

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

**APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS FOR SPARTANBURG COUNTY
The Honorable Gordon G. Cooper, Master-in-Equity**

OPINION NO. 2013-UP-224 (S.C. CT. APP. FILED MAY 22, 2013)

**CORIE CREST HOMEOWNERS ASSOCIATION OF SPARTANBURG, INC.,
RICHARD T. BIGGS, KATHLEEN A. BIGGS, JAMES HANNAH, AND
ELIZABETH A. HANNAH,..... RESPONDENTS,**

v.

KATHERYNA MULHOLLAND-MERTZ,..... PETITIONER.

PETITION FOR WRIT OF CERTIORARI

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SC Court of Appeals

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on June 19, 2013.

QUESTIONS PRESENTED

1. Did the South Carolina Court of Appeals ("Court of Appeals") overlook the entire evidence presented by Petitioner that should have withstood a Rule 41(b), SCRCP motion, applying the proper standard of de novo review? [Issue 1]
2. Did the Court of Appeals misapprehend the clear meaning of Section 41 of the Restrictions when it affirmed the Order of the lower court that found the Respondents had a right to amend its Restrictions prior to October 1, 2040? [Issue 2 and 3]

STATEMENT OF THE CASE

On September 17, 2009, Petitioner brought an action against Respondents alleging certain violations of the Protective Covenants, Conditions, Restrictions and Easements of Corie Crest Subdivision ("Restrictions") and seeking a temporary and permanent injunction to prohibit the construction of storage buildings by Respondents and other property owners within Corie Crest Subdivision.

The Respondents filed their Answer on October 22, 2009 denying the injunctive relief sought by Petitioner.

After certain discovery had been conducted by the parties, Respondents then filed a motion for summary judgment seeking dismissal of Petitioner's injunctive relief.

On May 15, 2010, the trial court heard Respondents' motion and Petitioner's motion for temporary injunction.

On June 15, 2010, an Order was filed by the trial court granting Petitioner's motion for temporary injunction and denying Respondents' motion for summary judgment. [R, p.66].

After the Order granting Petitioner's motion for temporary injunction, Respondents Corie Crest Homeowners Association of Spartanburg, Inc. ("Association"), without any notice or vote from Petitioner and other property owners within the subdivision, amended the Restrictions to clarify certain sections that were the subject of the lower court's findings in the pretrial motions' hearing. The Amended Restrictions were recorded at the Register of Deeds for Spartanburg County on August 26, 2010.

Petitioner then filed an Amended Complaint on January 13, 2011 to reaffirm her prayer for the original relief, and further prohibit the enforcement of the Amended Restrictions, and declare those Amended Restrictions null and void.

Respondents on April 28, 2011, filed their Amended Answer denying Petitioner's amended relief.

The Master-in-Equity for Spartanburg County presided over the trial on August 24, 2011 and August 25, 2011. At the close of Petitioner's case, the Master-in-Equity granted Respondents' motion to dismiss this case under Rule 41(b), SCRCP. The Master-in-Equity then issued his written Order on September 9, 2011. In that Order the Master-in-Equity found that Petitioner did not present sufficient evidence to overcome the Rule 41(b) motion by the Respondents despite testimony of Petitioner, four (4) other property owners and an expert witness and the introduction of seventeen (17) exhibits. The Master-in-Equity further found that Section 41 of the Restrictions gave the Respondents the right to amend the Restrictions but they could not terminate them until October 1, 2040.

On September 22, 2011, Petitioner filed her Motion to Amend Findings of Facts and Conclusions of Law and a Motion for New Trial under Rule 52(b), SCRCP, which was denied on March 8, 2012.

On March 20, 2012, Petitioner served her Notice of Appeal upon the Respondents.

Oral arguments were heard before the South Carolina Court of Appeals on May 6, 2013 with its opinion filed on May 22, 2013 that affirmed the lower court.

Petitioner properly filed her Petition for Rehearing which was subsequently denied by the Court of Appeals on June 19, 2013.

[Katheryna Mulholland-Mertz v. Corie Crest Homeowners Association of Spartanburg, Inc., Richard T. Biggs, Kathleen A. Biggs, James Hannah, and Elizabeth A. Hannah, 2013-UP-224 (S.C. Ct. App. Filed May 22, 2013).]

Petitioner seeks a writ of certiorari to review the above decision of the Court of Appeals.

ARGUMENT

1. THE COURT OF APPEALS SHOULD HAVE HELD THAT PETITIONER PRESENTED SUFFICIENT EVIDENCE TO WITHSTAND THE RULE 41(b), SCRPC MOTION APPLYING THE PROPER STANDARD OF DE NOVO REVIEW. [ISSUE 1]

The Petitioner presented sufficient evidence to withstand Rule 41(b), SCRPC motion through her testimony, the testimony of witnesses who were property owners in the subdivision, expert witness testimony and introduction of Exhibits 1 and 10.

Petitioner testified she had a conversation with Respondent Richard T. Biggs when he told her the sheds of previous property owners were temporary structures and the only structure that could be built other than a single family residence was a detached garage. [R, p.103, lines 1-11].

Respondent Richard T. Biggs complained to Petitioner that a property owner and initial Defendant Joseph P. Denicola had constructed a garden shed, even though it was similar to his structure. [R, p.115, lines 1-17].

Petitioner testified that the application for Respondent Biggs' garden shed was approved under Section 7(A) of Restrictions which makes no reference that a garden shed can be constructed. [R, p.117 and p.118, lines 1-9].

Petitioner testified that Respondents Hannahs' "lean-to" building was not a permitted structure and not in harmony with their home. [R, p.124, lines 1-15].

Counsel for Respondents sought admissions from Petitioner that Section 2 and Section 8 of Restrictions are ambiguous. [R, p.159, lines 1-9]. Counsel for Respondents further requested that Petitioner agree that Section 2 and Section 20 of Restrictions were ambiguous. [R, p.161, lines 6-12].

Witness Christine Stenger testified she read the Restrictions and there could be no detached structures. [R, p.175, lines 7-20]. There was no reference for a patio storage similar to Respondents Hannahs' structure [R, p.177, lines 18-24].

Witness Terry Burgess testified that Respondent Richard T. Biggs went to an attorney to discuss removal of sheds belonging to property owners Martin and Denicola. [R, p.191, lines 1-24]. Mr. Burgess further testified that the construction of the garden shed by Respondents Biggs violated the Restrictions. [R, p.124, lines 17-25].

Witness Marc Cramer testified that Respondent Richard T. Biggs complained about sheds built by property owners prior to the construction of his shed and requested that he (Cramer) complain to the Property Manager. [R, p.125, lines 18-23].

Expert witness Woodrow W. Willard, Jr. testified there was a contradiction of Section 2 and Section 8 of the Restrictions which was agreed to by opposing counsel. [R, p.229, lines 6-19].

Notwithstanding testimony presented by Petitioner and other witnesses that provided oral evidence of violations of Restrictions, the conduct and subsequent acts of the Respondents to amend the Restrictions for the purpose to delete Sections 2, 7 and 8 of the Restrictions and replace them with amended Sections 2, 7 and 8 were done as a direct result to this case at hand. [R, pp. 269-270 and R, pp.295-296].

The only reasonable inference that can be drawn to amend the Restrictions was to make violations committed by Respondents under the Restrictions be in compliance through the Amended Restrictions.

In the alternative only, the recordation of Amended Restrictions was to make clear previous ambiguous and inconsistent language contained in Sections 2, 7 and 8 of the Restrictions.

Applying the standard of de novo review, sufficient evidence was presented to the trial court that should have withstood Rule 41(b), SCRPC motion to dismiss. Hardy v. Aiken, 369 S.C. 160, 631 S.E.2d 539 (2006).

2. THE COURT OF APPEALS MISAPPREHENDED THE MEANING AND PURPOSE OF SECTION 41 OF THE RESTRICTIONS WHEN IT AFFIRMED THE DECISION OF THE LOWER COURT. [ISSUES 2 and 3]

The Court of Appeals misapprehended the meaning and purpose of Section 41 of the Restrictions when it affirmed the decision of the lower court that allowed amendments to other sections of the Restrictions.

Section 41 contains the following pertinent language:

TERMS OF ENFORCEMENT AND AMENDMENTS:

These covenants, conditions, easements and restrictions shall be binding upon the developer, its successors and assigns, and upon all future owners, their respective heirs, successors in assigns, and all parties claiming under them, until October 1, 2040, at which time the terms hereof shall be automatically extended for successive periods of ten years thereafter, unless the then owners owning at least two-thirds ($\frac{2}{3}$) of the lots in Corie Crest agree in writing to terminate or change the same.

The terms and conditions of this instrument may be amended or changed only upon written agreement of the owners owning at least two-thirds ($\frac{2}{3}$) of the lots in Corie Crest.

The Order of the lower court found that owners of two-thirds ($\frac{2}{3}$) of the lots in the subdivision can amend the Restrictions prior to October 1, 2040. The trial court further found that you could not terminate the Restrictions until October 1, 2040. The Master-in-Equity reasoned that there were two levels of independent interpretation. One was for the amendment and the other for termination of the Restrictions.

The Court of Appeals overlooked the intent of the Restrictions to provide stability and integrity of the subdivision. The plain and obvious purpose of Section 41 of the Restrictions is to give clear notice to present and future property owners that the Restrictions could not be changed or terminated until October 1, 2040. The purpose was to faithfully adhere to the preamble of the Restrictions where the developer wanted

preservation of property values and amenities of the subdivision and for maintenance of common areas without change for a set period. [R, p.268]. Taylor v. Lindsey, 332 S.C.1, 498 S.E.2d 862 (1998).

The Restrictions has clear expiration dates, amendment dates, and set renewal dates. There is no express provision in the Restrictions to allow any of those dates to come earlier than October 1, 2040. Hardy v. Aiken, 369 S.C. 160, 631 S.E.2d 539 (2006).

CONCLUSION

Having presented her arguments for review by this Court, the Petitioner respectfully requests that her petition for writ of certiorari be granted in Questions 1 and 2.

Respectfully submitted,



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JULY 16, 2013

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

**APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS FOR SPARTANBURG COUNTY
The Honorable Gordon G. Cooper, Master-in-Equity**

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PROOF OF SERVICE

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I certify that I have served the Petition for Writ of Certiorari on Corie Crest Homeowners Association of Spartanburg, Inc., Richard T. Biggs, Kathleen A. Biggs, James Hannah, and Elizabeth A. Hannah by depositing in the United States Mail, with due and proper postage affixed thereto, on July 16, 2013, copies of the same

addressed to their attorneys of record:

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Respectfully submitted,



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SWORN to before me this
10th day of July, 2013

S. Lauren Satterfield
Notary Public For South Carolina
My Commission Expires: May 15, 2023

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July 16, 2013

The South Carolina Court of Appeals
Post Office Box 11629
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Attn: Jenny Abbott Kitchings, Clerk for the South Carolina Court of Appeals

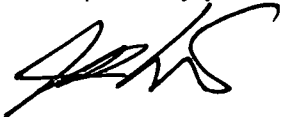
Re: Mulholland-Mertz v. Corie Crest Homeowners Association of
Spartanburg, Inc., et al.
Appellate Case No. 2012-209866; Opinion No. 2013-UP-224

Dear Ms. Kitchings,

Please find enclosed a copy of the Petition for Writ of Certiorari and a copy of the Proof of Service to the attorneys for the Respondents that has been filed with The Supreme Court of South Carolina.

Please do not hesitate to contact me should you have any questions or need anything further from this office.

Respectfully yours,



James D. Calmes, III

Enclosures: 1) One copy of Petition for Writ of Certiorari
2) One copy of Proof of Service

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SC Court of Appeals