indicate that the structure is "transportable", has a "traveling mode", and need *not* be permanently affixed. *See* S.C. Code § 40-29-20(9) ("'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

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[5] It is not disputed that a manufactured home is built on a permanent chassis and must be titled with the Department of Motor Vehicles under state law. If the manufactured home was indeed never intended to be road worthy, it hardly makes sense to have to title it with the Department of Motor Vehicles.

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.").

The Supreme Court has recognized that the HUD standards for manufactured home construction dictate a towable structure on a chassis in *Bibco Corp. v. City of Sumter*, 332 S.C. 45, 504 S.E.2d 112 (1998). In that case, the City of Sumter's zoning ordinances excluded mobile homes from R-9 districts but allowed modular homes. *Id.* at 50, 504 S.E.2d at 115. Bibco made a rather convoluted federal preemption argument that the only difference between the two types of homes is the method of construction, and therefore the zoning was effectively "an attempt to dictate State construction standards for HUD-code manufactured homes" but those state standards are preempted by National Manufactured Housing Construction and Safety Standards Act of 1974. *Id.* In rejecting this argument, the Supreme Court noted that Sumter's ordinance defined mobile home as "a transportable structure of one or more sections built on a permanent chassis and designed to be towed." *Id.* at 51, 504 S.E.2d at 115. It thus concluded that a HUD-code manufactured home "would be considered a mobile home" under that ordinance. *Id.* In making that determination, the Court reviewed the federal definition of "manufactured home" found in 2 U.S.C. § 5402(6) which, like section 40-29-20 of the South Carolina Code, defines a manufactured home as "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 including the plumbing, heating, air-conditioning, and electrical systems contained therein."[6] The Court then distinguished the definition of modular home found in the ordinance, by emphasizing that modular homes are "not designed for ready removal to another site." *Id.* at 51–52, 504 S.E.2d at 116. The Court therefore rejected preemption and concluded "Bibco's mobile homes are excluded from R–9 districts not because they fail to comply with some State construction or safety standard **but because they are built on a permanent chassis and designed to be towed**." *Id.* at 52, 504 S.E.2d at 116 (emphasis added).

Furthermore, opting to place the manufactured home on a truck bed does not negate the fact it was constructed to be towable.[7] This Court has already observed as much in *Heape*, where the homeowner argued that the size and the fact that the home had been permanently affixed to the property distinguished the home from a trailer. 293 S.C. at 345, 360 S.E.2d at 158. In rejecting that argument, this Court found that

> a mobile home is a trailer is not changed by the fact that the wheels and the tongue were removed from each section, that the two sections were joined together and placed on a permanent foundation, and that the connected sections were attached to a septic tank and to water and power lines. The structure is still a trailer, its basic characteristics having not been changed by these actions.

Id. at 346, 360 S.E.2d at 159. The permanent installation of a manufactured home requires the

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[6] The only distinction between the federal statute and our state statute is that the version of 2 U.S.C. § 5402(6) cited in *Bibco* includes one other clause to the final sentence: "except that such term shall include any structure which meets all the requirements and with respect to which the manufacturer voluntarily files a certification required by the Secretary and complies with the standards established under this chapter." Therefore, despite Appellants' arguments that the definition of "manufactured home" found in section 40-29-20(9) does not suggest that the home is towable and equipped to be moved on highways, our Supreme Court has held the opposite is true.

[7] Appellants rely on Ms. Bouknight's testimony that the home did not have wheels and that she did not know that it ever did. As discussed *infra*, the wheels, axle, and hitch must be removed prior to affixing it to the property.

removal of the tow package, and therefore Appellants' home would not have wheels or a tow hitch when it was installed on the property. *See* S.C. Code Ann. § 56-19-510 ("(A) An owner of a manufactured home may affix the home to real property by: (1) installing the home in accordance with the required installation standards and removing the wheels, axles, and towing hitch . . . ."). Therefore, under federal regulations, state statutes, and precedent from this Court and the Supreme Court, a manufactured home is a towable vehicle that is necessarily equipped to be moved on streets and highways.

Appellants nevertheless reference *Henry v. Chambron*, 304 S.C. 351, 404 S.E.2d 518 (Ct. App. 1991). That case, which hinged on the question of whether the home at issue was a modular or mobile home, fails to support Appellants' position. *Id.* at 353, 404 S.E.2d at 519. Appellants do not contend their home is a modular home, and instead indicate they chose *not* to purchase a modular home because of the significant difference in expense. (R. 58–59). As *Henry* explains, the distinctions between the two structures are significant and include the very standards under which the homes must be constructed. Specifically, a modular home must be constructed according to local building codes—a mobile home does not. *Henry*, 304 S.C. at 352–53, 404 S.E.2d at 519; *see also* (R. 69) (noting that manufactured homes are subject to HUD standards).

Accordingly, the special referee's conclusion was wholly in line with the tenants of construction applicable to restrictive covenants. Strictly construing a restrictive covenant does not prevent enforcement of an unambiguous restriction. The meaning of the covenant at issue is unmistakable and though HUD updated the language to call a mobile home a manufactured home, it is the common usage that is at issue. The updates in safety and design brought on by technology and HUD regulations have not changed the basics of the structure. Many changes have occurred

in safety and technology since 1954, with significant ones in the automotive industry. But a car is still a car, even if they are now required to have seat belts and body designs have repeatedly transformed. They are all still built on a permanent chassis and designed for transportation. A manufactured home is also still built on a permanent chassis and even though there have been updates, it is designed to be the transportable, factory-built dwelling the restrictive covenant sought to keep out of Brookgreen Terrace with its prohibition on trailers.

II. The special referee properly ordered the removal of the manufactured home and Appellants failed to preserve any argument to the contrary.

Appellants also argue that the relief granted—requiring the removal of the home from the lot—was improper. Instead, since the restrictive covenant reference using the trailer as a residence, Appellants assert the proper remedy would be to preclude them from using it as a residence, not removal.

This argument is not properly before this Court. Appellants first raised this issue at the *hearing* for the Rule 59(e), SCRCP motion. It is well-settled that a party cannot argue an issue for the first time in a motion to alter or amend. *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) ("A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not."). Because it was not argued in the filed motion, it is not clear from the transcript that the special referee even realized Appellants intended to raise this as an actual legal argument. In neither the hearing—nor the brief—did Appellants cite to any law supporting this assertion or offer any explanation how that would be a sensible or equitable manner of enforcing the restrictive covenant. The argument was and is therefore abandoned. *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (finding argument abandoned where the appellant failed to "provide arguments or supporting authority for his assertion").

Respondent can only speculate as to what Appellants may attempt to argue, but it is enough to say it is simply too late to start that inquiry. Had Appellants brought this up previously, Respondent would have noted that the restrictive covenants also state that the land "shall be used for residential purposes only." (R. 46). Leaving a known uninhabitable structure on the property is not a residential purpose. The covenant also prohibits "anything whatsoever be done on the premises which may be or may become an annoyance to the neighborhood, or may injure that value of any other lot or lots in the area." (R. 46). Certainly, leaving an empty trailer on the property in a subdivision that has a restrictive covenant specifically preventing the use of that structure as a residence in this residential neighborhood would annoy the neighborhood and diminish the value of homes in the area.

Appellants were well-aware of the restrictive covenants prior to making the choice to purchase and affix their manufactured home to the property for them to use as a residence. (R. 61, 109). It would be wholly inequitable to allow them to violate the covenant and simply move out leave the structure on the property. The special referee therefore properly ordered its removal. *See Sea Pines Plantation Co.*, 294 S.C. at 274, 366 S.E.2d at 896 ("Although the issuance of a mandatory injunction depends upon the equities between the parties, the decision of whether to issue such relief rests in the court's discretion."); *Buffington*, 383 S.C. at 393, 680 S.E.2d at 291 (2009) (holding if a party against whom a restrictive covenant is enforced was on notice of the covenant when the party acquired the subject property, it would be inequitable to consider that party's financial loss in purchasing and improving the subject property).

CONCLUSION

The term "trailer" in the restrictive covenant is clear and unambiguously encompasses

Appellants' manufactured home an Appellants' challenge to the remedy is procedurally barred and should not be considered. Even so, there is not rationale in sense or equity to require anything other than removal. Accordingly, Respondent respectfully requests this Court affirm the order of the special referee.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014, order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information of Appellate Court Filings."

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