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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas
Fifteenth Judicial Circuit

The Honorable Daniel Coble,
Circuit Court Judge

APPELLATE CASE NO. 2023-000295

Gary L. Park and Cynthia Park..... Appellants,

vs.

Scott Barry Gutovitz and Caron Dawn Gutovitz..... Respondents,

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APPELLANTS' INITIAL BRIEF

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July 17, 2023.

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STATEMENT OF THE ISSUE ON APPEAL

1. **THE LOWER COURT ERRED IN DENYING THE PARKS' RIGHT TO HAVE THIS CASE TRIED BY THE COURT, AND NOT A JURY; AN ACTION TO ENFORCE AN RESTRICTIVE COVENANT OR EASEMENT IN REAL PROPERTY IS AN ACTION IN EQUITY**

INTRODUCTION

The Appeal at bar involves an action to enforce restrictive covenants by way of injunction. South Carolina law is clear: an action to enforce restrictive covenants by injunction is an action in equity. *Buffington v. T.O.E. Ent.*, 383 S.C. 388, 391, 680 S.E.2d 289, 290 (2009); *S.C. Dep't of Nat. Res. v. McClellanville*, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001); *Holling v. Margiotta*, 231 S.C. 676, 680, 100 S.E.2d 397, 399 (1957); *Gibbs v. Kimbrell*, 311 S.C. 261, 428 S.E.2d 725 (Ct.App.1993). The lower court erred in striking Respondents' jury trial demand because Parks have a substantial right to have this matter tried by the Court.

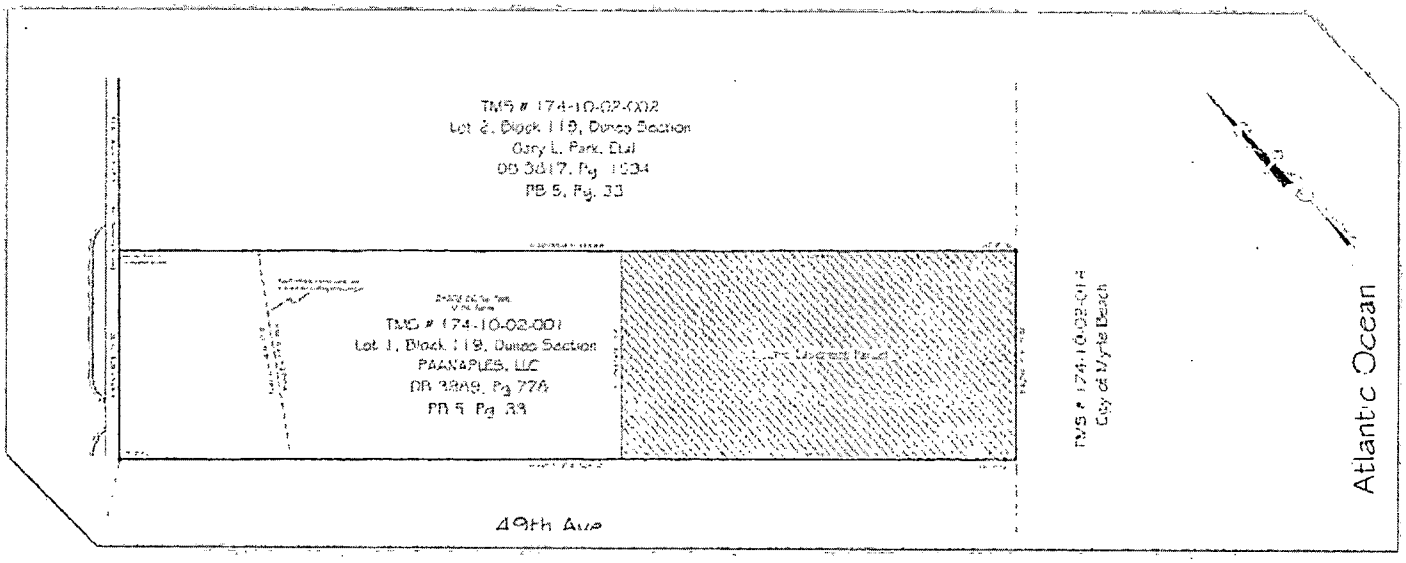
Under S.C. Code § 14–3–330(2), the Parks are required to appeal the underlying order immediately to avoid the waiver of their right to a non-jury mode of trial. Appellants respectfully pray for an Order of this Court Reinstating this Appeal.

BRIEF STATEMENT OF FACTS

In 2017, Plaintiffs' owned an oceanfront residence they had built with an address of 4902 North Ocean Boulevard in Myrtle Beach. An entity named PAANaples, LLC ("PAANaples") owned the vacant lot immediately to the south of Plaintiffs' residence, being the property which is the subject of this Action (hereinafter the "Property"), with a street address of 4900 N. Ocean Blvd., Myrtle Beach, South Carolina. (Complaint, ¶5, and Plat Book 5, Page 33, incorporated in the Complaint as "Complaint Exhibit A"). PAANaples, LLC placed a perpetual restrictive covenant by filing the "Scenic Easement Agreement," on July 13, 2017, in Horry County Deed Book 4025, pages 2283 to 2289, which restricted the oceanfront portion the Property, identified and defined as the "Scenic Easement Parcel." (Complaint ¶7, Scenic Easement Agreement being incorporated with the Complaint as "Complaint Exhibit B"). The Scenic Easement Agreement expressly states the Scenic Easement Parcel "shall be perpetually maintained and preserved as open space," and:

> [T]here shall be no new structures of any kind, together with any reconstruction thereof, placed or erected upon the Scenic Easement Parcel unless an application therefor, with plans and specification of such structures, together with a statement of the purpose for which the structure will be used, has been submitted to and written approval obtained from the Grantee. (Complaint Exhibit B, 1(a)).

The location and boundaries of the Scenic Easement Parcel are specifically identified by reference to and incorporation of the plat prepared by Norris & Ward Land Surveyors, P.A., recorded on May 4, 2017 in Horry County Plat Book 275, at Page 112. (Complaint ¶10, said Plat incorporated into the Complaint as "Complaint Exhibit C," as outlined in pink below):



On August 30, 2017, the Gutovitzs purchased the lot on the south side of the Plaintiffs' residence, which included the Scenic Easement Parcel subject to the Easement Agreement. In July 2018, Defendants requested permission from the Plaintiffs to build a "balcony" within the Scenic Easement Parcel, (Complaint ¶15, *See also* Dep. C. Gutovitz., Exh. 2). In response to the Defendants' request, Plaintiffs' employed counsel to amend the Easement Agreement for the sole benefit of Defendants. As a result, on or around September 19, 2019, the Parks and Gutovitzs signed the First Amendment to the Scenic Easement (hereinafter the "Easement Amendment") (Complaint ¶16-19, Easement Amendment incorporated in the Complaint as "Complaint

Exhibit D"), which states in pertinent part, "Park has agreed to allow Gutovitz to place **a** porch within the ... Easement Parcel, as defined in the Easement Agreement, so long as the following conditions are met:"

a. There shall be no change to the plans and specifications as submitted by Gutovitz to Park and attached hereto and made a part and parcel hereof as "Exhibit A." Any proposed change, of whatever kind, quality or nature, to the plans and specifications set forth in Exhibit A shall require the prior written consent of Park.

b. ****

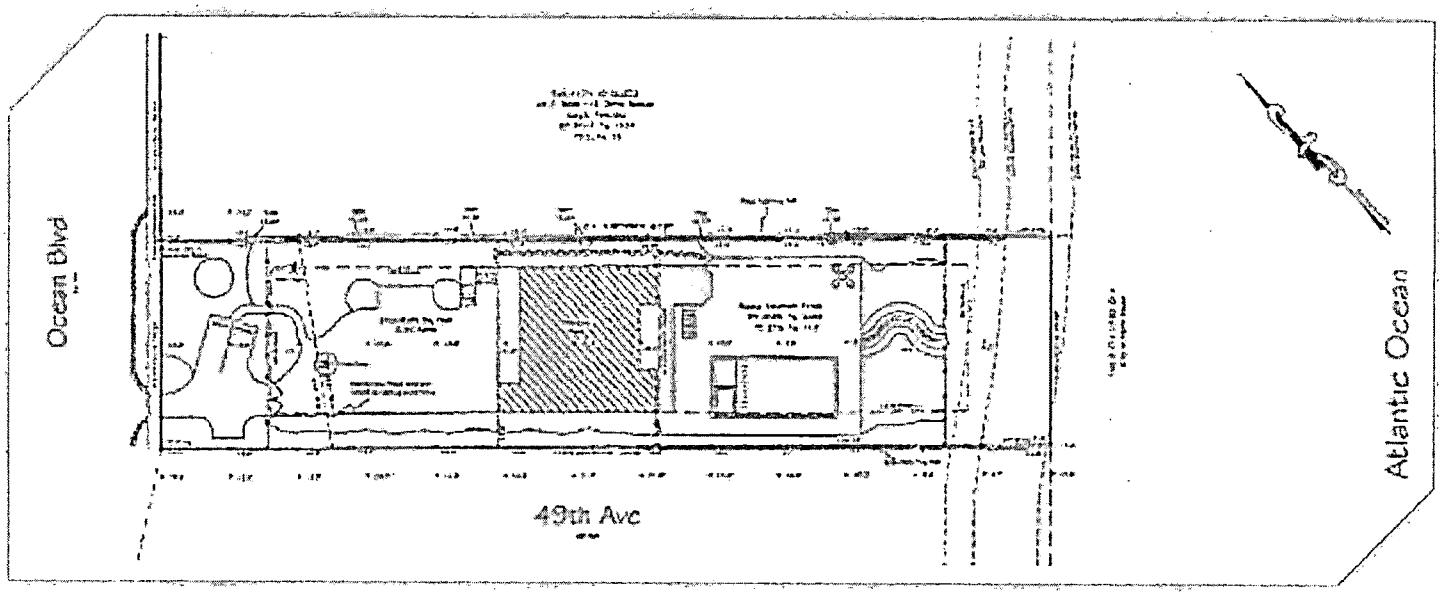
c. The position of the uncovered porch of the house (facing the ocean) owned by Gutovitz shall not exceed the position of the uncovered porch of the house owned by Park.

d. The porch shall remain open (not enclosed) now and in the future by any subsequent owners to Gotovitz.

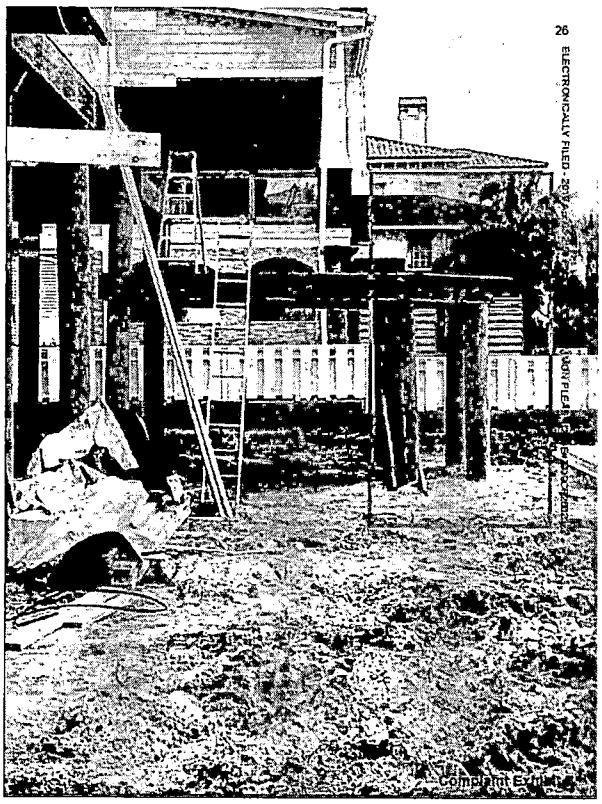
(Complaint ¶18, and Complaint Exhibit D, ¶2(a),(c)(*emphasis added*)).[1]

The Easement Amendment attached and incorporated an 8.5" x 11" depiction of the Gutovitzs' proposed porch, as shown outlined in pink below, as Exhibit A to the Easement Amendment. (Complaint ¶19, Complaint Exhibit D):

[1] While the Deposition Testimony of the Gutovitz and all of their contractors and witnesses was introduced and relied upon during the February 7, 2023 hearing on Appellants Motion to Strike Jury Trial Demand and Motion for Summary Judgment, that testimony is not directly relevant in this appeal. While the Defendants and each of their witnesses confirmed the violation of the restrictive covenants, none of these facts change the nature of the underlying Action, that being an action in equity to enforce a restrictive covenant upon real property. Therefore, other than the initial obvious violation of the Easement Amendment set forth and pictured in the Complaint, testimony regarding the continued and subsequent violations are intentionally excluded in this Appeal.



Soon after construction began in November of 2018, the Gutovitzs' violation of the Easements Agreements was readily apparent, as could be seen in the color picture attached to Plaintiffs' Complaint as Complaint Exhibit F, with a red box outlining the portion of a multi-level porch which was positioned closer to the ocean than Plaintiffs' porch. (Complaint ¶ 21, Complaint Exhibit F), as shown in the picture below.



The encroachment depicted above in Complaint Exhibit F was confirmed as a violation of the restrictive covenant by the email from Counsel for the Gutovitzs dated November 29, 2018, with an attached survey, both of which were incorporated into the Complaint as Complaint Exhibit H.

Thereafter through counsel, the Parks attempted to convince the Gutovitzs to comply with the Scenic Easement Agreement and Amendment to the Scenic Easement (Complaint Exhibits G, H, & I), Plaintiffs were forced to initiate this Action to compel Defendants' compliance with the Easement and Amendment, reserving the right to move for injunctive relief and the removal of any improvements subsequently constructed. Injunctive relief was not originally sought, as Counsel for the Gutovitzs, Shep Guyton, wrote an email dated November 21, 2018, whereby the Parties agreed that construction would stop in the Scenic Easement Parcel until this matter was resolved.

STATEMENT OF THE CASE

The Parks initially provided notice of their intent to file a lawsuit to compel compliance with the Easement Agreements by filing their Notice of Lis Pendens, bearing case number 2019-LP-26-0363, on March 15, 2019. The Parks filed their Complaint in this Action on Friday, April 5, 2019, bearing civil action number 2019-CP-26-02083, forwarding Causes of Action labeled Breach of Express Easement Agreements, Declaratory Judgment, and Permanent Injunction for the sole purpose of compelling compliance with the Scenic Easement Agreement and the Easement Amendment. The Gutovitzs filed their Complaint in this Action on Monday, April 8, 2019, bearing civil action number 2019-CP-26-02152, forwarding Causes of Action labeled as Declaratory Judgment and Breach of Contract Causes of Action asserting their compliance with and seeking interpretation of the Scenic Easement Agreement and the Easement Amendment, and Slander of Title based upon the Parks filing of a Lis Pendens in this matter.

On October 28, 2019, the Parks filed a Motion for a Temporary Injunction and Memorandum in Support, which was granted by the Orders of Honorable Judge Benjamin H. Culbertson on December 17, 2019, and February 10, 2020. In August 2020, after the Parks decided that living next door to the Gutovitzs was not tolerable, the Parks sold their residence. Thereafter on October 10, 2020, the Gutovitz moved to dissolve the Temporary Injunction. As part of the sale, the Parks expressly retained the right to enforce the Easement Agreements and to recover attorney fees incurred up to that date by way of Assignment of Rights of same from the buyers, signed August 25, 2020. (*See* Motion in Opposition, Nov. 10, 2020). After a hearing on January 26, 2021, the Motion to Dissolve Injunction was granted, and the bond money was released by way of Order of the Honorable William H. Seals, Jr.

On October 22, 2019, the Parks had also moved for Partial Summary Judgment seeking dismissal of the Gutovitzs' "slander of title cause of action alleging the Lis Pendens filed by the Parks disparaged the Gutovitzs ownership interest in their property [on the grounds that in] *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 30, 567 S.E.2d 881, 897 (2002), the South Carolina Supreme Court held the 'filing of a lis pendens is absolutely privileged in South Carolina ... and cannot form the basis of an action for slander of title.'" The Parks' Motion for Partial Summary Judgment was denied by way of Form 4 Order dated December 17, 2019, that being the same day the Parks' Motion for a Temporary Injunction was granted. Soon after, the Gutovitzs filed motions to reconsider the injunction and to Amend their Complaint to add a cause of action for malicious prosecution, while maintaining their slander of title cause of action. *See Pond Place Partners, Inc.*, 351 S.C. at 32, 897 ("no reported decision has upheld an award of damages for malicious prosecution for recording a notice of lis pendens; We find the filing of a lis pendens is ***ABSOLUTELY*** privileged in South Carolina ... [and CANNOT form the basis for an action for slander of title." (*emphasis in original*)). On March 11, 2020, the Gutovitzs' Motion to Amend was Granted by the Honorable Judge Paul M. Burch, and the Gutovitzs filed their Amended

Complaint adding a malicious prosecution cause of action on March 16, 2020. On March 26, 2020, the Parks filed their Amended Answer and Amended Counterclaims, incorporating their claims pending in Civil Action 2019-CP-26-02083 as counterclaims, and additionally adding counterclaims based upon the Frivolous Proceedings Act, S.C. Code § 15-36-10, and the Doctrine of Mistake and Recission of the Easement Amendment.

During this Action, the following depositions have been taken:

Caron Gutovitz ..... September 16, 2019
Scott Gutovitz ..... September 16, 2019
Cindy Park ..... January 10, 2020
Gary Park..... January 17, 2020
MCW Custom Homes, M. Chad Webb ..... August 26, 2021
Dick's Pools, William B. Blackmon..... December 2, 2021
Lowrey Design Group, Robert Lowrey ..... December 29, 2021
Alan Campbell, PE..... April 21, 2022

On March 23, 2022, the Honorable R. Scott Sprouse issued an Order Consolidating the two cases. On November 4, 2022, the Parks filed their formal Offer of Judgment, formally offering to accept judgment in the amount of $0.00 for the purpose of resolving all matters in the consolidated actions, which was rejected by the Gutovitzs by and through no response. Thereafter, by way of Form 4 Order of the Honorable William H. Seals, Jr., filed on November 7, 2022, all remaining motions pertaining to the case were to be filed and heard by the Honorable Judge Daniel Coble, and the cases given a date certain for trial shortly thereafter, during the week starting February 28, 2023.

On November 18, 2022, Plaintiffs filed the instant Motion to Strike Jury Demand and for Summary Judgment, which was heard by the Honorable Judge Daniel Coble, along with several other Motions, on February 7, 2023. On February 6, 2023, the Gutovitzs had filed their Response to Motion for Summary Judgment, which included argument in opposition to the Parks' Motion to Strike the Jury Trial Demand.

By way of Orders entered by Judge Cobee on February 10th and 24th, 2023, the Parks' Motion to Strike the Jury Trial Demand was denied. The Parks filed their Notice of Appeal in this Matter on February 24, 2023.

STANDARD OF REVEW

The Parks, as Appellants, have filed this Appeal on the ground that the underlying order refused to strike the Gutovitzs' jury trial demand, and thereby affects the mode of trial in this matter. Inasmuch as Appellants have a substantial right to the proper non-jury mode of trial in this action, the underlying order is immediately appealable under S.C. Code § 14-3-330(2) and related case law. S.C. Code § 14-3-330(2) provides:

> **An order affecting a substantial right** made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action ... (*empahasis added*).

In *Lester v. Dawson*, 327 S.C. 263, 266, 491 S.E.2d 240, 241 (1997), the Supreme Court held:

> [O]rders affecting the mode of trial affect substantial rights under S.C. Code Ann. § 14–3–330(2) (1977) and must, therefore, be appealed immediately. *E.g., Foggie v. CSX Transp.*, 313 S.C. 98, 431 S.E.2d 587 (1993) ("**Issues regarding mode of trial must be raised in the trial court at the first opportunity, and the order of the trial judge is immediately appealable.**"). **Moreover, the failure to timely appeal an order affecting the mode of trial effects a waiver of the right to appeal that issue.** *Id.*; *see also Edwards v. Timmons*, 297 S.C. 314, 377 S.E.2d 97 (1988) (where appellant did not appeal the order referring matter to master in equity, she could not complain after final order that she was deprived of her right to a trial by jury); *Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985) (where appellant failed to timely appeal an order referring dispute to master in equity, appellant could not later complain that he had been entitled to a trial by jury). (*emphasis added*)

In *Pelfrey v. Bank of Greer*, 270 S.C. 691, 693, 244 S.E.2d 315, 315 (1978), the Court stated, "if the action is in equity, it is to be tried by the court; if at law, it is triable by a jury." As a result, the *Pelfrey* Court held "It is clear that the order of the lower court denying a compulsory reference of

the issues affects the mode of trial and, contrary to the contention of respondent, is appealable." The court concisely stated the principle: It is settled beyond controversy in this state that it is error, from which an appeal will lie, to deny a party a mode of trial to which he is entitled by law. *Id.* (*citing Alston v. Limehouse*, 61 S.C. 1, 39 S.E. 192 (1901); *Williford v. Downs*, 265 S.C. 319, 218 S.E.2d 242 (1975).

The underlying orders on appeal refusing to strike the jury trial demand affect Appellants' substantial right to a non-jury mode of trial. Therefore, under S.C. Code § 14–3–330(2), and related case law, Appellants are required to appeal the underlying orders immediately to avoid the waiver of such right.

Whether a party is entitled to a jury trial is a question of law, which an appellate court reviews de novo, owing no deference to the trial court's decision. *Carolina First Bank v. BADD, L.L.C.*, 414 S.C. 289, 292, 778 S.E.2d 106, 108 (2015). The South Carolina Constitution provides that the right to a jury trial shall be preserved inviolate. *Id.* The relevant question in determining the right to a trial by jury is whether the nature of the underlying action is legal or equitable. *Id.* (*quoting Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997)). Because an action to enforce a restrictive covenant by way of injunction is one sounding in equity, a party is not entitled to a jury trial. *Buffington v. T.O.E. Ent.*, 383 S.C. 388, 391, 680 S.E.2d 289, 290 (2009).

LEGAL ARGUMENT

1. THE LOWER COURT ERRED IN DENYING THE PARKS' RIGHT TO HAVE THIS CASE TRIED BY THE COURT, AND NOT A JURY; AN ACTION TO ENFORCE AN RESTRICTIVE COVENANT OR EASEMENT IN REAL PROPERTY IS AN ACTION IN EQUITY

a. AN ACTION TO ENFORCE RESTRICTIVE COVENANTS BY INJUNCTION IS AN ACTION IN EQUITY.

The *Pelfrey* case discussed above involved an action in equity, and the lower court was found to be in error in refusing to strike the phrase "the plaintiff demands a jury trial" from the

pleadings. *Id.* At 695, 317; *see also Du Pont v. Du Bos*, 33 S.C. 389, 11 S.E. 1073, 1077 (1890) (the denial of a jury trial did not deny plaintiff any substantial right to which he was entitled). Since the time of the decision rendered in *Pelfrey* and *Du Pont*, South Carolina law has remained exceedingly clear: an action to enforce restrictive covenants by injunction is an action in equity. *Buffington v. T.O.E. Ent.*, 383 S.C. 388, 391, 680 S.E.2d 289, 290 (2009); *S.C. Dep't of Nat. Res. v. McClellanville*, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001); *Holling v. Margiotta*, 231 S.C. 676, 680, 100 S.E.2d 397, 399 (1957); *Gibbs v. Kimbrell*, 311 S.C. 261, 428 S.E.2d 725 (Ct.App.1993); *Gibbs v. Kimbrell*, 311 S.C. 261, 267, 428 S.E.2d 725, 729 (Ct. App. 1993). Nowhere in their responsive briefing or argument to the lower court did the Gutovitz provide any case law or authority for the position that the nature of this case has been altered from that of being an action to interpret and enforce the restrictive covenants in question.

Of course, the Appeal at bar involves the appeal of the consolidated action filed by the Parks and the Gutovitzs, both actions seek the interpretation and enforcement of the Easement Agreement and the Easement Amendment. In the Gutovitzs' Motion to Consolidate these two cases, counsel concedes the nature of each case is the same by asserting to the lower court that "these two suits were filed almost simultaneously and ... the matters involved are almost identical between the parties in the two actions." (Motion to Consolidate, Dec. 17, 2021). Again, there can be no question that both actions seek the interpretation and enforcement of the Easement Agreement and the Easement Amendment.

In this Action, the Gutovitzs have not offered any case which indicates that an action to enforce a restrictive covenant should be converted to a legal matter over the objection of the owner of the covenant. Therefore, as in *Pelfrey*, the Appellants are entitled to a trial of this matter by the Court, and not a jury.

b. THE DECLARATORY JUDGMENT STATUTE DOES NOT CHANGE THE EQUITABLE NATURE OF A CASE SEEKING TO INTERPRET OR ENFORCE A RESTRICTIVE COVENANT.

In their Response to Motion for Summary Judgment, provided to Appellants the morning of the hearing, i.e. February 7, 2023, Respondents erroneously argue that their cause of action to construe the restrictive covenants at issue under the South Carolina Declaratory Judgment Act changes the nature of this action from equitable to legal by citing to S.C. Code § 15-53-90, entitled "Determination of facts; jury trial," which provides as follows:

> When a proceeding under this chapter involves a determination of an issue of fact such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending. All existing rights to jury trial are hereby preserved.

(*See* Gutovitzs' Response to Mot. S.J., p 6) A quick glance at the annotations to this statute quickly shows that the opposite is actually true. In *Redwood Food Corp. v. Baker*, 269 S.C. 528, 531, 238 S.E.2d 214, 215 (1977), the Supreme Court held that the refusal of a jury trial was proper:

> Where, in action for declaratory judgment to determine whether lease gave tenant right to operate dinner theater on premises, landlord's introducing counterclaim introduced no right of jury trial into action basically equitable in nature.
>
> A review of the cases in this State involving the question of when a jury trial is demandable as a matter of right, is to be found in *Collier v. Green*, 244 S.C. 367, 137 S.E.2d 277 (1964). In *Aiken Mortgage Co. v. Jones*, 197 S.C. 245, 15 S.E.2d 119 (1941), this Court, answering a litigant's demand for a jury trial on a counterclaim for money damages, held that a jury trial was not mandated in what was essentially an equitable action. From that opinion we quote:

Accordingly, the holding of the Supreme Court in *Collier v. Green*, 244 S.C. 367, 373, 137 S.E.2d 277, 281 (1964), also suggests that the Gutovitzs' jury trial demand should be stricken from the pleadings:

> [T]here are two general modes of trial, trials by Court and trials by jury. To the Court belongs all issues of law and all cases in chancery, and to the jury all questions of fact in cases at law for the recovery of money or of any specific real or personal property, *Meetze v. Charlotte, Columbia & Augusta Ry. Co.*, 23 S.C. 1; but the constitutional declaration that 'the right of jury trial shall remain inviolate' does not apply to cases within the equitable jurisdiction of the Court. *Lucken v. Wichman*, 5 S.C. 411.

There is no question that an action to enforce restrictive covenants by injunction which includes a declaratory judgment cause of action retains its nature as an action in equity. In this Action, as in *Redwood* and *Collier*, the Appellants are entitled to a trial of this matter by the Court, and not a jury.

c. ALL OF THE GUTIVITZS' FACTUAL ARGUMENTS AND DEFENSES REGARDING ENFORCEMENT OF A RESTRICTIVE EASEMENT ARE PROPERLY CONSIDERED AND SUBSUMED WITHIN THEIR EQUITABLE DEFENSES TO BE CONSIDERED BY THE COURT.

In *Buffington v. T.O.E. Enterprises*, the Supreme Court agreed that a restrictive covenant had been violated, and affirmed the lower court's enforcement of the restriction by injunction, holding: "the court must consider equitable doctrines asserted by a party when deciding whether to enforce the covenant." *Buffington v. T.O.E. Enterprises*, 383 S.C. 388, 394, 680 S.E.2d 289, 292 (2009). Thus, the *Buffington* Court stands for the proposition that the Court, and not a jury, is empowered to construe the restrictive covenant and to consider and address the numerous factual issues which may be asserted as defenses. *Id.* p. 392, 291 (*citing Circle Square vs. Atlantic Dev. Co.*, 267 S.C. 618, 621, 230 S.E.2d 704, 705 (1976) (Action in equity considering facts related to laches, waiver, or estoppel)). To be clear, the Buffington Court reiterated the numerous factual issues:

> In our view, it would be inequitable to consider Petitioners' financial loss in purchasing and improving the land since they were on notice of the covenants when they purchased the property. To find otherwise would indicate that any business could defeat a restrictive covenant by spending a significant amount of money developing the land. ... Respondents brought suit as soon as Petitioners began developing the lots. The record contains no evidence to support lifting the covenants based on equitable doctrines. In our view, to ignore the restrictive covenants in the absence of such evidence would eliminate a homeowner's justified reliance on property restrictions. Therefore, we find that equity does not weigh in Petitioners' favor and the restrictive covenants are enforceable.

Id. pp. 393-34, 291-292.

Similarly, in this Action, Counsel for the Gutovitzs asserts that the Parks were not allowed to enforce the Scenic Easement Agreement, and may not recover the attorney fees they incurred in their attempt to enforce the easement (prior to the Parks determining that living next door to the Gutovitzs was not tolerable). (*See* Trans., pp. 29-31). In *Buffington*, the Supreme Court made it clear that all questions regarding enforceability are matters to be resolved by the Court, and not a jury.

Counsel for the Gutovitzs also argued other "disputes" concerning the Easement Agreement and the Easement Amendment, including ambiguity because the term "Scenic Easement Agreement" is not defined, and the words "porch," "deck," and "balcony" were used interchangeably. (Trans. pp. 31-33).[2] In *Buffington*, the Supreme Court also made it clear that all questions regarding any facts which would constitute equitable defenses were also matters to be resolved by the Court, and not a jury. In other words, a finding of ambiguity may alter the evidence which the Court may review, however, it does not change the nature of the Action.

In sum, the *Buffington* Case states that an action to enforce restrictive covenants by injunction will include the courts review of numerous other "facts" or matters in "dispute" – but that does not alter the equitable nature of this Action. In this Action, as in *Buffington*, the Appellants are entitled to a trial of this matter by the Court, and not a jury.

d. GUTOVITZS CLAIMS FOR SLANDER OF TITLE AND MALICIOUS PROSECUTION BASED UOPN THE PARKS FILING OF A LIS PENDENS DO NOT CHANGE THE NATURE OF THIS ACTION

The Gutovitzs erroneously argue that the slander of title and malicious prosecution causes of action forwarded in their later filed Action, by way of subsequent amendment to their complaint,

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[2] Counsel also referenced a breach of contract cause of action, however, the only documents in question and are the subject of this Action are the Scenic Easement Agreement, and the Amendment to the Scenic Easement Agreement, both of which are restrictive covenants upon the Property purchased by the Gutovitzs.

against the Park somehow changes the nature of this action from equitable to legal.[3] First, there can be no question the Gutovitzs' claims seeking to construe and enforce the restrictive covenants in this action are equitable, of which they have no right to trial by a jury. Second, the Gutovitzs' slander of title cause of action is an improperly maintained and frivolous pleading. Third, the Gutovitzs' malicious prosecution causes of action cannot be determined until after the resolution of the equitable claims in this case.

> [T]o maintain an action for malicious prosecution, a plaintiff must establish: (1) the institution or continuation of original judicial proceedings; (2) by or at the instance of the defendant; (3) termination of such proceedings in plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage." *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 435, 629 S.E.2d 642, 648 (2006)(*quoting Parrott v. Plowden Motor Co.*, 246 S.C. 318, 321, 143 S.E.2d 607, 608 (1965)). "An action for malicious prosecution fails if the plaintiff cannot prove each of the required elements by a preponderance of the evidence, including malice and lack of probable cause." *Law*, 368 S.C. at 435, 629 S.E.2d at 648.

Gecy v. Somerset Point at Lady's Island Homeowners Ass'n, Inc., 426 S.C. 540, 548, 828 S.E.2d 73, 77–78 (Ct. App. 2019). The Gutovitz cannot prove the third (3rd) element for a malicious prosecution cause of action **until after the equitable matters are decided in this Action**. For this reason, the Gutovitzs' malicious prosecution (and any possible slander of title) cause of action are only permissive claims in this Action, for which they have waived any trial by a jury in this Action. *See Carolina First Bank v. BADD, L.L.C.*, 414 S.C. 289, 294, 778 S.E.2d 106, 109 (2015); *Wachovia Bank v. Blackburn*, 407 S.C. 321, 330, 755 S.E.2d 437, 441 (2014).

It is important to note, that the Gutovitzs' initial complaint did not include a malicious prosecution cause of action until after the Parks' sought dismissal of the Gutovitzs' slander of title claim as frivolous. On October 2019, the Parks moved for Partial Summary Judgment seeking dismissal of the Gutovitzs' "slander of title cause of action premised upon the filing of a lis

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[3] At the outset, the Gutovitzs' slander of title and malicious prosecution claims were voluntarily consolidated with and into the Parks' civil action seeking the enforcement of a restrictive covenant.

pendens." The Parks' motion was based upon the Supreme Court's holding in *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 30, 567 S.E.2d 881, 897 (2002), holding: "We find the filing of a lis pendens is ***ABSOLUTELY*** privileged in South Carolina ... [and] **CANNOT** form the basis of an action for slander of title.'" (*Oddly enough, emphasis was in original*). While the Parks' Motion for Partial Summary Judgment was denied by way of Form 4 Order dated December 17, 2019 (the same day the Parks' Motion for a Temporary Injunction was granted), Counsel for the Gutovitzs partially complied with the Supreme Court's directive in *Pond Place Partners*, by filing a Motion to Amend their Complaint to add a cause of action for malicious prosecution (despite maintaining the frivolous slander of title cause of action). On March 11, 2020, the Gutovitzs' Motion to Amend was Granted by the Honorable Judge Paul M. Burch, and the Gutovitzs filed their Amended Complaint adding a malicious prosecution cause of action on March 16, 2020, even where the Supreme Court had noted that "no reported decision has upheld an award of damages for malicious prosecution for recording a notice of lis pendens" *See Pond Place Partners, Inc.*, 351 S.C. at 32, 897.

CONCLUSION / PRAYER FOR RELIEF

Appellants respectfully pray this Honorable Court will find that this Action to enforce a restrictive covenant is an action in equity, and reverse the decision of the lower court by striking the Gutovitzs' jury trial demand.

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July 17, 2023.