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SC Court of Appeals

AMENDED PETITION FOR REHEARING

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Larry B. Hyman, Jr., Circuit Court Judge

Appellate Case No. 2020-000528

Vista Del Mar Condominium Association; Dennis M. Merritt, Trustee of the Dennis M. Merritt Living Trust; John J. Hawkins; Eleanor N. Hawkins, ... Plaintiffs,

v.

Vista Del Mar Condominiums, LLC; Atlantic Development Company, LLC; Atlantic Coast Funding, LLC; and John Doe, a Nominal Defendant Representing all Persons or Entities Unknown Who May Claim an Interest in the Property that is the subject of this action, ...Defendants,

And

Atlantic Development Company, LLC and Atlantic Coast Funding, LLC; .....Third-Party Plaintiffs,

v.

Barbara P. Swartz; Nancy S. Case; Winston-Salem Daly Development, LLC; Charles F. Webber; Mark L. Skowron, as Trustee of Mark L. Skowron Revocable Trust dated April 24, 2002 and Gail L. Skowron, as Trustee of the Gail L. Skowron Revocable Trust dated 04/24/2002; Norman W. Taylor, Trustee of the Norman W. Taylor Revocable Living Trust dated April 28, 2008; Tim Mitchell Development, LLC; Eric R. Sklut and Lori Levine Sklut; Fred C. Warehime and Patricia F. Warehime; James W. Blackburn, III and Peggy S. Blackburn; Barbara I. Bowser; KHDH, LLC; Beth G. Bauknight; Roderick D. Sanders (or his successor), as Trustee of the Amended and Restated Revocable Declaration of Trust of Anne Mallard Sanders u/a/d January 16, 2015; GGK Properties, LLC; Leon Levine and Sandra Levine; Joseph Moglia and Amy H. Moglia; Angela M. Mason, as Trustee of the Angela Mason Revocable

Trust dated June 9, 2003 and amended and restated May 27, 2007; Dexter R. Barbee, Sr.; Daniel M. Talbert, Sr.; Craig W. Lawton; Craig W. Lawton; David N. Dalton; Janet W. Weed, Trustee of the Janet W. Weed Revocable Trust under Trust Instrument dated April 17, 2013; Robert H. Messier, Jr. and Janice H. Messier; Jeffrey Schneider, Trustee for the Jeffrey Schneider Revocable Trust Dated August 1, 2017; Phillip Kleinman and Charisse D. Kleinman; Stephen Gatto and Camille Gatto; Lutz Real Estate, LP; Astorg Imports, Inc.; ABLP Properties, LLC; Sutton Children, LLC; Daniel C. Schuster and Mardell J. Schuster; Roy C. Putrino and Eileen M. Putrino; Spencer Squier and Sherri Squier; VDM 1004, LLC; Roger B. Matherly and Bonnie V. Matherly; ITAC 203, LLC; Rebecca R. Shroff and Kersi S. Shroff; Sandra P. Levine and Lori Ann Sklut, Co-Trustees of the Irrevocable Trust F/B/O Amy Beth Levine dated September 18, 1986; David E. Lukowski; Richard B. Kline and Leslie Kline; James P. Aplington and Carol D. Aplington; Michael L. Van Glish and Judith K. Van Glish; Anna A. Olsen; Anne Marie Murray; William J. Pridemore and Irina V. Pridemore; William B. Davidson and Julia Davidson; Bruce Alexander Henderson and Valerie Sokolov; Mark W. Lee; Sue David Kline; Thomas Mckiernan and Anne Mckiernan; Philip H. Strobl and Amy Mott Strobl; James M. Faircloth and Sylvia Faircloth; Cheryl Jackson and Phillip H. Jackson; Weldon Riggs and Tiffiany Riggs; Janet P. Merritt, Trustee of the Janet P. Merritt Living Trust U/A dated March 24, 2000; Melia Mooney Pavoris; William L. Mansfield and Patricia S. Mansfield; Stuart W. Gibbs and Helen R. Gibbs; Michael R. Blackburn and Pamela M. Blackburn; Jeffrey G. Edwards and Teresa T. Edwards; and Michael J. Wilk, ...Third-Party Defendants,

Of which Vista Del Mar Condominium Association; Dennis M. Merritt, Trustee of the Dennis M. Merritt Living Trust; John J. Hawkins; Eleanor N. Hawkins; Barbara P. Swartz; Nancy S. Case; Winston-Salem Daly Development, LLC; Charles F. Weber; Mark L. Skowron, as Trustee of Mark L. Skowron Revocable Trust dated April 24, 2002 and Gail L. Skowron, as Trustee of the Gail L. Skowron Revocable Trust dated 04/24/2002; Norman W. Taylor, Trustee of the Norman W. Taylor Revocable Living Trust dated April 28, 2008; Tim Mitchell Development, LLC; Eric R. Sklut and Lori Levine Sklut; Fred C. Warehime and Patricia F. Warehime; James W. Blackburn, III and Peggy S. Blackburn; Barbara I. Bowser; KHDH, LLC; Beth G. Bauknight; Roderick D. Sanders (or his successor), as Trustee of the Amended and Restated Revocable Declaration of Trust of Anne Mallard Sanders u/a/d January 16, 2015; GGK Properties, LLC; Leon Levine and Sandra Levine; Joseph Moglia and Amy H. Moglia; Angela M. Mason, as Trustee of the Angela Mason Revocable Trust dated June 9, 2003 and amended and restated May 27, 2007; Dexter R. Barbee, Sr.; Daniel M. Talbert, Sr.; Craig W. Lawton; Craig W. Lawton; David N. Dalton; Janet W. Weed, Trustee of the Janet W. Weed Revocable Trust under Trust Instrument dated April 17, 2013; Robert H. Messier, Jr. and Janice H. Messier; Jeffrey Schneider, Trustee for the Jeffrey Schneider Revocable Trust dated August 1, 2017; Phillip Kleinman and

Charisse D. Kleinman; Stephen Gatto and Camille Gatto; Lutz Real Estate, LP; Astorg Imports, Inc.; ABLP Properties, LLC; Sutton Children, LLC; Daniel C. Schuster and Mardell J. Schuster; Roy C. Putrino and Eileen M. Putrino; Spencer Squier and Sherri Squier; VDM 1004, LLC; Roger B. Matherly and Bonnie V. Matherly; ITAC 203, LLC; Rebecca R. Shroff and Kersi S. Shroff; Sandra P. Levine and Lori Ann Sklut, Co-Trustees of the Irrevocable Trust F/B/O Amy Beth Levine dated September 18, 1986; David E. Lukowski; Richard B. Kline and Leslie Kline; James P. Aplington and Carol D. Aplington; Michael L. Van Glish and Judith K. Van Glish; Anna A. Olsen; Anne Marie Murray; William J. Pridemore and Irina V. Pridemore; William B. Davidson and Julia Davidson; Bruce Alexander Henderson and Valerie Sokolov; Mark W. Lee; Sue David Kline; Thomas Mckiernan and Anne Mckiernan; Philip H. Strobl and Amy Mott Strobl; James M. Faircloth and Sylvia Faircloth; Cheryl Jackson and PhillipH. Jackson; Weldon Riggs and Tiffiany Riggs; Janet P. Merritt, Trustee of the Janet P. Merritt Living Trust U/A dated March 24, 2000; Melia Mooney Pavoris; William L. Mansfield and Patricia S. Mansfield; Stuart W. Gibbs and Helen R. Gibbs; Michael R. Blackburn and Pamela M. Blackburn; Jeffrey G. Edwards and Teresa T. Edwards; and Michael J. Wilk, are the .....Appellants,

And

Of which Vista Del Mar Condominiums, LLC; Atlantic Development Company, LLC; Atlantic Coast Funding, LLC; and John Doe, a Nominal Defendant Representing all Persons or Entities Unknown Who May Claim an Interest in the Property that is the subject of this action are the.....Respondents.

AMENDED PETITION FOR REHEARING

Pursuant to Rules 219, 221(a) and 240, SCACR, Appellants Vista Del Mar Condominium Association (the "Association") and the individual unit owners ("Unit Owners") of the Vista Del Mar Horizontal Property Regime (the "Regime") (collectively, "Appellants") respectfully request and move the Court to rehear their Appeal in this matter. Further, Appellants respectfully request that the Court consider a rehearing *en banc* as this case involves a question of exceptional importance to not only the parties, but to attorneys who advise homeowners' associations and close real property transactions.

INTRODUCTION

On August 16, 2023, this Court filed Opinion No. 6016 in the above-captioned case. The Court affirmed the circuit court's order granting summary judgment in favor of Developers-Respondents. The Court held that: (1) "the circuit court did not err in finding the Transition Period had not ended and Developer still possessed the authority to remove the Property from the Regime on April 6, 2009" (Op. at 9); (2) "Developer's removal of the Property from the Regime was valid (Op. at 12); and (3) the circuit court's findings regarding the access easement were affirmed under the rule that "whe[n] a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case" (Op. at 12). Appellants respectfully submit that this Court overlooked or misapprehended the Horizontal Property Act, specifically S.C. Code Ann. § 27-31-70, and South Carolina case law. Upon reconsideration, the Court should enter an Order vacating its Opinion No. 6016, reversing the order of the circuit court granting summary judgment in Respondents' favor, and remanding the action for further proceedings consistent with said Order.

ARGUMENT

The South Carolina Appellate Court Rules permit this Court to rehear and reconsider its final order upon a petition that states "with particularity the points supposed to have been overlooked or misapprehended by the court." Rule 221(a), SCACR. Such a petition may not be used "to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (quoting Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina* 309 (1999)). Instead, "to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their

argument." *Id.* Here, it is respectfully submitted that the Court overlooked or misapprehended certain aspects of the Horizontal Property Act and South Carolina case law to rule that (1) the Developer could divide and remove 2.58 acres from the Regime by declaring that said property was a common element of the regime and was subject to division and removal from the regime; (2) that the Developer was authorized by the terms of the Master Deed to remove the Property from the regime; and (3) that an access easement had been duly granted that burdened the Regime's real property.

A. The Court overlooked or misapprehended the plain language of S.C. Code Ann. § 27-31-70 in ruling that the Developer could divide a common element from the Regime

This case is primarily governed by the Horizontal Property Act, S.C. Code Ann. §§ 27-31-10 et seq. The Court ruled that § 27-31-70 of the Act did not bar the Developer from dividing the common elements and removing the subject 2.58 acres from the Regime. (Op. at 7.)

S.C. Code § 27-31-70 provides: "The common elements, both general and limited, shall remain undivided and shall not be the object of an action for partition or division of the co-ownership. **Any covenant to the contrary shall be void**" (emphasis added).

With regard to the meaning of this statutory language, the Court's Opinion states: "Considering the Act as a whole, we hold Section 27-31-70's prohibition of partition or division of common elements concerns the unit owners' rights in the common elements and does not prohibit a developer from removing non-recreational common elements from a regime unless those common elements have vested in the unit owners pursuant to the terms of the master deed." (Op. at 11.) This interpretation overlooked or misapprehended the plain language of the statute. This interpretation essentially has re-written the statute.

"The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Mid-State Auto Auction v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). "'What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.'" *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992)); *see also Denson v. Nat'l Cas. Co.*, 439 S.C. 142, 146, 886 S.E.2d 228, 230 (2023).

In ascertaining legislative intent, the court should consider the language of the statute as a whole. *Mid-State Auto*, 324 S.C. at 69, 476 S.E.2d at 692. However, "[u]nless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning." *Id.*

In effect, "[u]nder the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581; *see also Denson*, 439 S.C. at 146, 886 S.E.2d at 230. "If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning. . . . Where the terms of the statute are clear, the court must apply those terms according to their literal meaning." *Paschal v. State Election Comm'n*, 317 S.C. 434, 436-37, 454 S.E.2d 890, 892 (1995).

Here, the Court generally referenced the Horizontal Property Act as a whole without pointing to any particular provision that would operate to negate the plain and ordinary meaning of the statement in § 27-31-70 that "[a]ny covenant to the contrary shall be void." The Court overlooked or misapprehended the law when it refused to interpret the statute according to its plain and literal meaning.

As noted in Appellants' initial brief, the use of the word "shall" in a statute ordinarily means that the action referred to is mandatory in nature. *See S.C. Dep't of Highways & Pub. Transp. v. Dickinson*, 288 S.C. 189, 191, 341 S.E.2d 134, 135 (1986); *Montgomery v. Keziah*, 277 S.C. 84, 85, 282 S.E.2d 853, 854 (1981). In effect, "[w]here the terms of the statute are clear, the court must apply those terms according to their literal meaning." *Collins v. Doe*, 352 S.C. 462, 466, 574 S.E.2d 739, 741 (2002).

Under the plain and literal terms of § 27-37-70, division and removal of common elements of any type from a condominium regime is not permissible. Once the common elements are submitted into a regime, they must exist as an undivided whole. The Court misapprehended or overlooked the plain meaning of this statute when it referenced the terms of the Master Deed that allow division and removal of a common element. To reach this conclusion, the Court misapplied or misapprehended the plain terms § 27-37-70 to determine that the Developer could remove non-recreational common elements from a regime if those elements have not vested in the unit owners pursuant to the terms of the master deed. (Op. at 11.) The conditions or limitations the Court imposed on the application of § 27-37-70 contravene the express language of the statute.

Had the South Carolina Legislature intended § 27-37-70 to be conditional in nature, it would not have included the unconditional last sentence in the statute. Unlike the prior section of the Horizontal Property Act, § 21-37-70 does not distinguish between recreational and non-recreational common elements. Instead, it plainly states that any covenant dividing the common elements "**shall be void**." S.C. Code Ann. § 27-37-70 (emphasis added). As this Court has previously observed, a court is "not at liberty, under the guise of construction, to alter the plain language of [a] statute by adding words [that] the Legislature saw fit not to include." *First Citizens Bank & Tr. Co., Inc. v. Blue Ox, LLC,* 422 S.C. 461, 471, 812 S.E.2d 418, 423 (Ct. App. 2018), *cert. denied*, 2018 S.C.

LEXIS 204 (Aug. 3, 2018) (alterations in original) (quoting *Shelley Constr. Co. v. Sea Garden Homes, Inc.*, 287 S.C. 24, 28, 336 S.E.2d 488, 491 (Ct. App. 1985)).

Accordingly, the statutory language can only be viewed as a conscious decision to prohibit any division and removal of the common elements of a regime. Had the Legislature intended that the language of a master deed have the power to alter this result, it would have included such language in the statute. *See Rogers v. Rogers*, 432 S.C. 168, 185, 851 S.E.2d 447, 456 (Ct. App. 2020) (recognizing that if the Legislature had intended to permit a lump sum child support award, it would have included it in the statutes pertaining to child support). Accordingly, the plain and unconditional language of § 27-37-70 can only be viewed as a conscious decision to prohibit any division and removal of the common elements of a regime. Appellants, therefore, respectfully petition for rehearing in accordance with Appellate Court Rule 221.

B. The Court overlooked or misapprehended the law when it ruled that the Transition Period had not ended before the Developer filed the Corrected Fourth Element to the Master Deed, which removed the Property from the Regime

In *Reyhani v. Stone Creek Cove Condo. II Horizontal Prop. Regime*, 329 S.C. 206, 211, 494 S.E.2d 465, 468 (Ct. App. 1997), the court held that "once common elements are set aside and vested in the co-owners, such co-owners may not be unilaterally deprived of their interests in the common elements by the actions of the developer." Even if the Court here was correct that a provision in the Master Deed could allow the division or partition of a common element, the Court nevertheless overlooked or misapprehended this legal principle in ruling that the common elements had not vested in the Unit Owners of the Regime at the time the Developer filed the Corrected Fourth Element to the Master Deed, which removed the subject Property from the Regime.

In interpreting a deed, South Carolina courts "are guided by two settled rules of law. First, the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy." *Wayburn v. Smith*, 270 S.C. 38, 41, 239 S.E.2d 890, 892 (1977); *see also K&A Acquisition Grp., LLC v. Island Pointe, LLC*, 383 S.C. 563, 581, 682 S.E.2d 252, 262 (2009). Second, "the deed must be construed as a whole, and effect given to every part thereof, if such can be done consistently with law." *Wayburn*, 270 S.C. at 42, 239 S.E.2d at 892.

"The intention of the grantor must be found within the four corners of the deed." *Gardner v. Mozingo*, 293 S.C. 23, 25, 358 S.E.2d 390, 392 (1987). If this can be accomplished, the deed is unambiguous, and the court may construe it as a matter of law. On the other hand, a contract is ambiguous "when the terms of the contract are reasonably susceptible of more than one interpretation." *S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001). Further, "[w]hen intention is not expressed accurately in the deed evidence aliunde may be admitted to supply or explain it." In such cases, the deed is ambiguous and, therefore, it is not susceptible to definitive interpretation by the court on a motion for summary judgment. *Gardner*, 293 S.C. at 25, 358 S.E.2d at 392.

Here, the Master Deed provides that the Unit Owners became vested in the common elements when the Transition Period expired. This occurred on the earlier of:

> 1. December 31, 2017; or
>
> 2. Three (3) months after the conveyance in the ordinary course of Developer's business of 99 percent of the maximum number of units to be contained in all phases of the regime, rounded down to the next whole number, to persons other than the Developer; or
>
> 3. Three (3) months following the date the Developer surrenders its authority as a Class "B" Member of the Association to appoint and

> remove directors and officers of the Association by an express amendment to this Master Deed executed and filed of record by Developer.

(R. 525-526.)

The Court ruled that option 3 applied, and that the Transition Period ended in February 2015, which was three months after the Developer filed an amendment to the Master Deed surrendering its Class B authority. (Op. at 9.) In reaching this conclusion, the Court held that option 2 was never triggered because the Developer "never completed all phases of the Regime contemplated in the Master Deed." (*Id.*)

This holding hinged on the Court's interpretation of the language of option 2. According to the Court, option 2 would have been triggered "upon the sale of the maximum number of Units that *could have been constructed* if all phases had been added to the Regime[.]" (*Id.* at 8.) Because not all possible phases of the Regime were, in fact, completed, the Court determined that option 2 never came into play here. (*Id.*)

The Court further ruled that the language of option 2 was "not reasonably susceptible to more than one interpretation, and thus, it is not ambiguous." (*Id.* at 9.) However, the Court's interpretation of option 2 is not the only reasonable interpretation. As Appellants pointed out, option 2 is worded in such a way that it could reasonably be interpreted as being triggered once 99 percent of all Units actually constructed were sold. If this is the case, then the transition period ended around March 31, 2008, and the Unit Owners and not the Developer had a vested ownership in the common elements. (*See id.* at 8-9.)

Here, the Court misapprehended or overlooked the applicable law when it refused to find that the language of option 2 was ambiguous. *See S.C. Dep't of Nat. Res*, 345 S.C. at 623, 550 S.E.2d at 302; *Gardner*, 293 S.C. at 25, 358 S.E.2d at 392. The four corners of the Master Deed do not plainly

refer to all units that could possibly have been constructed if all potential phases had been added to the Regime. Instead, the language of option 2 could equally be interpreted as referring to all units that were actually contained within the Regime. Thus, the language of the Master Deed is ambiguous as to when the Transition Period ended and the common elements became vested in the unit owners. *See S.C. Dep't of Nat. Res*, 345 S.C. at 623, 550 S.E.2d at 302; *Gardner*, 293 S.C. at 25, 358 S.E.2d at 392. Accordingly, the meaning of this contractual language could not be properly resolved by the Court on a summary judgment motion. *See Gardner*, 293 S.C. at 25, 358 S.E.2d at 392. The Court overlooked or misapprehended existing South Carolina law in concluding otherwise. Appellants, therefore, respectfully petition for rehearing in accordance with Appellate Court Rule 221.

C. The Court overlooked or misapprehended the law when it ruled that an access easement had been granted that burdened the Regime's real property

"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.*, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001); *see also K&A Acquisition*, 383 S.C. at 581, 682 S.E.2d at 262. A deed "cannot operate to convey an interest which the grantors do not have in the land described in the deed." *Belue v. Fetner*, 251 S.C. 600, 606-07, 164 S.E.2d 753, 756 (1968). In this case, the Court overlooked or misapprehended South Carolina law when it ruled that an access easement had been granted that burdened the Regime's real property. For the reasons discussed in Parts A and B, above, the Developer did not have an ownership interest in the subject Property when the easement was granted in December 2014. *See id.* Because the Developer did not have an ownership interest, it could not have granted an access easement that burdened the Regime's property. *See id.*

Further, the Master Deed does not include any reference to the access easement in question. The Master Deed specifically allows for easements for encroachments as between common areas and units and as between units and units, and easements for air space, utilities, construction, inspection by the Developer, emergency personnel, and for a sales office and related signs. Because the Master Deed does not authorize the access easement, it is void ab initio. *See id.* The Court overlooked or misapprehended established South Carolina law when it ruled that access easement had been duly granted here. Appellants, therefore, respectfully petition for rehearing in accordance with Appellate Court Rule 221.

CONCLUSION

For the foregoing reasons, this Court should reconsider its decision in this matter, and enter an Order vacating its Opinion No. 6016, reversing the order of the circuit court granting summary judgment in Respondents' favor, and remanding the action for further proceedings consistent with said Order.

Respectfully submitted,

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September 13, 2023

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