EXHIBIT A

Form 4 Order denying Defendant's Motion for Reconsideration adopting Plaintiff's Return,

June 21, 2023

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Charleston
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP1000039

Dolphin Point Owners Association Inc
PLAINTIFF(S)

Seabrook Island Property Owners Association Inc
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** *(CHECK APPLICABLE BOX)*: ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

This Court issued its Order on April 28, 2023. Defendant challenges the Order under Rule 59 (e), SCRCP, which Motion is answered and refuted point by point by Plaintiff's Return. The Court adopts the Plaintiff's Return as its Order and therefore respectfully DENIES Defendant's Motion to Reconsider and Vacate the Prior Order from April 28, 2023.

ORDER INFORMATION

This order ☑ ends ☐ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 06/21/2023 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

Charleston Common Pleas

Case Caption: Dolphin Point Owners Association Inc VS Seabrook Island Property Owners Association Inc

Case Number: 2019CP1000039

Type: Order/Electronic Form 4

So Ordered

s/Mikell R. Scarborough 3062

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	Civil Action No. 2019-CP-10-00039
	)	
DOLPHIN POINT OWNERS' ASSOCIATION, INC.,	)	**PLAINTIFF'S RETURN TO DEFENDANT'S MOTION FOR RECONSIDERATION**
Plaintiff,	)	
vs.	)	
SEABROOK ISLAND PROPERTY OWNERS' ASSOCIATION,	)	
Defendant.	)	

Plaintiff submits this return and response to Defendant's Motion for Reconsideration filed May 8, 2023. Most of the arguments were presented to the Court during the trial and rejected by the Court in its final order. To the extent that Seabrook Island Property Owners' Association (Defendant or "SIPOA") raises new grounds in its Motion under Rules 52 and 59, SCRCP, such arguments are improper and should not be considered. MailSource, LLC v. M.A. Bailey & Associates, Inc., 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct. App. 2003) ("A party cannot raise an issue for the first time in a Rule 59(e), SCRCP motion which could have been raised at trial.").

Using the numbering of Defendant, Plaintiff responds to each numbered paragraph as follows:

1. No response is required. This paragraph simply restates the comments of our state Supreme Court in Elam v. Department of Transportation, 361 S.C. 9, 602 SE2nd 772 (2004).
2. The Court did not err in determining the entire action was legal in nature. The primary purpose of the suit was to recover damages on the three causes of action alleged. The

fact that the parties consented to the reference of the case to the master-in-equity does not change the nature of the cause of action or dictate that the action was one in equity. The Master has the same authority as a circuit judge upon reference of a case and can determine actions at law. Rule 53 (c) ("Once referred, the master or special referee shall exercise all the power and authority which a circuit judge sitting without a jury would have in a similar matter."). Regardless of whether the case is classified as at law or in equity, the findings of the Court are supported by evidence and the Court did not commit errors of law.

3. Regardless of whether the cause of action for breach of contract based on the SIPOA Covenants was legal or equitable, the Court's determination of the scope of the Easement is supported by a plain reading of their relevant provisions.
4. Regardless of whether Plaintiff's cause of action for breach of common law duty to maintain the easement area is equitable or legal, the evidence supported Plaintiff's recovery on the claim and the Court's apportionment of expenses in the award of that cause of action.
5. Regardless of whether Plaintiff's cause of action for quantum meruit is legal or equitable, the evidence supports the Court's determination that Plaintiff was entitled to recover on the claim for quantum meruit. Plaintiff would also point out that claims for quantum meruit are frequently treated as legal in nature, to be determined by a jury. Franke Associates by Simmons v. Russell, 295 S.C. 327, 332, 368 S.E.2d 462, 465 (1988)(State supreme court held trial court erred in not allowing both express contract and quantum meruit causes of action to go to the jury because "in this instance that the

breach of contract claim and quantum meruit claim are alternative rather than inconsistent remedies.").

6. Further, a "plaintiff who states causes of action on an express contract and in quantum meruit need not elect between causes of action where a single recovery is sought." Harmon v. Jenkins, 282 S.C. 189, 198, 318 S.E.2d 371 (S.C.App.1984); Franke Associates by Simmons v. Russell, supra.

7. There was evidence at trial that the revetment was on the beach trust land of the Defendant. The surveys showed that the revetment was not on land owned by Plaintiff. There were photographs at trial, including those from the 2007 CSE Report (Defendant's Exhibit 8, p.26 of PDF, on Seabrook Seawall Station 14+00), that showed abundant beach seaward of the toe of the revetment with vegetation. That land was above the mean high water mark and constituted the Beach Trust property of SIPOA under the SIPOA covenants.

8. Defendant did not argue at trial that Plaintiff was bound by the allegation in its Complaint. Nor did Defendant object to the evidence as to the true location of the stone riprap as shown on the several plats admitted into evidence. The Court did not err in finding that the revetment was not part of the common property of Plaintiff which the undisputed evidence at trial established. The proof was further undisputed that Plaintiff did not construct the revetment and that SIPOA or its predecessor in title to the Beach Trust property constructed the revetment. (1988 OCRM Permit issued to SIPOA, Plaintiff's Exhibit 25). The Deed into Plaintiff of the common property did not state that the riprap revetment was an appurtenance to Plaintiff's property. (Defendant's Exhibit 24).

9. The Court did not err in determining the revetment was on the Beach Trust property. The proof established that SIPOA owns all of the property seaward of the front property lines of the private beach front lots. Plaintiff's Exhibit 4. As previously stated, there was evidence that the Beach Trust property included the entire revetment, particularly the photographs from the 2007 CSE Report (Defendant's Exhibit 8, p.26 of PDF, on Seabrook Seawall Station 14+00), and other photographs. Although Defendant's expert gave his opinion that the revetment was located on the beach, he did not give the opinion that the entire revetment was located above the mean high water mark and acknowledged the loss of upland in the easement area was due to overwash in Hurricane Matthew, not from the ordinary tidal cycle. Additionally, the Court is not required to accept the testimony of an expert. State v. Bell, 430 S.C. 449, 845 S.E.2d 514, 526, n. 7 (Ct. App. 2020)("The jury is free to believe or disbelieve the experts…"); Smith v. Safeco, 303 S.C. 131, 136, 399 S.E.2d 427, 429 (Ct. App. 1990) ("In weighing conflicting testimony, however, a jury may believe that part of the testimony which convinces it more heavily toward one view of the facts as opposed to another view. The jury is also free to accept a portion of a witness's testimony and reject a portion.").
10. The Court's finding that the revetment and upland easement area worked as a system was fully supported by the evidence. Since the proof further supported the finding that SIPOA had an obligation to maintain its easements under the SIPOA Covenants, the repair and maintenance of the easement area could only be accomplished through repairing and rebuilding the riprap revetment. The expenses to rebuild the revetment and restore the high ground in the easement area were properly determined by the Court to be expenses of maintaining the easement. As the Court explained in the final order,

the obligation of SIPOA under the SIPOA covenants in this instance arises from its obligation to maintain easements which is not obviated by the provision in Section 2(b) that SIPOA has no obligation to maintain or restore the beach. Order pp. 22-24

11. The Court correctly determined the scope of the easement from the wording of the easement itself. This grant of easement was "for ingress, egress and related purposes for the benefit of the Grantee, its members, and those utilizing the easement with its permission…." (Plaintiff's Exhibit 3). Contrary to Defendant's argument, the express purpose of the easement was clear and defined. The express wording of the easement did not limit the rights of Defendant, its members, and those members utilizing the Easement with permission to only the specific purposes argued by Defendant.
12. The Defendant's duty to repair the Easement area was based on its obligation under Section 2(b) of the SIPOA Covenants to repair and maintain easements. The duty was not based on a common law duty of Defendant to provide lateral support as argued by Defendant.
13. The Court's award of all the expenses incurred by Plaintiff to repair the easement area is supported by the evidence. All of the expenses were necessary to repair and maintain the easement, where the revetment and upland worked as a system.
14. All the invoices related to repair and maintenance of the easement area are recoverable. The photographs showed that the easement area included landscaping before Hurricane Matthew. The evidence did not show that this landscaping obstructed use of the easement area before the easement area was abandoned. To the contrary the evidence showed that SIPOA members continued to use the easement area despite significant landscaping installed after SIPOA abandoned the easement of record.

15. The cost of all the rock used to restore the revetment was properly awarded as damages. The rock was necessary to restore the elevation of the riprap to the 2007 elevation which was after the grant of the easement.

16. The Court did not err in granting recovery on Plaintiff's cause of action for quantum meruit.

17. A party may seek recovery on the alternative theories of express contract or quantum meruit, although it may only collect on one of the causes of action because of Defendant's challenges to the order. Harmon v. Jenkins, supra; Franke Associates by Simmons v. Russell, supra. Plaintiff has not yet collected.

18. The evidence supported an award to Plaintiff on its cause of action for quantum meruit. Plaintiff established that the repair of the easement area conferred a benefit on the Defendant before Defendant formerly abandoned the easement area, that the members of Defendant continue to utilize the easement area before and after its formal abandonment, and that the retention of this benefit by Defendant under the circumstances would make it inequitable without paying its value.

19. Recovery for quantum meruit is not limited to the increase in fair market value of the Defendant's property. Boykin Contracting, Inc. v. Kirby, 405 S.C. 631, 641, 748 S.E.2d 795, 800 (Ct. App. 2013) (Cost of work is an appropriate measure of damages where the damages are liquidated).

20. In construction cases the award of quantum meruit is often based on the cost of the work performed by the Plaintiff. See, e.g., Williams Carpet Contractors, Inc. v. Skelly, 400 S.C. 320, 324, 734 S.E.2d 177, 179 (Ct. App. 2012) ("The jury found in favor of

Skelly on the negligent misrepresentation action and Williams Carpet for the quantum meruit cause of action and awarded it $168,000 in damages.").

21. The Order includes findings of fact that support Plaintiff's recovery for quantum meruit. There was plenty of evidence that Defendant and its members used the easement area over the years on a continuous basis including after the repairs were performed to restore the easement area.

22. The Court did not disregard the equitable maximum of "he who seeks equity must do equity." Potential civil liability for injury to SIPOA members from the condition of the easement area after Hurricane Matthew was not just a concern of Plaintiff but also presented financial exposure to Defendant. An injured guest or member could claim and would claim that his or her injury was due to the failure of Plaintiff and/or SIPOA to maintain the easement area. South Carolina's recreational use statute, S.C. Code Ann. §27-3-10 et seq. has no application to an ingress and egress easement.

23. The Court did not commit an error of law in granting plaintiff recovery against defendant on its first cause of action for breach of contract.

24. The Court correctly interpreted the SIPOA Covenants according to their clear and unambiguous meaning. Section 2(b) states, in relevant part, "[T]he purpose and business of SIPOA is to preserve the Property values and the quality of life in the SID through:… (b) Protection, operation, maintenance and improvement of such roads, bridges, parks, playgrounds, beaches, open spaces, rights-of-way, easements and other SIPOA properties, as are deeded, leased or otherwise conveyed to or held in trust for the benefit of SIPOA or Property Owners;.." (emphasis added). There is no ambiguity

in this section's statement of SIPOA's responsibility. Both Sections 6 and 23[1] refer to the obligation of an owner to maintain his own property. There was uncontradicted proof that the revetment was on the Beach Trust property of SIPOA and that the failure of the revetment caused the collapse of the portion of the upland in the easement area. The fact that Plaintiff owned the easement area does not eliminate SIPOA's obligation to maintain easements. All easements are on the land of another. Defendant points to the portion of Section 2(b) that states: "The powers and authorities provided for herein are not in any way intended to and shall not be deemed to impose on the Board any obligation or duty to perform any of the functions enumerated or referred to herein." Plaintiff's claim is against SIPOA, not the board. Further, Plaintiff's claim was based on SIPOA's, that is the Association's, obligation to maintain, not the "powers and authorities" of the board. Finally, the transcript shows SIPOA did not raise an argument based on this sentence at trial and cannot raise it for the first time in a post-trial motion. MailSource, LLC v. M.A. Bailey & Associates, Inc., 356 S.C. 370, 374, 588 S.E.2d 639, 641 (Ct. App. 2003) ("A party cannot raise an issue for the first time in a Rule 59(e), SCRCP motion which could have been raised at trial.").

25. SIPOA's contention that the easement area was usable after Hurricane Matthew, even though torn up and dangerous, does not in any way relieve it of its obligation to maintain the easement. It was undisputed that this condition established the easement area was "not maintained."

[1] SIPOA asserts that it did not argue section 23 of the SIPOA Covenants imposed an obligation on Plaintiff to repair the easement. However, in its letter of September 2007 (Defense Exhibit 1), SIPOA specifically referred to section 23 as the basis for its contention that the front beach owners had to pay for the repair of the portions of the revetment on their respective properties.

26. The Court correctly held that the Plaintiff's claim against SIPOA under Section 2 (b) of the SIPOA Covenants was premised on its obligation to maintain easements, which is distinct from its obligation to maintain the beach. Therefore, the Court correctly found and concluded the proviso related to the separate obligation to maintain the beach did not apply to bar Plaintiff's claim. Order, p. 23.

27. The Court did not err in finding that Defendant, the grantee of the easement, had a common law duty to maintain the easement. This law is clear as a bell. Hayes v. Tompkins, 287 S.C. 289, 337 S.E.2d 888 (Ct. App. 1985). Order p. 27.

28. The evidence fully supports the Court's determination that this easement was appurtenant. Order pp. 19-20. Further, as the Court noted, the determination whether the easement was gross or appurtenant was immaterial since the original grantee, SIPOA, never attempted to transfer the easement. Order, p. 20.

29. As stated in response to No. 26, there was evidence supporting the Court's finding and conclusion that the easement was appurtenant. The obligations of the grantee of the easement to maintain the easement area stated in Hayes v. Tompkins, supra, do not depend on whether the easement was one in gross or appurtenant.

30. The evidence supported the Court's determination that the Defendant, its members, and their guests used the easement area. Further, contrary to what Defendant argues, the Court did in fact consider use of the easement area when considering the common law duty to maintain the easement as is evident by apportioning the repair cost 50/50 on this cause of action. Order pp. 28. 30.

31. The Court did not misapply the holding in Hayes v. Tompkins, supra, for the reasons just stated. SIPOA focuses this argument entirely on the Association's use. The

easement was granted to it, its members, and others using the easement with their permission. There was evidence that the members and their guests constantly used the easement up through the time SIPOA formally abandoned the easement in June 2019, which was before SIPOA undertook to deter usage by additional landscaping, roping, and a sign.

32. The second cause of action based on common law duty was an alternative cause of action to those for breach of express contract and quantum meruit. Plaintiff is entitled to proceed on alternative causes of action but to only one satisfaction. H.G. Hall Const. Co., Inc. v. J.E.P. Enterprises, 283 S.C. 196, 200. 321 S.E.2d 267, 269 (Ct. App. 1984)("[I]n cases where the complaint states different causes of action, but only one recovery is sought, and the causes are so stated because of an uncertainty as to which the evidence may establish or on which it may appear that plaintiff is entitled to recover, no election is required.").

33. Contrary to SIPOA's argument, there was evidence at trial to support the Court's 50/50 allocation of the full maintenance and repair expense under the second cause of action based on usage and the burden that the easement placed on the Plaintiff's property. Further, the burden was not confined to the usage by SIPOA and its members. The easement on the recorded plats constituted a significant burden on the property rights of Plaintiff until SIPOA formally abandoned it in June 2019.

34. The evidence supported the Court's finding and conclusion that the Plaintiff's claims were not barred by the statute of limitations based on the letter of September 2007 (Defendant's Exhibit 1) for the reasons stated in the Order. Order pp. 25-26. Even the excerpt from the case that Defendant quotes refers to "an injured party." Plaintiff was

not an injured party in September 2007. Further, the letter referred to a beachfront property owner's obligation to repair the portion of the riprap revetment on his or her property. It is undisputed no portion of the riprap revetment was on the property of Plaintiff at that time.

35. Whether the knowledge of the members of Plaintiff is attributable to SIPOA makes no difference to the determination of whether the Plaintiff's claims were barred by the statute of limitations based on the letter of September 2007 (Defendant's Exhibit 1). No cause of action for damages had accrued at that time. Contrary to Defendant's argument, Defendant did in fact assert at trial that the rules and regulations of SIPOA imposed the financial obligation to repair the portion of the riprap revetment on the owner's property. See Defendant's Exhibits 1 (first page) and 13. These were indeed unrecorded and, therefore, unenforceable under The South Carolina Homeowners Association Act (the "Act"), S.C. Code §§ 27-30-100 et seq., as concluded by the Court. Order p. 25.

36. The Court did rule on Defendant's declaratory counterclaim seeking an interpretation of Section 2(b) of the SIPOA Covenants. In ruling on Plaintiff's first cause of action and Defendant's defenses thereto, the Court found and concluded that Section 2(b) did impose the obligation on SIPOA to maintain the easement.

37. The Court's findings are supported by the evidence and the reasonable inferences therefrom, and the Court's conclusions are not tainted by errors of law. For that reason, Defendant has not established a basis for setting aside the Order or any portion thereof.

For the foregoing reasons, Plaintiff respectfully submits that no hearing is necessary, and the Court should deny Defendant's Motion for Reconsideration.

s/ G. Trenholm Walker
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