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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-In-Equity

Appellate Case No. 2023-001158

Case No. 2019-CP-10-00039

Dolphin Point Owners' Association, Inc., ... Respondent,

v.

Seabrook Island Property Owners Association……... Appellant.

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF ISSUES ON APPEAL

I. Did the Master in Equity err in holding that the entire action was a legal action?

II. Did the Master in Equity err as a matter of law by holding that Section 2(b) of the SIPOA Covenants obligates SIPOA to maintain, repair or restore the revetment and the Subject Easement Area?

III. Did the Master in Equity incorrectly determine the extent and scope of the Subject Easement for purposes of interpreting Section 2(b) of the SIPOA Covenants?

IV. If Section 2(b) of the SIPOA Covenants established a contractual obligation for SIPOA to maintain, repair or restore the revetment or the Subject Easement Area, did the Master in Equity err in holding SIPOA breached such obligation?

V. Did the Master in Equity err in determining the permitted uses within the extent and scope of the Subject Easement?

VI. Did the Master in Equity err in holding SIPOA owned the revetment?

VII. Did the Master in Equity err in holding SIPOA owned all of the land under the revetment?

VIII. Did the Master in Equity err in holding SIPOA was unjustly enriched?

IX. Did the Master in Equity err as a matter of law by awarding DPOA recovery for quantum meruit when the agreement between DPOA and SIPOA under the SIPOA Covenants is that SIPOA was not obligated to pay anything for maintenance, repair or restoration of the revetment and Subject Easement Area?

X. Did the Master in Equity err in holding that DPOA's actual expenditures were the proper measure of recovery for quantum meruit?

XI. Did the Master in Equity err in holding that SIPOA owed DPOA a common law duty to maintain the Subject Easement when an agreement regarding the maintenance of the Subject Easement existed between the parties?

XII. Did the Master in Equity err in holding that the Subject Easement was an appurtenant easement rather than an easement in gross?

XIII. Did the Master in Equity err in holding that SIPOA owed DPOA a common law duty to maintain the Subject Easement if the Subject Easement was an easement in gross?

XIV. Did the Master in Equity err in holding that use of the Subject Easement Area by beachgoers to access the beach over DPOA's walkovers was use of the Subject Easement by SIPOA?

XV. Did the Master in Equity err as a matter of law by misapplying the common law rule referenced in *Hayes*?

XVI. Did the Master in Equity err by disregarding the common law rule that SIPOA owes no duty of lateral support to DPOA?

XVII. Did the Master in Equity err in apportioning fifty percent (50%) of DPOA's total expenses to SIPOA under the equitable apportionment doctrine for measuring DPOA's recovery for its breach of common law duty claim?

XVIII. Did the Master in Equity err in holding that DPOA's claim against SIPOA based on an obligation under SIPOA Covenants for SIPOA to maintain, repair and restore the revetment did not accrue until when Hurricane Matthew damaged the revetment in 2016?

STATEMENT OF THE CASE

Respondent Dolphin Point Owners' Association, Inc. ("DPOA") as plaintiff filed its Summons and Complaint on January 3, 2019. (Compl.). Appellant Seabrook Island Property Owners Association ("SIPOA") as defendant filed its Answer and Counterclaims on March 7, 2019. (Ans.). DPOA filed a Reply to SIPOA's Counterclaims on April 9, 2019. (Pl. Reply.). The parties filed a proposed Consent Order of Reference motion on January 12, 2021. (Mot. Ref.). The Clerk of Court for Charleston County entered the signed Consent Order of Reference on January 13, 2021 referring the case to the Master in Equity for Charleston County. (Or. Ref.). SIPOA filed a Motion for Summary Judgment on February 4, 2022. (Def. MSJ.). DPOA filed a Memorandum in Opposition to SIPOA's Motion for Summary Judgment and an Affidavit of J. Sumter Bradwell in Opposition to SIPOA's Motion for Summary Judgment on April 8, 2022. (Pl. Memo. Opp.)(Aff. Bradwell.). SIPOA filed a Supplemental Memorandum in Support of SIPOA's Motion for Summary Judgment on April 13, 2022. (Def. Supp. MSJ Memo.) The Master in Equity filed an Order Denying SIPOA's Motion for Summary Judgment on May 31, 2022. (MSJ Or.). Trial was held before the Master in Equity on February 15 and 16, 2023. (Trial Tr.). The Master in Equity entered the Final Order on April 28, 2023 (the "Trial Order"). (Trial Or.) The Trial Order found for DPOA on all causes of action in DPOA's Complaint, and against SIPOA on its counterclaims, and awarded DPOA (i) $94,023.89 for breach of contract, (ii) 50% of $94,023.89 ($47,011.95) for breach of common law duty of the owner of the dominant estate to repair and maintain the easement on the servient estate, and (iii) $94,023.89 for quantum meruit/unjust enrichment. (Trial Or.). SIPOA filed a Motion for Reconsideration on May 8, 2023. (Def. Mot. Recon.). DPOA filed a Return to SIPOA's Motion for Reconsideration on May 18, 2023. (Pl. Ret. Mot. Recon.). The Master in Equity entered a Form 4 in which the Mater in Equity adopted

DPOA's Return to SIPOA's Motion for Reconsideration as its Order Denying SIPOA's Motion for Reconsideration on June 21, 2023 (the "Order on Motion for Reconsideration"). (Recon. Or.). SIPOA filed its Notice of Appeal with this Court on July 19, 2023 appealing both the Trial Order and the Order on Motion for Reconsideration (collectively, the "Orders"), which was then filed with the Charleston County Clerk of Court on July 24, 2023.

STATEMENT OF THE FACTS

This case arises out of a dispute between two property owner associations regarding the responsibility to repair and restore a rock revetment on a portion of the beach at Seabrook Island, South Carolina and also land within an easement area located behind the rock revetment.

Appellant Seabrook Island Property Owners Association ("SIPOA") is the master property owners' association for Seabrook Island, which is a gated residential community in Charleston County containing approximately 2,500 properties located at the mouth of the North Edisto River where it meets the Atlantic Ocean. Respondent Dolphin Point Owners' Association, Inc. ("DPOA") is an additional property owners' association on Seabrook Island, and each of DPOA's four (4) members owns a residential property facing Seabrook Island Road on one side and on the other side the waterfront where the North Edisto River meets the Atlantic Ocean, with the properties each being one-half of a duplex (the "Dolphin Point Lots"). (Def. Tr. Ex. 12, 22 and 23). The DPOA members primarily rent their properties out to short term renters, with some advertising them using services such as VRBO. (Trial Tr. p.88, line 23 – p.89, line 17). DPOA owns the common area surrounding the Dolphin Point Lots, including the certain waterfront common area seaward of the Dolphin Point Lots (the "Dolphin Point Common Area"). (Def. Tr. Ex. 24). The Dolphin Point Lots and the Dolphin Point Common Area are subject to both a declaration of restrictive covenants for Dolphin Point (the "Dolphin Point Covenants") and

SIPOA's master declaration of restrictive covenants (the "SIPOA Covenants"). (Def. Tr. Ex. 18 and 19).

The revetment at issue is located beside, but not within the boundaries of, the Dolphin Point Common Area. (Trial Or. p. 4). The revetment was damaged over time by forces of nature, including Hurricane Matthew on or about October 8, 2016. (Compl.) Additionally, a portion of the land within the Subject Easement Area was damaged by Hurricane Matthew. (Pl. Tr. Ex. 18). Hurricane Matthew did not damage the entire Subject Easement area, but only a small portion, which is visible in the 2017 GIS aerial imagery from the Charleston County GIS department as sand where vegetation had previously been located (Def. Tr. Ex. 17).

After the storm, DPOA asked SIPOA whether it would repair the revetment and DPOA's land behind the revetment, and SIPOA communicated to DPOA that it would not, because SIPOA had no obligation to do so. (Trial Tr. p. 140, line 13 – p. 142, line 4). SIPOA's general policy is that if a property owner wants a revetment on or near their property to be repaired or restored, any such repair or restoration was their responsibility. (Trial Tr. p. 238, line 8 – p. 239-23). After SIPOA declined to perform or pay for any repairs, DPOA then asserted that SIPOA held an access easement over a thirty (30) foot strip of land over the Dolphin Point Common Area immediately behind the revetment and across the southern boundary of the Dolphin Point Common Area as shown on recorded plats (the "Subject Easement"), and that the revetment was integral to the easement, and therefore SIPOA was obligated to repair and restore the revetment and the land within the Subject Easement Area. (Trial Or.). After SIPOA continued to decline, DPOA then proceeded to repair the revetment and the damaged area behind the revetment on the Dolphin Point Common Area itself and expended the aggregate sum of $94,023.89. (Trial Or.).

The location and boundaries of the Dolphin Point Lots and the Dolphin Point Common Area are shown on recorded plats, which plats also show the location and boundaries of the Subject Easement (the "Subject Easement Area") and the location of the revetment. (Def. Tr. Ex. 12, 21, 22 and 23). The revetment is not located on the Dolphin Point Common Area and is located outside of the boundaries of the Subject Easement Area. (Def. Tr. Ex. 12, 21, 22 and 23). The Subject Easement Area connected grassy property owned by SIPOA on the eastern side of the Dolphin Point Common Area (the "SIPOA Parcel") to Beach Trust property owned by SIPOA on the western side of the Dolphin Point Common Area. (Def. Tr. Ex. 17)(Def. Tr. Ex. 12, 21, 22 and 23).

Wooden boardwalks that were constructed by the developer of Dolphin Point (the "Dolphin Point Developer"), and are currently owned by DPOA or DPOA's members, extend and run perpendicularly from the duplexes on the Dolphin Point Lots, through the Dolphin Point Common Area (including the Subject Easement Area) with stairs at the end of them that cross over the revetment to lead down to the beach. (Trial Or. p. 10)(Def. Tr. Ex. 17)(Trial Tr. p.25, line 24 – p.26, line 3). Unidentified beachgoers have used portions of the Subject Easement Area to access DPOA's private walkovers to access the beach. (Trial Or.)

STANDARD OF REVIEW

When a suit involves both legal and equitable issues, each cause of action retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal. *Holly Woods Ass'n of Residence Owners v. Hiller*, 392 S.C. 172, 180, 708 S.E.2d 787, 792 (Ct. App. 2011). "The character of an action is primarily determined by the allegations contained in the complaint." *Seebaldt v. First Fed. Sav. & Loan Ass'n*, 269 S.C. 691, 692, 239 S.E.2d 726, 727 (1977). Whether the trial court properly interpreted claims as legal or equitable in nature requires

construction of the pleadings, which is a question of law with a *de novo* standard of review. *See Monteith v. Harby*, 190 S.C. 453, 455, 3 S.E.2d 250, 250 (1939); *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 662 S.E.2d 40 (2008).

An appellate court reviews all questions of law *de novo*. *Fesmire v. Digh*, 385 S.C. 296, 683 S.E.2d 803 (Ct. App. 2009)(citing *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 564, 658 S.E.2d 80, 90 (2008)). The standard of review for equitable actions is *de novo*. *Lewis v. Lewis*, 392 S.C. 381, 709 S.E.2d 650 (2011). In equity actions, an appellate court can review the record and make findings based on its view of the preponderance of the evidence. *Townes Assoc. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976); *Pruitt v. South Carolina Med. Malpractice Liab. Joint Underwriting Ass'n*, 335 S.C. 118, 515 S.E.2d 544 (Ct.App.1999). An action to construe a contract is an action at law reviewable under an 'any evidence' standard. *Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001). However, in a declaratory judgment action that seeks to determine enforceability of rights and obligations set forth in restrictive covenants, even if such action potentially may require the court to construe a contract, the proper scope of review is *de novo*. *Hardy v. Aiken*, 369 S.C. 160, 164–65, 631 S.E.2d 539, 541 (2006).

"The distinction between an appurtenant easement and an easement in gross involves the extent of a grant of an easement, as opposed to the creation of an easement." *Proctor v. Steedley*, 398 S.C. 561, 571, 730 S.E.2d 357, 362 (Ct. App. 2012). Thus, when a party appeals a judgment pertaining to the extent of an easement, the appellate court may take its own view of the preponderance of the evidence. *In re Estate of Kay*, 423 S.C. 476, 816 S.E.2d 542 (2018).

"Declaratory judgment actions are neither legal nor equitable and, therefore, the standard of review depends on the nature of the underlying issues." *Est. of Tenney v. S.C. Dep't of Health*

& Env't Control, 393 S.C. 100, 712 S.E.2d 395 (2011)(*citing Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009)).

ARGUMENT

I. The Master in Equity erred in holding that the entire action was a legal action.

As a starting point, this action is not entirely a legal action. Instead, it involves and depends upon both legal and equitable issues. The trial court relied on *Verenes v. Alvanos*, 387 S.C 11, 690 S.E.2d 771 (2010) for the proposition that the main purpose of a plaintiff's complaint determines whether the entire action is legal or equitable. However, the rule in *Verenes* is merely applicable to whether a plaintiff is entitled to a jury trial and does not change or transform the legal or equitable nature of the specific causes of action or issues involved therein. "As we interpret the 'main purpose' rule, its primary function is to administratively categorize an action in which parties seek both equitable relief and legal redress. When properly applied, the 'main purpose' rule reduces the complexity of litigation and *does not deprive litigants of the right to a jury trial* where appropriate." *Floyd v. Floyd*, 306 S.C. 376, 412 S.E.2d 397 (1991). (Emphasis added.)

The "main purpose" rule is completely inapplicable to this case, because the parties both waived any rights they had to seek a jury trial and consented to the order of reference for the entirety of the case to the Master in Equity. (Mot. Ref.)(Or. Ref.) Here, each cause of action must retain its own identity as legal or equitable for purposes of the applicable standard of review on appeal. *See Holly Woods Ass'n, supra*.

DPOA's cause of action for breach of contract based on the SIPOA Covenants involves both legal and equitable issues. The interpretation of an unambiguous restrictive covenant is a question of law for the court. *See South Carolina Dept. of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001). An action to construe a contract is an action at law reviewable under an 'any evidence' standard. *See Pruitt, supra.* Questions of

law are subject to *de novo* review. *See Fesmire, supra*. However, the Master's findings and holding on DPOA's breach of contract claim depend on whether the extent and scope of the Subject Easement includes the revetment and also the beach on which the revetment sits. Although the existence of an easement is a question of fact in a law action, the determination of the extent of an easement is an equitable matter. *Plott v. Justin Enterprises*, 374 S.C. 504, 649 S.E.2d 92 (Ct. App. 2007); *see Inlet Harbour v. S.C. Dep't of Parks, Recreation & Tourism*, 377 S.C. 86, 659 S.E.2d 151 (2008)(the determination of the scope of an easement is an action in equity.) The Master in Equity's interpretation of the SIOPA Covenants is based on the determination of the extent and scope of the Subject Easement, and since that is an equitable matter, this Court's standard of review is *de novo* on that issue, and this Court can review the record and make findings based on its view of the preponderance of the evidence.

DPOA's cause of action for breach of common law duty, and the Master in Equity's award for breach of common law duty, was based on *Hayes v. Tompkins*, 287 S.C. 289, 337 S.E.2d 888 (Ct. App. 1985). The Master in Equity found that the remedy sought for breach of common law duty was damages. (Tr. Ord.; Recon. Ord.) However, that is error, because the remedy under *Hayes* is equitable apportionment of expenses, based on the doctrine of contribution. *Id*. at 294, 892. The doctrine of apportionments is purely an equity doctrine. *James v. Malone*, 17 S.C.L. 334 (S.C. App. L. & Eq. 1830). DPOA's cause of action for breach of common law duty is an equitable matter, therefore this Court's standard of review is *de novo*.

DPOA's cause of action for quantum meruit is also equitable. The Trial Order states that the remedy sought for quantum meruit was damages. (Trial Or.) DPOA pled the elements of unjust enrichment in its complaint. (Compl.) Quantum meruit is recognized as an equitable doctrine to allow recovery for unjust enrichment. *Columbia Wholesale Co. v. Scudder May N.V.*,

312 S.C. 259, 440 S.E.2d 129 (1994). An action based on a theory of quantum meruit sounds in equity. *A&P Enterprises, LLC v. SP Grocery of Lynchburg, LLC*, 812 S.E.2d 759 (S.C. Ct. App. 2018). "In a case involving improvements to realty, the measure of recovery in restitution is the difference in the fair market value of the property before and after the improvements." *Barnes v. Johnson*, 402 S.C. 458, 742 S.E.2d 6 (Ct.App. 2013). DPOA's cause of action for quantum meruit seeks recovery for unjust enrichment in the form of restitution, which is equitable. Therefore, this Court's standard of review for quantum meruit is *de novo*.

One of SIPOA's counterclaim sought a declaratory judgment determining whether the SIPOA Covenants require it to maintain, repair, restore, renourish, protect or take any preventive or remedial actions related to the property that is the subject of DPOA's action. (Ans.) "Declaratory judgment actions are neither legal nor equitable and, therefore, the standard of review depends on the nature of the underlying issues." *Est. of Tenney v. S.C. Dep't of Health & Env't Control*, 393 S.C. 100, 712 S.E.2d 395 (2011)(*citing Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009)). SIPOA's other counterclaim sought attorney's fees under Section 35 of the SIPOA Covenants in connection with enforcing the SIPOA Covenants. (Ans.) The underlying issues at the center of SIPOA's counterclaims are whether the extent and scope of the Subject Easement includes the revetment and the beach on which it sits and whether SIPOA is able to specifically enforce the provisions in the SIPOA Covenants that expressly provide SIPOA has no obligation under the SIPOA Covenants to maintain, repair or restore the revetment or the Subject Easement Area. Even though the determination of the enforceability of the SIPOA Covenants requires the interpretation of a contract, the underlying issues are in equity and the proper scope of review is *de novo.* Accordingly, this Court can review the record and make findings based on its view of the preponderance of the evidence. *See Hardy; Tupper; Townes, supra*.

II. The Master in Equity erred as a mater of law by holding that Section 2(b) of the SIPOA Covenants obligates SIPOA to maintain, repair or restore the revetment and the Subject Easement Area.

A. The Master in Equity incorrectly interpreted Section 2(b) of the SIPOA Covenants.

The SIPOA Covenants are a contract between and among SIPOA and all of the property owners in the community, including DPOA and all of the owners of the Dolphin Point Lots. "Restrictive covenants are contractual in nature and bind the parties thereto in the same manner as any other contract." *Seabrook Island Prop. Owners Ass'n v. Pelzer,* 292 S.C. 343, 347, 356 S.E.2d 411, 414 (Ct. App. 1987). The Master in Equity correctly held that the SIPOA Covenants constitute a contractual agreement between the SIPOA and DPOA regarding the maintenance, repair and restoration of the Subject Easement Area. (Tr. Ord.) However, the Master in Equity incorrectly held that Section 2(b) obligates SIPOA to maintain, repair and restore its easements and that the proviso at the end of Section 2(b) does not apply to the revetment or easements. The interpretation of an unambiguous restrictive covenant is a question of law for the court. *See South Carolina Dept. of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001).

Section 2 of the SIPOA Covenants contains, among other provisions, an enumerated list of actions that SIPOA has the power and authority to perform in connection with carrying out of SIPOA's purpose. Section 2(b) of the SIPOA Covenants states as follows:

> "The purpose and business of SIPOA is to preserve the Property values and the quality of life in the [Seabrook Island Development] 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; ***provided, however, while the provision in this section for the maintenance of beaches shall not be construed as imposing an obligation on SIPOA or its agents to restore, renourish, protect or take any preventive or remedial action against beach or marsh changes occurring as a***

> ***result of forces of nature, projects of this nature may, however, be undertaken as authorized in SIPOA Bylaws***." (Emphasis added.)

Additionally, the first unenumerated clause in Section 2 immediately following the list of enumerated subsections provides:

> "The powers enumerated herein are not intended to be limiting, and the Board shall be authorized to perform any of the functions authorized by the Articles of Incorporation, the Bylaws or South Carolina law, except as specifically limited by these Protective Covenants, SIPOA Bylaws, the Articles of Incorporation or South Carolina law. ***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***." (Emphasis added.)

The entirety of Section 2 of the SIPOA Covenants, including but not limited to Section 2(b) and the first unenumerated clause in Section 2 immediately following the list of enumerated subsections his clause, unambiguously and expressly provides that though SIPOA has the power and authority to perform the actions described in the enumerated clauses of Section 2, SIPOA is not obligated under the SIPOA Covenants to perform any of the functions enumerated in Section 2. Moreover, Section 2(b) of the SIPOA Covenants contains a proviso that specifically and expressly provides that SIPOA has no obligation to "restore, renourish, protect or take any preventive or remedial action against beach or marsh changes occurring as a result of forces of nature."

"[T]he paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document." *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998). When "the language imposing restrictions upon the use of property is unambiguous, the restrictions will be enforced according to their obvious meaning." *Shipyard Prop. Owners' Ass'n v. Mangiaracina*, 307 S.C. 299, 308, 414 S.E.2d 795, 801 (Ct. App. 1992). "Words of a restrictive covenant will be given the common, ordinary meaning attributed to them at the time of

their execution." *Taylor*, at 4, 498 S.E.2d at 863. To find that a contract is ambiguous, a court must conclude that the agreement is reasonably capable of more than one interpretation. *South Carolina Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001). It is not enough that the contract language could have been clearer than it is. Rather, a contract is ambiguous only "when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997). While restrictions on the use of property are "strictly construed, with all doubts resolved in favor of the free use of property," this "rule of strict construction should not be applied so as to defeat the plain and obvious purpose of the instrument." *Kinard*, 407 S.C. at 257–58, 754 S.E.2d at 894 (citations and internal quotation marks omitted). Moreover, the "rule of strict construction governing restrictive covenants does not preclude their enforcement." *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987).

It is clear and unambiguous that Section 2 permits, ***but does not obligate***, SIPOA to maintain, repair and restore its common areas, including but not limited to property that SIPOA owns and also easements that SIPOA holds.

With regard to the proviso in Section 2(b), though it begins with "….while the provision in this section for the maintenance of beaches…", that language does not exclude either the revetment or easements held by SIPOA from the proviso's application. Instead, a plain reading of Section 2(b) and SIPOA Covenants as a whole lead to the conclusion that the proviso in Section 2(b) applies to all properties for which SIPOA has ownership in, use rights to, or obligations arising from, and eliminates any obligation SIPOA may otherwise have to take any maintenance, repair

or restoration action related thereto, as long as such action would constitute preventive or remedial action against beach or marsh changes occurring as a result of forces of nature.

The plain language of the term "beach" clearly applies to the subject revetment. One of the primary methods for attempting to protect beaches from changes that result from forces of nature is the installation of erosion control devices, such as rock revetments. The common, ordinary meaning of the term "beach" broadly encompasses the entire beach area and includes "a shore of a body of water covered by sand, gravel, or larger rock fragments" and "a seashore area." *See* Beach, Merriam-Webster's Collegiate Dictionary (11th ed. 2007); *see also Hanold v. Watson's Orchard Prop. Owners Ass'n,* Inc., 412 S.C. 387, 397-99, 772 S.E.2d 528, 534-35 (Ct. App. 2015), *aff'd*, 419 S.C. 162, 797 S.E.2d 47 (2017) (where term in restrictive covenants was not defined, court "resort[ed] to its usual and customary definition," including definition contained in "Merriam-Webster's Dictionary").

The Master in Equity found that the revetment was located on "Beach Trust" property owned by SIPOA. (Tr. Ord.) "Beach Trust" property is property that is owned by SIPOA in trust for its members and is described in Section 31 of the SIPOA Covenants as "…all lands, if any, located between the front Property lines of any oceanfront Lot and the high water mark of the Atlantic Ocean and the North Edisto River, directly in front of each such Lot..." (Def. Tr. Ex. 18)(Emphasis added.) Beach Trust property by definition includes beach areas and marsh areas.

Additionally, The preponderance of the evidence at trial showed that revetment is located on the beach. SIPOA's expert Francis Way ("Way") testified at trial that a purpose of the revetment is to attempt to prevent changes to the beach that would result from forces of nature, including but not limited to tidal activity and named storms such as Hurricane Matthew, that the damage to the revetment caused by Hurricane Matthew was the result of forces of nature, and that

if the damage to the revetment caused by Hurricane Matthew was not repaired, forces of nature could result in future beach changes, including retreat of the beach into the Dolphin Point Common Area and the Dolphin Point Lots. (Trial Tr. p. 316, line 21-p.337, line 3; p. 344, lines 20-22). Based on the common, ordinary meaning of the term "beach", the clear intent of Section 2(b) of the SIPOA Covenants is to establish that if any part of the beach area – including the revetment and the land within the Subject Easement Area, which is immediately behind the revetment – is or would be changed, damaged, or destroyed due to erosion, tides, storms or any other natural forces, SIPOA has no obligation under the SIPOA Covenants to maintain or repair it or share in any such maintenance, repair or restoration expense. Accordingly, the Master in Equity erred by holding that the proviso in Section 2(b) of the SIPOA Covenants did not apply to the revetment and the Subject Easement Area.

Additionally, the first unenumerated clause in Section 2 immediately following the list of enumerated subsections, which expressly refers to the provisions enumerated in Section 2, including but not limited to Section 2(b), unambiguously provides that the provisions enumerated in Section 2 *do not impose **any obligation or duty** for SIPOA to perform any of the functions enumerated in Section 2*. The exculpatory wording in this clause not only supports and underscores the proviso in Section 2(b), but also broadly relates to all of the powers and functions enumerated in Section 2, including the power and authority for SIPOA to maintain its easements. This clause is material, expressly incorporates Section 2(b), and must be taken into account to properly interpret Section 2(b) and the SIPOA Covenants as a whole pursuant to the paramount rule of contract construction, which is to ascertain and give effect to the intent of the parties as determined from the whole document. *See Taylor v. Lindsey, supra*.

The Master in Equity correctly citied the rule of construction that "an interpretation that gives meaning to all parts of the contract is preferable to one which renders provisions in the contract meaningless or superfluous.' *Stevens Aviation, Inc. v. DynCorp Int'l LLC*, 407 S.C. 407, 417, 756 S.E. 2d 148, 153 (2014)." (Tr. Ord.). However, the Master in Equity did not correctly apply this rule of construction, because to correctly apply this rule would require ***all of Section 2*** to be taken into account for purposes of determining SIPOA's obligations under the SIPOA Covenants. The Master in Equity erred as a matter of law by not taking the entirety of Section 2 of the SIPOA Covenants into account in interpreting Section 2(b).

Additionally, the Master in Equity held in the Order on Motion for Reconsideration that the language in the first unenumerated clause in Section 2 only refers to obligations of SIPOA's board of directors and not to the obligations of SIPOA itself. This is an error of law. It is axiomatic that corporate powers are exercised by or under the authority of a corporation's board of directors. S.C. Code Ann. Section 33-31-801(b) of the South Carolina Nonprofit Corporation Act (the "Nonprofit Act") provides that "[e]xcept as provided in this chapter or subsection (c), all corporate powers must be exercised by or under the authority of and the affairs of the corporation managed under the direction of its board." The enumerated list in Section 2 of the SIPOA Covenants specifically and expressly references actions that *SIPOA* has the power and authority to perform: "The purpose and business ***of SIPOA***…." (Emphasis added.) The references to SIPOA's board in the first unenumerated clause in Section 2 are simply references to the fact that the powers of SIPOA described in the preceding enumerated list are exercised by or under the authority of SIPOA's board.

B. The Master in Equity erred by finding SIPOA argued that Section 23 of the SIPOA Covenants and unrecorded rules or policies requires DPOA to repair the revetment.

The Master in Equity found that SIPOA argued that Section 23 of the SIPOA Covenants and unrecorded rules or policies requires DPOA to repair the revetment. (Tr. Ord.) However, SIPOA never asserted at trial or otherwise that Section 23 of the SIPOA Covenants, any other provision in the SIPOA Covenants, or any unrecorded SIPOA rules or policies require DPOA to repair the revetment. Rather, SIPOA argued that the SIPOA Covenants ***did not obligate SIPOA*** to maintain, repair or restore the revetment. Since the SIPOA Covenants do not obligate SIPOA to maintain, repair or restore any revetments, SIPOA's *general policy* – which is operational policy based specifically on the SIPOA Covenants – is that if a property owner wants a revetment on or near their property to be repaired or restored, any such repair or restoration was their responsibility, *unless SIPOA otherwise agrees to participate.* (Trial Tr. p. 238, line 8 – p. 239-23).[1]

C. The Master in Equity erred by disregarding Section 6 of the SIPOA Covenants.

The Master in Equity did not take Section 6 of the SIPOA Covenants into account in construing the SIPOA Covenants, even when requested to do so in SIPOA's Motion for Reconsideration. (Recon. Mot.; Recon. Ord.) This was error as a matter of law. The sections of the SIPOA Covenants that establish the respective obligations of SIPOA and DPOA with regard to the maintenance, repair and restoration of the revetment and the land within Subject Easement Area are Section 2 and Section 6. Accordingly, Section 6 must be taken into account in order to

[1] Section 23 of the SIPOA Covenants is not relevant to whether SIPOA is obligated under the SIPOA Covenants to maintain, repair or restore the revetment or the Subject Easement Area. Rather, Section 23 of the SIPOA Covenants provides certain self-help rights to SIPOA that allows SIPOA to cure violations of property owners' obligations to rebuild or remove damaged structures. Though Section 23 of the SIPOA Covenants is referenced in the letters that SIPOA sent out in 2007 (along with the inspection report for all of the revetments in the south beach area) to the DPOA members and all of the other property owners along the south beach area of the island, the record reflects that Section 23 was referenced in the letter because some, though not all, property owners along the south beach area of the island had revetments located on their properties.

determine whether that the SIPOA Covenants contain an agreement between SIPOA and DPOA regarding the maintenance, repair and restoration of the Subject Easement.

Section 6 of the SIPOA Covenants entitled "Maintenance of Property" establishes the obligation of each of the property owners in the community, including DPOA, to maintain and repair the properties they own, including their buildings and their grounds:

> "***It shall be the responsibility of each Property Owner to prevent the development of any unclean, unsightly or unkempt conditions of building or grounds***, including excessive undergrowth, which shall tend to detract from the beauty or safety of the neighborhood as a whole. If a Property Owner allows the development of any unclean, unsightly or unkempt condition of buildings or grounds or both on such Property, the unsatisfactory condition shall be corrected by the Property Owner at his or her expense upon notification by SIPOA. If the Property Owner fails to correct such condition within a reasonable period of time following notification by SIPOA, SIPOA shall have the right, but not the obligation, to correct the unsatisfactory condition, and the expense of such correction to correct the deficiency shall be billed to and borne by the Property Owner." (Emphasis added.)

Section 6 expressly obligates the property owners, including DPOA, to maintain and repair their properties, *including the grounds*. DPOA's obligation pursuant to Section 6 of the SIPOA Covenants includes DPOA's obligation to maintain the property located within the boundaries of the Subject Easement Area, since it is part of the grounds within the property owned by DPOA. Since Section 6 of the SIPOA Covenants obligates DPOA to maintain all of DPOA's property, including the land within Subject Easement Area, and Section 2 of the SIPOA Covenants expressly provides that *SIPOA is not obligated* to maintain its easements, reading Section 2 and Section 6 clearly establishes an agreement between SIPOA and SPOA regarding the maintenance, repair and restoration of the Subject Easement.

D. SIPOA properly raised and preserved all issues and arguments regarding interpretation of the SIPOA Covenants.

The Master in Equity erred by holding that SIPOA was prohibited from arguing in its Motion for Reconsideration that subsection 2(b) should be read with the entirety of Section 2

because SIPOA was raising the issue for the first time in its Motion for Reconsideration. (Recon. Ord.) Since the Trial Order contained findings regarding, and holdings based on, irrelevant provision in the SIPOA Covenants, and also was silent regarding multiple relevant provisions in the SIPOA Covenants, SIPOA asked for reconsideration to ensure that SIPOA had obtained a ruling on all portions of the SIPOA Covenants that must be considered in order to properly ascertain and give effect to the intent of the parties as determined from the whole document as required under *Taylor*. "If a party is unsure whether he properly raised all issues and obtained a ruling, he must file a Rule 59(e) motion or an appellate court may later determine the issue or argument is not preserved for review." *Elam v. S.C. Dep't of Transp*., 361 S.C. 9, 602 S.E.2d 772 (2004).

In situations where an issue is neither clearly preserved nor clearly unpreserved, any doubt should be resolved in favor of issue preservation. *Johnson*, at 412, 812 S.E.2d at 210 (*see Atl. Coast Builders*. at 333, 730 S.E.2d at 287 ("where the question of issue preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation." (Toal, C.J., concurring in result in part and dissenting in part)).

SIPOA introduced the full copy of the SIPOA Covenants into evidence at trial. (Def. Ex. 18). SIPOA also introduced full copies of prior versions of the SIPOA from 1974, 1987 and 1989 (Def. Ex. 30, 31 and 32). SIPOA addressed in its motion for directed verdict at trial the historical background of *Lovering v. Seabrook Island Prop. Owners Ass'n*, 291 S.C. 201, 352 S.E.2d 707 (1987) and how that litigation contemporaneously illustrated to SIPOA that it could potentially be contractually obligated to property owners under the SIPOA Covenants to maintain, repair and restore, and also potentially to take preventative action to protect, SIPOA's properties that are damaged or could be damaged by forces of nature. SIPOA argued that the SIPOA Covenants were

revised in response to the *Lovering* litigation to ensure that the SIPOA Covenants ***specifically and expressly did not obligate*** SIPOA to maintain, repair or restore, or take any preventative action to protect, any of SIPOA's properties that are damaged or could be damaged by forces of nature. (Trial Tr. p. 200-209).

Moreover, SIPOA also attached and expressly incorporated by reference a full copy of the SIPOA Covenants into its prior Motion for Summary Judgment as an exhibit, which motion sought summary judgment on all of DPOA's causes of action and also SIPOA's counterclaim for declaratory judgment seeking a determination regarding "whether the SIPOA Covenants require to maintain, repair, restore, renourish, protect or take any preventive or remedial actions related to the property that is the subject of [DPOA's] action." (MSJ)(Ans.) SIPOA's Motion for Summary Judgment specifically included in the paragraph that set forth the language of Section 2(b) an express reference to see the full copy of the SIPOA Covenants attached Exhibit B to the Motion. (MSJ). Additionally, SIPOA's Motion for Summary Judgment specifically argued that the SIPOA Covenants must be read together as a whole. (MSJ).

SIPOA specifically referenced its Motion for Summary Judgment (and SIPOA's Supplemental Memorandum in Support of Defendant's Moton for Summary Judgment) when arguing the motion for directed verdict SIPOA made at trial, based on the grounds for SIPOA's motion for directed verdict being similar to the grounds for SIPOA's Motion for Summary Judgment. (Trial Tr. p. 188-189). The Master in Equity took SIPOA's directed verdict motion under advisement overnight between the first and second day of trial and indicated that he would review not only materials presented at trial but also SIPOA's prior Motion for Summary Judgment and SIPOA's Supplemental Memorandum in Support of Defendant's Moton for Summary Judgment prior to ruling on SIPOA's motion for directed verdict the following morning. (Trial

Tr. p. 225-226).[2] SIPOA's counsel specifically incorporated all arguments made previously into SIPOA's motion for directed verdict, also without objection from DPOA's counsel. (Trial Tr. p. 357, lines 10-17).

III. The Master in Equity incorrectly determined the extent and scope of the Subject Easement for purposes of interpreting Section 2(b) of the SIPOA Covenants.

A. The location of the Subject Easement shown on the recorded plats exclude the revetment from the extent of the Subject Easement as a matter of law.

The determination of the scope or extent of the easement is a question in equity with *de novo* review. *See Tupper, supra*. The Master in Equity found that the Subject Easement Area was 30 feet in width and that its boundaries were located entirely within land owned by DPOA. (Tr. Or.) The Master in Equity also found that the boundaries of the Subject Easement were as shown on the record plats referenced in the Trial Order. (Tr. Order p.4) The Master in Equity also found that the revetment was located entirely on SIPOA's "Beach Trust" property as shown on the record plats referenced in the Trial Order. (Tr. Order p.25). These findings ***exclude*** the revetment, and also the beach on which the revetment sits, from the Subject Easement Area and therefore from the extent and scope of the Subject Easement as a matter of law.

"The language of an easement determines its extent." *Plott*, 374 S.C. at 513, 649 S.E.2d 96. "A grant of an easement is to be construed in accordance with the rules applied to deeds and other written instruments." *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 558 S.E.2d 902 (Ct. App. 2001). "The question as to the purpose and effect of a reference to a plat in a deed is ordinarily one as to the intention of the parties to be determined from the whole instrument and the circumstances surrounding its execution." *Lancaster v. Smithco, Inc.*, 246 S.C. 464, 468, 144 S.E.2d 209, 211 (1965). When a deed describes land as shown on a

[2] DPOA's counsel made no objection. (Trial Tr. p. 225-226).

certain plat, such plat becomes part of the deed for the purpose of showing the boundaries, metes, courses and distances of the property conveyed. *Hobonny Club, Inc. v. McEachern*, 272 S.C. 392, 397, 252 S.E.2d 133, 136 (1979); *Carolina Land Co., Inc. v. Bland*, 265 S.C. 98, 105, 217 S.E.2d 16, 19 (1975); *Bennett v. Invs. Title Ins. Co.*, 370 S.C. 561, 635 S.E.2d 660 (Ct. App. 2006); *see also Holly Hill Lumber Co. v. Grooms*, 198 S.C. 118, 135, 16 S.E.2d 816, 823 (1941) (" 'As a general rule, when maps, plats, or field notes are referred to in a grant or conveyance they are to be regarded as incorporated into the instrument and are usually held to furnish the true description of the boundaries of the land....' ").

The Master in Equity specifically found that the boundaries of the Subject Easement are in the locations reflected on the recorded plats and that the revetment is located outside of those boundaries. (Trial Or.) The plats and the legal description in the unrecorded instrument from 2005 that granted the Subject Easement are unambiguous and clearly reflect the intent of the parties at the time of the grant for the boundaries reflected on the referenced plat to be incorporated into the instrument.[3] As a matter of law, the revetment is not included in the extent of the Subject Easement based on the Master's correct finding that the revetment is not located within the Subject Easement Area as shown on the recorded plats. *See Martin v. Bay*, 400 S.C. 140, 145-152, 732 S.E.2d 667, 670-673 (Ct. App. 2012).

B. <u>The Master in Equity's findings regarding whether the extent or scope of the Subject Easement includes the revetment are inconsistent</u>.

The Master in Equity also found that the revetment and the Subject Easement Area work as a "system" because they provide structural stability to each other, with the revetment supporting the Subject Easement Area and the Subject Easement Area supporting the revetment. The Master

[3] The plat referenced in the unrecorded easement grant is the Lewis Seabrook plat dated January 24, 2005, which was recorded on February 17, 2005 prior to the execution of the unrecorded easement grant. (Def. Tr. Ex. 21.)

in Equity also found that since they works as a system, that the Subject Easement Area could not be maintained and restored unless the revetment was rebuilt. (Tr. Order p.25). The dictionary has multiple definitions of the word "system", but the only one that fits the use of the word as used by the Master in Equity in the context of the revetment and the Subject Easement Area is "a regularly interacting or interdependent group of items forming a unified whole." *See* System, Merriam-Webster.com. 2023. https://www.merriam-webster.com (May 7, 2023). If the Master in Equity found that the revetment and the Subject Easement Area are a system, then that finding means they are also a regularly interacting or interdependent group of items forming a unified whole. As a result, a finding that the revetment is part of a unified whole with the Subject Easement Area would mean the revetment ***is included*** in the extent and scope of the Subject Easement. The Master in Equity's findings that the revetment is both included in and excluded from the extent or scope of the Subject Easement are inconsistent and constitute error. The revetment is either included or excluded from the extent and scope of the Subject Easement. It cannot be both.

C. The Master in Equity's holding that revetment is included in the extent and scope of the Subject Easement, but that the beach on which the revetment sits is excluded from the extent and scope of the Subject Easement, is error.

The Master in Equity's holding that Section 2(b) of the SIPOA Covenants obligates SIPOA to repair the revetment because the revetment and the Subject Easement Area are a system and is based on the revetment being within the extent and scope of the Subject Easement, but excludes the beach on which the revetment sits from the extent and scope of the Subject Easement, is unsupported by the evidence and also error as a matter of law.

If Section 2(b) of the SIPOA Covenants obligates SIPOA to maintain, repair and restore the Subject Easement Area as one of its easements, then the interpretation of Section 2(b) depends

on the determination of whether the revetment, and also the beach on which it sits, are included or excluded from the scope and extent of the Subject Easement.

If the revetment ***is not within*** the extent and scope of the Subject Easement, then the Master in Equity erred as a matter of law in interpreting the SIPOA Covenants to obligate SIPOA to repair and restore the revetment as part of the Subject Easement pursuant to an obligation to repair and restore easements under Section 2(b).

However, if the revetment ***is within*** the extent or scope of the Subject Easement, then the Master in Equity erred in holding that SIPOA was obligated to repair and restore the revetment and the Subject Easement Area under Section 2(b) by interpretating the proviso in 2(b) to not apply to the revetment or the Subject Easement Area. Using the Master in Equity's analysis for finding that the revetment and the Subject Easement Area work as a system, the revetment and the beach on which it sits also work as a system. The revetment and the beach on which its sits provide structural stability to each other, with the revetment stabilizing the beach on which it sits and the beach on which it sits supporting the revetment. Logic would then lead to only one conclusion: if the revetment and the Subject Easement Area are a regularly interacting or interdependent group of items forming a unified whole, and if the revetment and the beach on which it sits are also a regularly interacting or interdependent group of items forming a unified whole, then all three of the revetment, the beach on which it sits, and the Subject Easement Area also constitute a regularly interacting or interdependent group of items forming a unified whole. All three of them must form the system and comprise the unified whole, not just two of them. Therefore, the proviso in Section 2(b) ***must apply*** to the revetment and the Subject Easement Area even if Section 2(b) is properly construed to only apply to beaches, since the beach would be included in the extent or scope of the

Subject Easement due to the beach, revetment, and Subject Easement Area being a unified whole – i.e., *an easement system*.

The beach on which the revetment sits cannot be considered as both integrated with and also separate from the *easement system* for purposes of purposes of construing obligations related to the *easement system* pursuant to Section 2(b). Doing so is antithetical and violates all rules of contract construction. However, that is precisely what the Master in Equity did in holding that SIPOA breached the SIPOA Covenants and grant recovery to DPOA. The Master in Equity's holding is error as a matter of law and wholly inconsistent with the findings in the Orders that the revetment and Subject Easement Area are a system.

IV. If Section 2(b) of the SIPOA Covenants established a contractual obligation for SIPOA to maintain, repair or restore the revetment or the Subject Easement Area, the Master in Equity erred in holding SIPOA breached such obligation.

Even if the SIPOA Covenants did impose a contractual obligation on SIPOA to maintain repair and restore the Subject Easement Area, such obligation would not include an obligation to repair the revetment. Any contractual obligation to repair and restore the Subject Easement Area that SIPOA could possibly have had under the SIPOA Covenants would have been limited to only performing, and only paying for, such repair and restoration that would have been required to keep the Subject Easement Area in the condition that it could be used by SIPOA for SIPOA's purposes. *See Grindstaff v. Oaks Owners' Association, Inc.* 2016 OK CIV APP 73, 386 P.3d 1035 (2016)("…the duty of HOA under the CCRs and Bylaws did 'not include a duty to affirmatively install erosion control' to prevent the natural erosion of the creek bank in question. Moreover, the trial court found HOA's duty to maintain and repair required it, instead, to 'keep the channel free of debris and fallen trees,' and found HOA met this duty by keeping the creek clear of such

debris.") No evidence exists in the record that SIPOA intended to use the Subject Easement Area after Hurricane Matthew.[4]

V. The Master in Equity erred in determining the permitted uses within the extent and scope of the Subject Easement.

The Master in Equity erred in determining the uses permitted in the scope of the Subject Easement. The Master in Equity determined that the permitted uses of the Subject Easement were general in nature based on the following language in the unrecorded easement document: "An easement for ingress, egress and related purposes for the benefit of the Grantee, its members, and those utilizing the easement with its permission,…" However, not only is that an error of law, but it is also wholly unsupported by the evidence.

Easement use rights are not absolute. "An easement is a right which one person has to use the land of another for a specific purpose, and gives no title to the land on which the servitude is imposed." *Windham v. Riddle*, 381 S.C. 192, 201, 672 S.E.2d 578, 582 (2009) (quoting *Douglas v. Med. Inv'rs, Inc.*, 256 S.C. 440, 445, 182 S.E.2d 720, 722 (1971)). When language in a plat reflecting an easement is capable of more than one construction, the construction that least restricts the property will be adopted. *Tupper v. Dorchester Cty.*, 326 S.C. 318, 326, 487 S.E.2d 187, 191 (1997). "[T]he owner of the easement cannot materially increase the burden of the servient estate or impose thereon a new and additional burden." *Clemson Univ. v. First Provident Corp.*, 260 S.C. 640, 650, 197 S.E.2d 914, 919 (1973) (quoting 25 Am. Jur. 2d Easements and Licenses, § 72, page 478). "The right of the easement owner and the right of the landowner are not absolute, irrelative and uncontrolled, but are so limited, each by the other, that there may be a due and reasonable enjoyment of both." *Hill v. Carolina Power & Light Co.*, 204 S.C. 83, 96, 28 S.E.2d 545, 549

[4] As will be discussed hereinbelow as an issue on appeal, use by unidentified beachgoers is not evidence of any intent of *SIPOA as an organization* to use the Subject Easement.

(1943). "In other words, a grant or reservation of an easement in general terms is limited to a use which is reasonably necessary and convenient and as little burdensome to the servient estate as possible for the use contemplated." *Id*. If use of an easement is not defined, it must be interpreted as whatever least restricts the property owner. *Snow v. Smith*, 416 S.C. 72, 86, 784 S.E.2d 242, 249 (Ct. App. 2016).

Importantly, even if nothing in the language of the easement limits its use, the use must be limited to the least restrictive use and the easement beneficiary only has rights incident or necessary to its proper enjoyment, but nothing more. *Id*. Further, when the purpose of an express easement is not clear, a court must ascertain the objectively manifested intention of the parties to the original conveyance in light of the circumstances in existence at the time the easement was made, as well as the physical condition of the premises, and the use of the easement and acts acquiesced to during the years shortly after the original grant. 25 *Am. Jur. 2d Easements and Licenses* §63 (citing *Sleeper v. Loring*, 2013 ME 112, 83 A.3d 769 (Me. 2013); *Martin v. Simmons Properties, LLC*, 467 Mass. 1, 2 N.E.3d 885 (2014)).

The Master in Equity correctly found that SIPOA and grantor of the Subject Easement disputed the extent and scope of SIPOA's permitted uses under the easement in the years shortly after the grant. (Tr. Ord.) It is undisputed that the Subject Easement granted SIPOA the right to construct and use a boardwalk in the Subject Easement Area to provide access from the SIPOA Parcel on the eastern side of the Dolphin Point Common area to Beach Trust property owned by SIPOA on the western side of the Dolphin Point Common Area in connection with an expansive boardwalk project involving multiple properties that was being contemplated by SIPOA during the mid-2000s (the "Boardwalk Project"). (Trial Or. p. 5-11). SIPOA never used the Subject Easement Area to construct or use any boardwalk and SIPOA abandoned the Boardwalk Project

years prior to Hurricane Matthew. (Trial Or. p. 7). Only the following other potential permitted uses of the Subject Easement Area were discussed between SIPOA and the Dolphin Point Developer: (a) routine access with small vehicles, for activities such as trash collection, and (b) emergency access with larger vehicles; such discussions occurring through March 19, 2007. (Trial Or. p. 9-11)(Pl. Tr. Ex. 1, 5-12). The record does not reflect further discussions regarding any uses of the Subject Easement between SIPOA and the Dolphin Point Developer occurred after March 19, 2007. (Trial Or. p. 11). No discussions regarding the Subject Easement at all ever occurred between SIPOA and DPOA until after Hurricane Matthew. (Trial Tr. p.57, line 5 – p.59, line 5; p.63, lines 17-23). Importantly, Ed Williams was a representative of the Dolphin Point Developer from at least 2004 to 2007 and was specifically and primarily involved in the negotiation and creation of the Subject Easement, and he was also an owner of one of the Dolphin Point Lots, DPOA's president, and a member of DPOA from 2006 through 2015, and was also DPOA's president until 2015. (Trial Tr. p. 25, lines 12-23; p.113, lines 6-12; p.173, lines 2-7)

SIPOA's rights under the Subject Easement did not include the right to use DPOA's walkovers and the unrecorded instrument granting the Subject Easement expressly provided that the walkovers were to remain the private property of the Dolphin Point Developer, its successors and assigns, which include only DPOA and DPOA's members. (Pl. Tr. Ex. 3). DPOA member and current president Sumter Bradwell testified that DPOA "put up signs in order to discourage use of the Dolphin Point boardwalks" at the top of the Dolphin Point Walkovers sometime in the summer of 2016, prior to Hurricane Matthew. (Trial Tr. p.22, ln 2-7; p. 80, ln 18-20).

SIPOA's use of the Subject Easement for trash collection ended sometime in the years around 2006. (Trial Tr. p.93, line 3 – p.95, line 23; p. 148, line 15- p.151, line 25). When repairing the walkovers after Hurricane Matthew, DPOA did not rebuild the sand ramps that previously

existed and were used by SIPOA in the mid-2000s for its "gators" to cross over the walkovers for trash collection, as DPOA's president Sumter Bradwell believed that SIPOA had abandoned its use of the Subject Easement for trash collection. (Trial Tr. p. 149-51). SIPOA does not use the Subject Easement Area for emergency access purposes. (Trial Tr. p.92, line 8-13, line 23; p. 148, line 15- p.151, line 25). SIPOA has and has always had available access to the beach through other beach access points. (Trial Tr. p.148, ln 11-15).

Based on the preponderance of the evidence and also the Master's findings regarding the conduct of the parties to the Subject Easement in the years shortly after the easement was granted, SIPOA's use rights under the Subject Easement as a matter of law were limited to the rights of SIPOA to use the easement for (a) the potential Boardwalk Project that was subsequently abandoned, (b) trash collection, (c) emergency access, and (d) to traverse DPOA's property from the SIPOA Parcel on the eastern side of DPOA's property to SIPOA's Beach Trust property on the western side of DPOA's property.

VI. The Master in Equity erred in holding SIPOA owned the revetment.

The Court erred in ruling that the revetment is owned by SIPOA, as that ruling is wholly unsupported by the evidence. Though the evidence at trial was presented that the revetment was located outside of the boundaries of the easement area, SIPOA did not assert or admit that it owned the revetment. Moreover, DPOA offered no evidence that SIPOA owned the revetment.[5] The Master's determination that SIPOA owned all of the beach on which the revetment sits is wholly unsupported by the evidence.

[5] The regulatory permits and permit applications related to the revetment that are in the record are not evidence of ownership as a matter of law. It is well-settled that neither regulatory permits nor applications for regulatory permits are determinations of property rights. *See Too Tacky P'ship v. S.C. Dep't of Health & Env't Control*, 386 S.C. 32, 686 S.E.2d 194 (Ct. App. 2009).

Based on the Master's finding that the revetment is a supporting, integral part of the system comprised of the revetment and the upland landward of it, the revetment would be an appurtenance to the Dolphin Point Common Area and DPOA is obligated to maintain the revetment under the Dolphin Point Covenants. *See Sea Cabins on the Ocean IV Homeowners Ass'n, Inc. v. City of North Myrtle Beach*, 337 S.C. 380, 523 S.E.2d 193 (Ct. App. 1999) and *Sea Cabins on the Ocean IV Homeowners Ass'n, Inc. v. City of North Myrtle Beach* 828 F.Supp. 1241 (D.S.C. 1993)(a pier was an appurtenance to real property of a horizontal property regime and was a common element of the horizontal property regime.) *See also Tristram v. Marques*, 117 Cal.App. 393, 3 P2d 947 (1931)(holding a retaining wall and fill dirt located outside the boundaries of a property, but that provided lateral support to such property, were appurtenances to such property.) Accordingly, DPOA would be obligated to maintain the revetment under the Dolphin Point Covenants.

VII. The Master in Equity erred in holding SIPOA owned all of the land under the revetment.

The Court erred in ruling that SIPOA owns all of the beach on which the revetment sits, as that ruling is wholly unsupported by the evidence. (Trial Or.). The Master in Equity found that SIPOA owns the owns the "Beach Trust" properties on Seabrook Island, as that term is defined in the SIPOA Covenants. (Trial. Or.) However, SIPOA's ownership of Beach Trust properties extends from the seaward boundary line of the lots owned by property owners only to the mean high water mark of the Atlantic Ocean and the Edisto River. The property below the mean high-water mark is owned by the State of South Carolina. *See Rice Hope Plantation v. S. C. Public Serv. Auth.*. 2.6 S. C. 600, 59 S. E. (2d) 132 (1950).

The preponderance of the evidence shows that a substantial portion of the beach on which the revetment sits is located below the mean-highwater mark and is therefore by definition not Beach Trust property owned by SIPOA. DPOA offered no evidence regarding the location of the

mean high-water mark with regard to the property seaward of DPOA's property. The only evidence offered at trial regarding the potential location of the mean high-water mark was offered by SIPOA. SIPOA's expert witness, Way, testified that when he observed the area, the time of which site visit was near low tide, he observed on about half the rocks in the revetment wetness still present from the last high tide and also that he observed wrack and the wrack line interspersed in the rocks in the revetment rather than on the sandy portion of the beach seaward of the revetment. (Trans. p. 319-323). Way also testified that the wrack line shows where the high water line has been recently. (Tr. p. 323 ln. 12-15). SIPOA submitted photographs showing wetness and the high tide water line well up the revetment. (Def. Tr. Ex. 20). The Master's determination that SIPOA owned all of the beach on which the revetment sits is wholly unsupported by the evidence.[6]

VIII. The Master in Equity erred in holding SIPOA was unjustly enriched.

A. SIPOA was not unjustly enriched as a matter of law.

Quantum meruit is recognized as an equitable doctrine to allow recovery for unjust enrichment. *Columbia Wholesale Co. v. Scudder May N.V.*, 312 S.C. 259, 440 S.E.2d 129 (1994). "The terms 'restitution' and 'unjust enrichment' are modern designations for the older doctrine of quasi-contracts." *Ellis v. Smith Grading & Paving, Inc.*, 294 S.C. 470, 473, 366 S.E.2d 12, 14 (Ct.App.1988). Quantum meruit, quasi-contract, and implied by law contract are equivalent terms for an equitable remedy, the sole test for which has been adopted by the South Carolina Supreme Court as: (1) a benefit conferred by plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value. *See Okatie River, L.L.C. v. Se. Site Prep,*

[6] As stated hereinabove, the regulatory permits and permit applications related to the revetment that are in the record are not evidence of ownership as a matter of law. It is well-settled that neither regulatory permits nor applications for regulatory permits are determinations of property rights. *See Too Tacky P'ship v. S.C. Dep't of Health & Env't Control*, 386 S.C. 32, 686 S.E.2d 194 (Ct. App. 2009).

L.L.C., 353 S.C. 327, 577 S.E.2d 468 (Ct. App. 2003)(citing *Myrtle Beach Hospital, Inc. v. City of Myrtle Beach*, 341 S.C. 1, 8, 532 S.E.2d 868, 872 (2000), citing *Columbia Wholesale Co., supra.*)

Quantum meruit is only available if the retention of the benefit by SIPOA is unjust. However, SIPOA's retention of a benefit, to the extent any benefit was conferred on or retained by SIPOA at all, was not unjust. The preponderance of the evidence at trial shows DPOA received substantial, material benefit from the work done to the revetment, and that DPOA has retained and will retain such benefit for as long as it owns its property. Retention of benefit by SIPOA is not unjust as a matter of law if DPOA receives benefit as well. *See Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 581 S.E.2d 161 (2003); *see also Player v. Chandler*, 299 S.C. 101, 382 S.E.2d 891 (1989).

Additionally, DPOA had no reason to expect payment or reimbursement from SIPOA. SIPOA clearly and expressly communicated that it would not participate in the work or the expenses. (Trial Tr. p. 140, line 13 – p. 142, line 4). DPOA's members knew that SIPOA's general policy is that if a property owner wants a revetment on or near their property to be repaired or restored, any such repair or restoration was their responsibility. (Def. Tr. Ex 34; Demler Depo.) (Trial Tr. p. 238, line 8 – p. 239-23). Retention of benefit by a defendant is not unjust as a matter of law when a defendant has given a plaintiff no reason to expect payment or reimbursement. *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 762 S.E.2d 696 (2014). The Master in Equity correctly found that SIPOA had given DPOA no reason to expect payment or reimbursement prior to DPOA performing the work: "SIPOA ultimately took the position it had no responsibility for the repair and would not pay for it." (Trial Order.)

Further, there was no evidence of any benefit received by SIPOA with respect to the subject repairs. In fact, the preponderance of the evidence showed that SIPOA could not use the Subject Easement Area after the repairs were performed. DPOA's member Sumter Bradwell testified that the repairs performed by DPOA did not allow for SIPOA's use of the easement, noting that repairs were not performed in a manner that would allow for vehicular access across the Subject Easement Area because he believed such use had been abandoned by SIPOA. (Trial Tr. p. 149-151) Moreover, SIPOA's executive director Heather Paton testimony reflects that SIPOA had other legal access points it could use to access SIPOA's property located to the west of DPOA's property. (Trial Tr. p.248, lines 9-15). DPOA sought to discourage individuals from walking across the Subject Easement Area and restored the area in a manner to obstruct access over it. (Id. p. 149-151)(Def. Tr. Ex. 20).

B. The Master in Equity did not apply the equitable maxim of "He who seeks equity must do equity".

The Master in Equity erred by not taking into account the equitable maxim of "He who seeks equity must do equity" in determining whether DPOA is entitled to quantum meruit. *Provident Life & Accident Ins. Co. v. Driver*, 317 S.C. 471, 479, 451 S.E.2d 924, 929 (1994). This principle applies to one who affirmatively seeks equitable relief. *City of Columbus v. Mercantile Trust & Deposit Co.*, 218 U.S. 645, 662, 31 S.Ct. 105, 54 L.Ed. 1193 (1910). In order for justice to be done between parties, a party is required to do equity when asking the court to invoke the aid of equity. *See Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107, 531 S.E.2d 287, 291 (2000). The Master in Equity's finding that the DPOA's members' desire to protect their property being one of the reasons for DPOA repairing and restoring the revetment and Subject Easement Area had no bearing on whether DPOA is entitled to recovery is error, because such a finding disregards this

equitable maxim. Though such a desire may not be determinative, it must be taken into account in balancing the equities.

Though DPOA received and will retain substantial and material benefit from the repair and restoration of the revetment and the Subject Easement Area as long as DPOA owns its property, it has sought restitution from SIPOA for the entirety of the expenses, thereby asking this Court to allow DPOA to receive and retain its material, substantial and permanent benefit ***for free***. It is inequitable for SIPOA to be required to bear the entire expense for something that primarily, if not solely, benefits DPOA. Further, the preponderance of the evidence in the record shows that the primary reason DPOA's members wanted the revetment and Subject Easement Area to be repaired was to protect their homes and their common property, including from the potential that their homes could at some point slide into the ocean if the revetment was not repaired and their lost land mass replaced, as Tim Kana with CSE told DPOA member Linda Demler on November 15, 2016, and as she promptly communicated to the other DPOA members via email on that same day. (Def. Tr. Ex. 29 [Demler emails]) (Def. Tr. Ex 34; Demler Depo.) ((Bradwell testimony: Trial Tr. p. 41, ln 14-25; p. 44: ln. 19—p.45 ln 14). However, DPOA's members presented their reasons to SIPOA and to the Master in Equity as concerns that DPOA would be liable for injuries that may occur to individuals using the Subject Easement Area and DPOA's walkovers to access the beach and the ocean. (Def. Tr. Ex 34; Demler Depo.) (Bradwell testimony: Trial Tr. p. 41, ln 14-25; p. 44: ln. 19—p.45 ln 14)(Hogan testimony: Tr. p. 178, ln. 1-21; p. 183, ln 2—p. 184 ln 2; p. 276, ln 23—p.277, ln 4; p. 185, ln 3-6). DPOA was and is statutorily protected from any such potential liability by South Carolina's Recreational Use Statute, S.C. Code Ann. §§ 27–3–10 et seq.[7] Accordingly,

[7] The Master in Equity incorrectly held that the Recreation Use Statute does not apply to access easements. (Recon. Or., p.7) The Recreational Use Statute defines "owner" as "the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises." S.C. Code Ann. § 27–3–20(b). If the use by SIPOA members and their guests

any such liability concerns that were communicated to SIPOA prior to DPOA filing this action and also that were presented by DPOA to the Master in Equity in this action were not grounded in the law, as DPOA had statutory immunity from the exact liability they testified was their primary motivation for making the repairs.

IX. The Master in Equity erred as a matter of law by awarding DPOA recovery for quantum meruit when the agreement between DPOA and SIPOA under the SIPOA Covenants is that SIPOA was not obligated to pay anything for maintenance, repair or resoration of the revetment and Subject Easement Area.

Relief under a quantum meruit theory is not available when a valid contract exists between the parties and covers the dispute between them. "If the tasks the plaintiff is seeking compensation for under a quantum meruit theory are encompassed within the terms of an express contract which has not been abandoned or rescinded, the plaintiff may not recover under quantum meruit." *Swanson v. Stratos*, 350 S.C. 116, 122, 564 S.E.2d 117, 120 (Ct. App. 2002). It is "a defense to an action in quantum meruit that there is an express contract covering the issue of compensation for services or materials furnished." *Id.* (citation and internal quotation marks omitted).

Typically, this rule is used by a defendant when the damages to which a plaintiff would be entitled under an express contract between the parties covering the services or materials furnished is lower than the amount of recovery to which the plaintiff would be entitled under a theory of quantum meruit. *See Johnston v. Brown*, 290 S.C. 141, 148, 348 S.E.2d 391, 395 (Ct.App.1986), *rev'd on other grounds*, 292 S.C. 478, 357 S.E.2d 450 (1987) ("While a recovery may be had in quantum meruit for services fully performed under an express contract, the plaintiff's recovery is limited to the amount the parties agreed should be paid for the services.")

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of the Subject Easement Area to access the beach by using the Dolphin Point Walkovers was a permitted use under the Subject Easement, then SIPOA would also have been considered a "person in control of the premises."

The Master in Equity ruled that DPOA was entitled to pursue both its breach of contract claim and its quantum meruit claim as alternative remedies under *Franke Assocs. by Simmons v. Russell*, 295 S.C. 327, 368 S.E.2d 462 (1988). The fact that *Franke* allows DPOA to pursue breach of contract and quantum meruit as alternative remedies does not change the fact that DPOA is limited to recovering under its breach of contract claim since the amount for which DPOA and SIPOA have agreed that SIPOA is responsible to pay for the maintenance, repair and restoration of the revetment and the Subject Easement Area is encompassed within the terms of the SIPOA Covenants. Though the agreed upon amount for SIPOA to pay under the SIPOA Covenants is "nothing", the rule in *Swanson, Gibson* and *Johnson* is nonetheless applicable. "A party cannot disavow a binding contract and pursue quantum meruit, no matter how green the grass of equity may seem." *Gibson v. Epting*, 426 S.C. 346, 356, 827 S.E.2d 178, 183 (Ct. App. 2019). Since the SIPOA Covenants provide that SIPOA is not obligated to pay anything for the for the maintenance, repair and restoration of the revetment and the Subject Easement Area, quantum meruit is unavailable to DPOA as a matter of law.

X. The Master in Equity erred in holding that DPOA's actual expenditures were the proper measure of recovery for quantum meruit.

The Master in Equity erred as a matter of law in determining the amount of recovery for quantum meruit. It is well-settled law that when party is unjustly enriched with improvements to real property, the actual expenditures made are not the proper measure for unjust enrichment. *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012). "In a case involving improvements to realty, the measure of recovery in restitution is the difference in the fair market value of the property before and after the improvements." *Barnes v. Johnson*, 402 S.C. 458, 742 S.E.2d 6 (Ct.App. 2013)(quoting *Niggel Assocs., Inc. v. Polo's of N. Myrtle Beach, Inc.*, 296 S.C. 530, 533, 374 S.E.2d 507, 509 (Ct.App.1988); *see also Stringer Oil Co. v. Bobo,*

320 S.C. 369, 373–74, 465 S.E.2d 366, 369 (Ct.App.1995) (finding the appropriate measure of a defendant's unjust enrichment is not the costs incurred by the plaintiff in making the improvements; rather, it is the value of the plaintiff's improvements to the defendant); *Barrett v. Miller*, 283 S.C. 262, 264, 321 S.E.2d 198, 199 (Ct.App.1984) (confining the monetary value of a defendant's unjust enrichment to the increase in market value of the defendant's real property brought about by the plaintiff's efforts).[8]

The proper measure of recovery for DPOA's quantum meruit claim is the amount of increase in the fair market value of SIPOA's property due to the improvements made by DPOA. However, the Master in Equity measured DPOA's recovery for quantum meruit as the full amount of actual expenditures made by DPOA, which is error as a matter of law. Additionally, the Master in Equity's award of DPOA's recovery for quantum meruit is wholly unsupported by the evidence, as no evidence was presented regarding the fair market value of SIPOA's property whatsoever. *See Santoro v. Schulthess*, 384 S.C. 250, 681 S.E.2d 897 (Ct. App. 2009)("This Court's task in reviewing a damages award is not to weigh the evidence, but to decide if any evidence exists to support the damages award.")

XI. The Master in Equity erred in holding that SIPOA owed DPOA a common law duty to maintain the Subject Easement when an agreement regarding the maintenance of the Subject Easement existed between the parties.

The Master in Equity erred by ruling that the common law rule referenced in *Hayes v. Tompkins*, 287 S.C. 289, 337 S.E.2d 888 (Ct. App. 1985) would apply if the SIPOA Covenants do

[8] The Master in Equity's reliance on *Boykin Contracting, Inc. v. Kirby*, 405 S.C. 631, 748 S.E.2d 795 (Ct. App. 2013) and *Williams Carpet, supra*, are misplaced. *Boykin* specifically held that the plaintiff's costs were the appropriate measure of damages because, as distinguishing factors from the normal rule, the damages were liquidated and the parties had a quid pro quo agreement that worked would be performed in exchange for payment for the services. Neither of those distinguishing factors are present in this case, and *Boykin* is inapplicable here. *Williams Carpet* was a construction case where the property owner specifically and expressly requested services and materials from the subcontractor that brought the action seeking recovery under quantum meruit and specifically and expressly authorized the subcontractor to perform the works. *Williams Carpet* is also inapplicable here.

not obligate SIPOA to maintain and repair the Subject Easement Area. *Hayes* states: ***"[i]n the absence of an agreement***, the … owners of the servient tenement, are under no duty to maintain and repair the easement represented by the gravel road for the benefit of the dominant tenant ….. Ordinarily the owner of an easement has the duty to keep it in repair…." *Id.* (Emphasis added.) Though neither Section 2(b) nor any other section of the SIPOA Covenants obligate SIPOA to maintain the Subject Easement Area, the SIPOA Covenants still constitute the contractual maintenance and repair agreement between the parties regarding the Subject Easement Area. *See Greenfarb v. R.S. K. Realty Corp.*, 256 N.Y. 130, 175 N.E. 649 (1931)(a covenant contained in a separate declaration that obligated a servient estate owner to maintain an easement constituted the agreement that established the obligation on the servient owner because the servient owner took title to the servient estate subject to the easement and the separate covenant.) Additionally, neither *Hayes* nor any other of the cases on which *Hayes* relies require the agreement between the parties regarding the maintenance of the easement to be contained within the instrument that grants the easement itself. The Master in Equity's holding that the instrument that grants the easement itself must contain the agreement of the parties is an error of law.

As discussed hereinabove, Section 6 of the SIPOA Covenants obligate DPOA to maintain and repair all of its property, including the grounds within the boundaries of the Subject Easement Area. Section 2 of the SIPOA Covenants, including subsection (b) and the unenumerated clauses discussed above, provide that SIPOA has no obligation to maintain, repair or restore the revetment or the Subject Easement Area. Accordingly, the SIPOA Covenants expressly address the property on which the Subject Easement Area is located and constitute the express contractual agreement between the parties regarding maintenance, repair and restoration of the Subject Easement Area.

XII. The Master in Equity erred in holding that the Subject Easement was an appurtenant easement rather than an easement in gross.

The Court erred in determining that the subject easement was an appurtenant easement. Instead, the subject easement was an easement in gross. An appurtenant easement inheres in the land, concerns the premises, has one terminus on the land of the party claiming it, and is essentially necessary to the enjoyment thereof. Unless an easement has all of the elements necessary to be an appurtenant easement, it will be characterized as a mere easement in gross. *Tupper v. Dorchester Cty.*, 326 S.C. 318, 326, 487 S.E.2d 187, 191 (1997). "The distinction between an appurtenant easement and an easement in gross involves the extent of a grant of an easement, as opposed to the creation of an easement." *Proctor v. Steedley*, 398 S.C. 561, 571, 730 S.E.2d 357, 362 (Ct. App. 2012). Thus, when a party appeals a judgment pertaining to the extent of an easement, the appellate court may take its own view of the preponderance of the evidence. *In re Estate of Kay*, 423 S.C. 476, 816 S.E.2d 542 (2018).

The Master in Equity's ruling that the Subject Easement was necessary for the enjoyment of SIPOA's property because SIPOA had no other access to the Beach Trust property is unsupported by the evidence. Instead, the preponderance of the evidence at trial showed that the Subject Easement is not necessary for the enjoyment of SIPOA's property because SIPOA had other access to SIPOA's Beach Trust property. Though DPOA presented evidence that the subject easement could have provided *convenient* access to certain portions of SIPOA's property, DPOA provided no evidence that the subject easement was legally necessary to SIPOA's enjoyment its property. *See Bailey, supra* (necessity does not exist where an owner has other access to its property, though such access is less convenient.) SIPOA testified at trial that it currently has and has always had other means of legal access to the beach, including at the time the Subject Easement was granted SIPOA, including but not limited to access points to the east and north of the subject property, and was able to use those legal access points to access SIPOA's Beach Trust property

located to the west of DPOA's property. (Trial Tr. p.248, lines 9-15) Further, the Master in Equity's findings reflect that SIPOA had other means of access to its properties at the time the Subject Easement was created. (Tr. Ord.) *See Williams v. Tamsberg*, 425 S.C. 249, 821 S.E.2d 494 (Ct. App. 2018)(the necessity required for an express easement by grant to be an appurtenant easement is determined at the time of the grant.) The Master in Equity's holding that the Subject Easement was necessary to the enjoyment of SIPOA's property and that the Subject Easement was an appurtenant easement instead of an easement in gross is wholly unsupported by the evidence and also errors as a matter of law.

XIII. The Master in Equity erred in holding that SIPOA owed DPOA a common law duty to maintain the Subject Easement if the Subject Easement was an easement in gross.

If the Subject Easement is an easement in gross, the Master in Equity erred in ruling that SIPOA had a common law duty to DPOA under *Hayes* due to SIPOA being the owner of the dominant estate. (Trial Order). As a matter of law, there is no dominant estate or dominant tenement for easements in gross. With an easement in gross, no dominant tenement exists and the easement right does not pass with title to any land. An "easement in gross" is an easement with a servient estate but no dominant estate. *See* 28A *C.J.S. Easements* § 18, *Ballington v. Paxton*, 327 S.C. 372, 488 S.E.2d 882 (1997), *Cheshire Land Trust, LLC v. Casey*, 156 Conn.App. 833, 115 A.3d 497 (2015), *Hise v. BARC Elec. Co-op.*, 254 Va. 341, 492 S.E.2d 154, Util. L. Rep. P 26,627 (1997), *DeShon v. Parker*, 49 Ohio App.2d 366, 361 N.E.2d 457, 3 O.O.3d 430 (1974), *Percival v. Williams*, 82 Vt. 531, 74 A. 321 (1909), *Patterson v. Chambers' Power Co.*, 81 Or. 328, 159 P. 568 (1916), *Shingleton v. State*, 260 N.C. 451, 133 S.E.2d 183 (1963). Since an easement in gross has no dominant estate, the common law rules in *Hayes* is inapplicable to an easement in gross as a matter of law. As a result, the Master in Equity erred in holding that SIPOA

owed a common law duty to DPOA under *Hayes* as the owner of the dominant estate to the Subject Easement.

XIV. The Master in Equity erred in holding that use of the Subject Easement Area by beachgoers to access the beach over DPOA's walkovers was use of the Subject Easement by SIPOA.

The Master in Equity erred in holding the use of a portion of the Subject Easement Area by beachgoers to access the beach using DPOA's private walkovers constitutes use of the Subject Easement by SIPOA. It is axiomatic that a corporation is legally distinct from its shareholders. *See Costas v. First Fed. Sav. & Loan Ass'n*, 283 S.C. 94, 321 S.E.2d 51 (1984). Nonprofit corporations have members instead of shareholders. *See* S.C. Code Ann. Sections 33-31-140 (23) and (24) and 33-31-601. Accordingly, SIPOA members, and by extension their guests and invitees, are legally distinct from SIPOA itself. The Master in Equity recognized this in one part of the Trial Order in reference to the use of the Subject Easement by SIPOA to use "gators" to pick up trash years ago: "This Court finds that SIPOA, *as an organization*, did in fact use the [Subject Easement] in this manner for some period of time." (Trial Order, p. 12)(Emphasis added.) Despite the legal distinction between beachgoers and SIPOA, the Master in Equity equated use of the Subject Easement Area by beachgoers to access the beach using DPOA's private walkovers to use of the Subject Easement by SIPOA. Accordingly, the Master in Equity erred as a matter of law.

Additionally, the Master in Equity's determination that beachgoer use constitutes SIPOA's use is also wholly unsupported by the evidence. SIPOA never communication or advertised to its membership that the Subject Easement was available for use to access the beach or SIPOA's Beach Trust property on the other side of DPOA's property. (Trial Tr. p.92, line 8-13). SIPOA's executive director Heather Paton, who had been employed by SIPOA in various capacities since 2007, testified that she was not aware of the Subject Easement until DPOA filed commenced this

lawsuit. (Trial Tr. p.251, line 14-25). SIPOA never included the Subject Easement in its numbering system for beach access points available for use by SIPOA members and their guests. (Trial Tr. p.245, line 19 – p. 246, line 21)(Pl. Ex. 17). DPOA's members admitted at trial that the beachgoers' conduct would have remained the same with or without the existence of the Subject Easement (Tr. p.100, ln 7-10; Tr. p. 182, ln 1-4). In fact, the beachgoers' use continued unabated after SIPOA's 2019 formal abandonment of the Subject Easement and continued through the time of trail as beachgoers ignore no trespassing signs, walk around physical blockages, and walk through DPOA's bushes and plantings. (Tr. p. 98, ln 11–99, ln 8).

XV. The Master in Equity erred as a matter of law by misapplying the common law rule referenced in *Hayes*.

The Master in Equity erred by relying on *Hayes v. Tompkins*, *supra,* for the position that a common law duty exists for an easement holder in all instances. As discussed above, *Hayes* involved an appurtenant easement with a dominant tenement, and the subject easement here is an easement in gross with no dominant tenement. However, to extent the common law rule would apply to easements in gross as well, this case is still distinguishable from *Hayes.*

As previously discussed, the preponderance of the evidence at trial showed that SIPOA did not intend to continue use of the easement after Hurricane Matthew. As also discussed above, the use of the Subject Easement Area by beachgoers to use DPOA's walkovers to access the beach is not a use of the Subject Easement by SIPOA. DPOA's only evidence of any intent of SIPOA to continue use of the Subject Easement Area was the beachgoers's use of the DPOA walkovers to access the beach. The only evidence presented at trial *as to the intent of SIPOA as an organization* clearly showed that SIPOA did not intend to use the easement after Hurricane Matthew.

Further, the Master in Equity did not take into account or rule on the opinions citied by *Hayes* for the common law on which *Hayes* holding is based, all of which stand for the proposition

that SIPOA did not breach any common law duty to DPOA. *See Capers v. Fripp*, S.C.L. (Rice) 224 (1839)("[h]e who used the way must repair it, or bear the inconvenience…."), *Richardson v. Jennings*, 184 N.C. 559, 114 S.E. 821 (1922) ("undoubtedly the general rule that, in the absence of contract stipulation or prescriptive right to the contrary, the owner of an easement is liable for costs of maintenance and repairs where it exists and is used and enjoyed for the benefit of the dominant estate alone."), *Bina v. Bina*, 213 Iowa 432, 239 N.W. 68, 78 A.L.R. 1216 (1931)(stating "[the dominant estate] owns the easement, as above specified, and if the private way were not used also by [the servient estate], the former would be duty-bound to make the required repairs thereon…. Even though [the servient estate] likewise uses the right of way, there is no reason why the [dominant], subject to the conditions hereinafter named, cannot reasonably repair the same suitable to the limited character of their easement"), *Lamb v. Lamb*, 177 N. C. 150, 98 S. E. 307 (1919)("[b]ut in such case the owner of the dominant estate is not required to maintain or repair the easement for the benefit of the servient tenement. He may ordinarily abandon it altogether without infraction of any rights of the servient owner.)(Citing 9 R. C. L. p. 795, citing *Pomfret v. Ricroft*, 1 Saund. 321, 10 Eng. Rul. Cases, p. 16, and *Mason v. Shrewsbury*, etc., Ry. Co., L. R., 6 Q. B. p. 578, 10 Eng. Rul. Cas. p. 22, and note, a general principle recognized and applied in this state in *Canal Co, v. Burnham*, 147 N. C. 41, 60 S. E. 650, 17 L. R. A. (N. S.) 945, 125 Am. St. Rep. 527, 64 N. E. 910, 65 N. E. 752, 95 Am. St. Rep. 315), *Carson v. Jackson Land & Mining Co.*, 90 W. Va. 781, 111 S.E. 846 (1922)("It is likewise very well established that the owner of an estate over which there exists an easement is under no obligation to maintain the easement in a condition fit for use….the owner of an easement over the lands of another is under the obligation to keep such easement in proper condition to be enjoyed, in the absence of an agreement devolving this duty on the owner of the servient estate.")

None of the authority that *Hayes* cites creates or recognizes a common law duty for an easement beneficiary to maintain the Subject Easement Area for the benefit of the fee simple owner. *Instead, the authority on which Hayes relies recognizes that the only common law duty of a beneficiary of an easement is to maintain and repair the easement* ***for its own benefit****, and then* ***only to the extent*** *that the easement area* ***requires maintenance or repair in order to be used and enjoyed by the easement beneficiary, but no more****. Importantly, the common law rule also expressly allows the beneficiary of the easement to choose not to maintain or repair the easement* ***if it elects to discontinue its use of the easement***. No evidence exists in the record that SIPOA as an organization intended to use the easement after Hurricane Matthew.

XVI. The Master in Equity erred by disregarding the common law rule that SIPOA owes no duty of lateral support to DPOA.

The Master in Equity's holding that SIPOA breached a common law duty to DPOA for failure to repair or restore the revetment was based on findings that the revetment and the Subject Easement Area work as a system by providing structural stability and support to each other and that the Subject Easement Area could not be repaired and restored unless the revetment was repaired and restored. This is an error of law.

The Master in Equity correctly found that the revetment is located outside of the boundaries of the Subject Easement Area. (Tr. Ord.) Accordingly, the revetment is not within the extent of the Subject Easement as a matter of law. *See Binkley*, *Lancaster*, *Hobonny Carolina Land*, *Bennett*, *Holly Hill Lumber* and *Martin, supra.* The Master in Equity held that SIPOA breached a common law duty to DPOA under *Hayes* by failing to repair and restore the "easement on the servient estate". (Trial Or.) However, the rule in *Hayes* and the cases on which *Hayes* relies only applies to easements, and therefore only applies to property within the extent of such easements.

Since the revetment is not within the extent of the Subject Easement as a matter of law, the rule in *Hayes* does not apply to the revetment.

The Master in Equity bases SIPOA's common law obligation to repair the revetment on a finding that the Subject Easement Area could not be repaired or restored without the repair and restoration of the revetement because they work together as a system providing structural stability to each other. In order for SIPOA to have breached a common law duty to DPOA for failure to repair and restore the revetment, such breach must have been of a duty to provide lateral support to the Subject Easement Area, not based on a common law duty to maintain the Subject Easement Area.

However, there is no common law duty for a landowner to maintain, repair or improve its own property to provide lateral support to an adjacent landowner. Rather, a landowner only has a duty, which rests on negligence, to not remove lateral support for an adjacent landowner through excavation if the adjacent landowner's property has been improved with structures that require lateral support. Importantly, if the adjacent land is in its natural condition, then a landowner does not have any duty at all regarding lateral support for adjacent land, and such landowner is permitted to remove lateral support through excavation. *See Momeier v. Kobig*, 220 S.C. 124, 66 S.E2d 465 (1951)(citing *Bailey v. Gray*, 53 S.C. 503, 31 S.E 354 (1898)). Moreover, it follows that there is no duty for a landowner to repair its own property in order to provide lateral support to an adjacent landowner when such loss of lateral support was caused by forces of nature. *See Carrig v. Andrews*, 127 Conn. 403, 17 A.2d 520 (1941)(where an excavation was made on defendant's land by force of wind and water generated by an unprecedented hurricane, thereby removing lateral support furnished to plaintiff's adjoining land, defendant was under no duty to refurnish lateral support so removed.) Accordingly, the only possible common law duty SIPOA could have

breached by not repairing and restoring the revetment would have been a common law duty to provide lateral support to the Subject Easement Area. The land within the Subject Easement Area is land in its natural state, SIPOA did not excavate anything, and DPOA's loss of lateral support was caused solely by forces of nature. SIPOA did not breach any common-law duty to provide lateral support to the Subject Easement Area as a matter of law and as a result did not breach any common law duty whatsoever to repair or restore the revetment.

XVII. The Master in Equity erred in apportioning fifty percent (50%) of DPOA's total expenses to SIPOA under the equitable apportionment doctrine for measuring DPOA's recovery for its breach of common law duty claim.

If SIPOA did owe DPOA a common law duty to maintain, repair and restore the Subject Easement, the Master in Equity's equitable apportionment of the repair expenses is incorrect as a matter of law and is also not supported by the preponderance of the evidence.

In *Hayes*, in addition to considering the benefits of the Subject Easement Area to each party, the court also gave consideration to the burden the easement placed on the servient estate. However, the Master in Equity did not take into account that the burden the easement imposed on DPOA's property was minimal as shown by the preponderance of the evidence and testimony at trial. (Trial Tr. p. 92, lines 2-4; p. 152 line 4 – p. 153, line 12.) DPOA member and president Sumter Bradwell testified that the Subject Easement had not altered his use the property at all. (Trial Tr. p. 92, ln 2-4) (Q. This easement has not altered your use of the property at all, has it? A. No, not really. I wouldn't say it has.) DPOA member Kevin Hogan testified that the existence or nonexistence of the Subject Easement had not affected his use of the property in any way. (Trial Tr. p. 181, ln 9-16) (Q. Yes, sir. The existence or nonexistence the easement has not affected your use of the property in any way. A. No.).

Additionally, as a matter of law, DPOA could not repair the Subject Easement to the level it desired and then seek reimbursement from SIPOA for those expenditures:

> "When a servient estate owner seeks contribution they must show the dominant estate owner's maintenance created an additional burden or an interference that would damage the servient estate. '[A]bsent a showing that the easement owners' maintenance of the easement created an additional burden or interference with the servient estate, the servient estate cannot dictate the standard by which the easement should be maintained, expend funds to maintain it to the level desired by the servient estate and then seek reimbursement for those expenditures and contribution for future expenditures from the easement owners.'"

Beckstead v. Price, 146 Idaho 57, 190 P.3d 876 (2008)(citing *Walker v. Boozer*, 140 Idaho 451, 455, 95 P.3d 69, 73 (2004)). There is no evidence in the record that SIPOA maintained the Subject Easement Area, much less that SIPOA took any action that created an additional burden or an interference with DPOA's ability to use or maintain the Subject Easement Area.

Further, the Master in Equity's holding that SIPOA should be apportioned fifty percent (50%) of the expenses for the repair and restoration is not supported by the preponderance of the evidence. The preponderance of the evidence shows that the overwhelming use and benefit of the revetment and the Subject Easement Area was by and to DPOA, with very little to no use or benefit of either to SIPOA. As discussed hereinabove, SIPOA's only use of the Subject Easement was for trash pickup sometime between February 2005 and an undetermined time period in and around 2006. Also as discussed hereinabove, the use of the Subject Easement Area by beachgoers to access the beach over DPOA's walkovers was not use of the Subject Easement by SIPOA as an organization. No evidence exists in the record showing that SIPOA intended to use the Subject Easement Area after Hurricane Matthew. Accordingly, there is no evidence in the record that SIPOA ever used the Subject Easement for any purposes or any periods other than trash pickup in 2005 and for some period in and around 2006.

Conversely, the evidence at trial showed that not only was the Subject Easement Area landscaped by DPOA with shrubbery and a grassy area that constituted DPOA's yard and primary

aesthetically pleasing viewpoint towards the beach and the ocean, including an irrigation system used and maintained by DPOA located within the Subject Easement Area, *but also that the Subject Easement Area was the only means of access to the beach and the ocean over DPOA's property for DPOA and its members, guests and invitees*. (Def. Tr. Ex. 12, 20, 22, 23.) The Trial Order states that DPOA's members and their guests did not use the Subject Easement Area to access the beach but instead DPOA's members and guests accessed the beach by using DPOA's walkovers instead of the Subject Easement Area. However, this finding is wholly unsupported by the evidence, because the Master in Equity did not take into account the undisputed fact that both of DPOA's walkovers cross over and run through all 30 feet of the Subject Easement Area's width. In fact, it is impossible for DPOA's members, guests or invitees to access the beach through DPOA's property without crossing over and using the Subject Easement Area. Additionally, as shown on the plats in the record (Def. Tr. Ex. 12, 22 and 23), the houses of DPOA's members are located relatively close the Subject Easement Area, with one of the houses located approximately twenty feet away from the Subject Easement Area, and the land within the Subject Easement Area provides lateral support for the portion of DPOA's property on which the houses of DPOA's members are built. Further, the Subject Easement Area was used by DPOA's members and their guests and invitees for various activities, including for using DPOA's walkovers to access the beach (Trial Tr. p.88, line 13-17, p.5 - p.92 line 4; p. 152 line 4 – p. 153, line 8). The preponderance of the evidence showed that DPOA's use of the Subject Easement Area was frequent if not continuous, materially and substantially outweighed SIPOA's use.

Additionally, since the revetment was located outside of the Subject Easement Area, then an equitable apportionment of expenses under *Hayes* should be based solely on relative benefits and burdens as to the use of the *Subject Easement Area*, exclusive of the revetment, and also should

be based solely on expenses for work done to the *Subject Easement Area*, excluding the revetment. The invoices from BluTide Marine Construction and Brownswood Nursery speak for themselves by containing line-item charges that clearly identify which specific expenses were related to specific work and materials for the revetment and the Subject Easement Area. (Pl. Tr. Ex. 22 and 23). The $4,800 line item for upland fill dirt is the only expense related to repair of the land within Subject Easement Area. The line items for landscaping expenses totaling $945.59 were for landscaping improvements of the land within Subject Easement Area, which actually obstructed portions of the Subject Easement Area, and were not for maintenance or repair. The line items for the other expenses totaling $87,868.00 were for work done to the revetment, which were not expenses for maintenance or repair of the land within Subject Easement Area. The Master in Equity erred in ruling that all expenses paid by DPOA, totaling $94,023.89 in the aggregate, were for the cost of repairing the Subject Easement Area.

XVIII. The Master in Equity erred in holding that DPOA's claim against SIPOA based on an obligation under SIPOA Covenants for SIPOA to maintain, repair and restore the revetment did not accrue until when Hurricane Matthew damaged the revetment in 2016.

The Master in Equity held that DPOA's cause of action for breach of the SIPOA Covenants did not accrue in 2007 because none of the DPOA members sustained any financial loss in 2007 since the revetment repair project proposed in 2007 for all of the revetments in the south beach area of the island never proceeded and none of the DPOA members were ever charged for revetment repair expenses. (Trial Order, p.26). This is an error at law.

The applicable statute of limitations for DPOA's breach of contract cause of action is three years. S.C. Code Ann. § 15-3-530. However, financial loss is not required for the statute of limitations to begin to run. Under the discovery rule, "an injured party must act promptly where the facts and circumstances of an injury would put a person of common knowledge and experience

on notice that some right of his has been invaded or that some claim against another party might exist. The statute of limitations begins to run from this point, and not when advice of counsel is sought or a full-blown theory of recovery developed." *Dorman v. Campbell*, 500 S.E.2d 786, 789 (Ct. App. 1998). The preponderance of the evidence shows that DPOA and its members had notice, both constructive and actual, in 2007 that the Subject Easement existed, that the revetment required maintenance and repair, that the SIPOA Covenants were a contract between SIPOA and DPOA, and that SIPOA took the position that it was not obligated to maintain or repair the revetment.[9] At the time the DPOA had such knowledge, it could have pursued an action to enforce the SIPOA Covenants by injunction or through an action for specific performance of SIPOA's alleged obligation to maintain and repair the revetment at SIPOA's expense. *Kneale v. Bonds*, 317 S.C. 262, 265, 452 S.E.2d 840, 841 (Ct.App.1994).

CONCLUSION

As discussed above, the Master in Equity made reversible error in the holdings, and the findings on which each of the holdings are based, for DPOA on all of DPOA's causes of action, and also on SIPOA's counterclaim for declaratory judgment. Accordingly, both the Trial Order and the Order on Motion for Reconsideration should be reversed, each of DPOA's causes of action should be dismissed, and SIPOA should be granted a declaratory judgment determining that

[9] SIPOA sent to all of the property owners in the south beach area of the island facing revetments on their seaward side, including all of the DPOA members, a letter in 2007 together with a copy of a 2007 inspection report regarding the revetments prepared by Coastal Science Engineering ("CSE") (the "2007 CSE Report"), which letter informed such property owners that certain revetments needed repair and SIPOA would coordinate such repair, but that the property owners would be responsible for the repair expenses. (Def. Tr. Ex. 1-8). DPOA member Linda Demler signed and returned a form acknowledging receipt of SIPOA's letter, the 2007 CSE Report, and expressly agreeing to be financially responsible for the revetment repair expenses. (Def. Tr. Ex. 7). The 2007 CSE Report disclosed that portions of the revetment beside the Subject Easement Area were in "fair" and "poor" condition. (Def. Tr. Ex. 8)(Trial Tr. p. 114, line 21- p. 115, line 9; p. 119, lines 1 – p.120, line 9)(Def. Tr. Ex 34; Demler Depo.)

SIPOA has no obligation to maintain, repair or restore either the revetment or the Subject Easement Area.

[Signature on following page]

Respectfully submitted,

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