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S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

CERTIORARI TO RICHLAND COUNTY
The Honorable DeAndrea G. Benjamin, Circuit Court Judge

Case No. 2018-CP-40-06557
Court of Appeals Case No. 2021-000641
Supreme Court Case No. 2024-001121

Stonington Community Association, Inc. ..... **Respondent**,

v.

Carl D. Taylor, Jonathan Stevens, Veronica Stevens, Lena M. Bretous, Vickie M. Wise, Gerald Maynard, Lisa Maynard, Reginald Dalton, Donna Dalton, Thomas Lafayette Brown a/k/a Thomas L. Brown, Sharline Brown, Derrick L. Taylor, Gaye S. Taylor, Syrecea Parker, Carolyn L. Austin, Richea G. House, Sr., Gayle D. House, Larkin Hancock, Jr., Katrina Hancock, Jeffery M. Farmer, Kelly S. Farmer, Anthony T. Reddish, Diann Reddish, Joel H. Daley, Syreta L. Daley, Judy Dove, Henry Faison, Dorothy Brisbon, George L. Lawrence, Annette M. Lawrence, Devinci L. Fulton, and John A Francis, Defendants,

of whom Lena M. Bretous, Vickie M. Wise, Gerald Maynard, Lisa Maynard, Derrick L. Taylor, Gaye S. Taylor, Richea G. House, Sr., Gayle D. House, Devinci L. Fulton, and John A. Francis are the
..... **Petitioners**.[1]

RETURN TO PETITION FOR WRIT OF CERTIORARI

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[1] Appellant Syrecea Parker is not listed as a Petitioner on the Petition for Write of Certiorari. Stonington is unaware of any dismissal of Parker from this appeal and therefore, the rulings challenged on this appeal are final as to Parker.

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INTRODUCTION

Petitioners seek a writ of certiorari to the Court of Appeals for a correctly-decided unpublished opinion where no special and important reasons exist to merit this Court's attention. While the Court of Appeals' opinion in this case will have an impact on the parties, it will have no impact on the law. The Court of Appeals' non-precedential decision simply applies existing law to the unique facts in this case. Because the Court of Appeals correctly decided this appeal, because Petitioners have found no valid error in the Court of Appeals' decision, and because there is no matter of particular public import presented in this case, Stonington requests that this Court deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Respondent Stonington Community Association, Inc. (hereinafter "Stonington" or "Respondent") filed the underlying action for a declaration as to whether certain lots within the Stonington subdivision are subject to Stonington's restrictive covenants and the collection of unpaid assessments. On December 17, 2018, Stonington filed a Lis Pendens, Summons and Complaint against Petitioners and other defendants, seeking Declaratory Judgment, Enforcement of Covenants, Specific Performance, and Quantum Meruit in the Court of Common Pleas for Richland County. (R. pp. 50-115). The lawsuit was filed in response to a group of homeowners, residing in Phase II of a three-phase subdivision, contesting their membership in the Stonington homeowner association and refusing to pay assessments to Stonington (hereinafter "Homeowners"). (R. pp. 521-523).

On January 16, 2019, by and through the same counsel, a group of Homeowners filed their Answer and Counterclaim of Abuse of Process. (R. pp. 116-126). On March 14, 2019, the remaining Homeowners filed their Answer and Counterclaim of Abuse of Process ("Second

Answer"), identical to the First Answer and by and through the same counsel. (R. pp 116-126). The counterclaims allege that the *lis pendens* was filed in this action for the improper purpose of harassing the Homeowners and coercing them into signing agreements to be bound by the Stonington restrictive covenants and paying assessments to Stonington.

Since the filing of the action, various Homeowners settled with Stonington and were dismissed from the action. Petitioners constitute twelve (12) of the remaining Petitioner Homeowners.

On July 22, 2020, Stonington filed its Motion for Summary Judgment on Defendants' Counterclaim for Abuse of Process ("Motion"). (R. pp. 127-129). On August 27, 2020, Stonington filed its Notice Motion for Partial Summary Judgment on its claim for Declaratory Judgment ("Partial Motion"). (R. pp. 130-131). (collectively, the "Motions"). On October 19, 2020, Stonington filed its Memorandum in Support of its Motion for Partial Summary Judgment ("First Memo"). (R. pp. 132-294). On October 20, 2020, Stonington filed its Memorandum in Support of its Motion for Summary Judgment Against Counterclaim of Defendants ("Second Memo"). (R. pp. 295-305). On December 31, 2020, Stonington filed its Memorandum in Support of its Motion for Summary Judgment Against Counterclaim of Defendants ("Third Memo"). (R. pp. 306-320).

A hearing was held on the Motions on January 4, 2021. (R. pp. 503-570). Three minutes prior to the hearing, Petitioners filed their Memorandum in Opposition to Plaintiff's Motion for Summary Judgment ("First Memo in Opp"). (R. pp. 321-422). On January 8, 2021, the Honorable Judge DeAndrea Gist Benjamin (hereinafter, "Judge Benjamin") issued a FORM 4 Order taking the Motions under advisement ("FORM 4 Order"). (R. pp. 423-425). On January 13, 2021, Stonington filed a Supplemental Memorandum in Support of Plaintiff's Motion for

Partial Summary Judgment ("Fourth Memo"). (R. pp. 426-431). On March 15, 2021, Stonington filed its Second Supplemental Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment ("Fifth Memo"). (R. pp. 432-440). On March 31, 2021, Petitioners filed their Supplemental Memorandum in Opposition to Plaintiff's Motion for Summary Judgment ("Second Memo in Opp"). (R. pp. 441-453).

On April 1, 2021, Judge Benjamin granted Stonington's Motions in an Order Granting Plaintiff's Motion Partial Summary Judgment ("First Order"). (R. pp. 1-12). That Order granted Stonington's motion for partial summary judgment and also dismissed the Petitioners' counterclaims.

On April 12, 2021, Petitioners filed their Notice of Motion and Motion Pursuant to Rule 59(e), SCRCP, to Alter or Amend the Order Granting Summary Judgment ("59e Motion"). (R. pp. 454-458). On May 6, 2021, Stonington filed its Memorandum in Opposition to Defendants' Motion to Alter or Amend ("Memo in Opp to 59e"). (R. pp. 459-467). On May 10, 2021, Petitioners filed their Reply Memorandum in Support of Defendants' Motion Pursuant to Rule 59(e), SCRCP, To Alter or Amend the Judgment. (Reply to Memo in Opp to 59e). (R. pp. 468-472).

On May 28, 2021, Judge Benjamin issued an Amended Order Granting Plaintiff's Motion for Partial Summary Judgment and Motion for Summary Judgment as to Defendants' Counterclaim ("Amended Order"). (R. pp. 13-23). This is the only Order from which this appeal was taken.

On June 7, 2021, Petitioners filed a Notice of Motion and Motion Pursuant to Rule 59(e), SCRCP to Alter or Amend regarding the Amended Order ("Second 59e Motion"). On June 15, 2021, and before Stonington could respond to the Second 59e Motion and before Judge

Benjamin could rule on it, Petitioners filed a Notice of Appeal, prematurely divesting the trial court of jurisdiction.

On March 20, 2024, the Court of Appeals affirmed the trial court. *Stonington Cmty. Ass'n, Inc. v. Taylor*, Unpublished Opinion No. 2021-000641, (S.C. Ct. App. Mar. 20, 2024). On May 9, 2024, Petitioners petitioned the Court of Appeals for rehearing pursuant to Rule 221(a), SCACR. ("Petition for Rehearing"). On June 4, 2024, the Court of Appeals denied the Petition for Rehearing. On July 5, 2024, Petitioners filed their Petition for Writ of Certiorari ("Petition") to review the Court of Appeals' decision. This Return follows.

STANDARD OF REVIEW - CERTIORARI

A writ of certiorari is not guaranteed to any litigant, but rather is granted in the sound discretion of the Court only where there exist special and important reasons. Rule 242(b), SCACR. Such reasons may exist where (1) there are novel questions of law, (2) where there was dissent in the lower court's opinion, (3) where there is conflict created with prior precedent, (4) where there are substantial constitutional issues, or (5) where there is conflict created with federal case law. Rule 242(b)(1) – (5), SCACR. Stonington would submit that none of these considerations apply in this case.

STATEMENT OF THE FACTS

Stonington was planned as a phased residential development by the "Developer," Stonington Development, LLC. (R. p. 134). The Developer organized on or about January 13, 2000, as a South Carolina limited liability company. (R. pp. 134-135). Shortly thereafter, Developer acquired title to approximately one-hundred and sixty-five (165) acres of land in Richland County by separate deeds recorded in the Richland County Register of Deeds Office.

(R. p.135). Each deed's property description refers to a plat prepared for and recorded by the Developer in the Richland County Register of Deeds Office. (R. p. 156).

Stonington's residential development was approved as a planned-unit development (PUD) by the Richland County Planning Commission in 2000, pursuant to the Developer's application to the Planning Commission. (R. pp. 157-162). On June 10, 2002, the Developer recorded a "Bonded Plat of Stonington – Phase I" ("Phase I Plat") showing portions of Developer's Property subdivided into fifty-five (55) residential lots, rights-of-way for ingress and egress, open space designated as "Common Area", and contiguous parts of Developer's Property designated for "Future Development." (R. p. 164). On November 5, 2002, the Developer recorded the Stonington Declaration of Covenants, Conditions, Restrictions and Easements (Amended) *(sic)* (the "Original Declaration") with the Richland County Register of Deeds, which set forth the various use restrictions, easement rights, and other obligations of ownership for subsequent grantees. (R. pp. 165-184). On May 26, 2004, the Developer created a subdivision plat for Stonington Phase II-A and Phase II-B entitled "Bonded Plat of STONINGTON – PHASE II-A & II-B." (R. p. 185). On September 6, 2005, the Developer recorded the Amended and Restated Declaration of Covenants, Conditions, Restrictions, Easements, Charges and Liens for Stonington (the "Amended Declaration"; collectively with the Original Declaration "Stonington Declarations"). (R. pp. 187-230). Both the Original Declaration and the Amended Declaration referenced only a Phase I Plat. (R. pp. 165-184, 187-230).

In 2008, in the wake of the "Great Recession," the Developer's lender, Carolina First Bank brought a foreclosure action against a portion of the land owned by the Developer, which included most of the Phase II lots which had not already been sold. (R. pp. 408-410, 439). This

suit resulted in the transfer of a portion of the land to Carolina First Bank by way of a Foreclosure Deed. (R. p. 408-410). Thereafter, the Wade Corporation acquired title to 8 of the 9 Phase II lots subject to this appeal. (R. p. 237-238). The Wade Corporation acted as the successor developer in that it continued the development of the residential neighborhood, as originally planned and intended. (R. pp. 233-236). All of the Petitioners took title to real property located in the Stonington residential subdivision ("Lots") with notice of the restrictive covenants. (R. p. 539, line 21-p. 540, line 2; p. 553, line 4-p. 554, line 4; and *See* R. p. 325).

On December 16, 2009, a group of homeowners (which included six of the original Defendants) filed a lawsuit against the Developer and others, asserting that "all of the lots, common areas, and roads in the Stonington Subdivision […] are subject to the provisions of the [Stonington] Covenants and Restrictions and the By-Laws. (R. p. 153). On January 15, 2010, the Honorable G. Thomas Cooper, Jr. issued a Consent Order Withdrawing Injunction, Dismissing Parties and Confirming Partial Settlement in favor of the plaintiffs in that action. (R. pp. 338-342).

On November 18, 2015, a group of homeowners (which included seven of the original Defendants) filed a lawsuit against the Developer, Stonington, its management company, and other entities/persons, asserting that the plaintiffs in that suit were members of the Stonington homeowner association and desirous of control of the Stonington homeowner association. (R. pp. 285-290). The plaintiffs in that action obtained all of the requested relief, to include control over and management of Stonington, seats as interim directors of Stonington, a court ordered member meeting/election, and also reimbursement for their attorney's fees and costs via a Consent Order Confirming Settlement Agreement. (R. pp. 291-294).

ISSUES PRESENTED

I. Have the Petitioners set forth special or important reasons to warrant this Court's review, pursuant to Rule 242, SCACR?

II. Do Petitioners seek an advisory opinion from this Court where Petitioners do not appeal all of the underlying bases for the trial court's ruling?

III. Did the Court of Appeals correctly affirm the trial court's findings that the Petitioners' Lots are bound by and subject to the Stonington restrictive covenants?

RETURN ARGUMENT

I. PETITIONERS DO NOT SET FORTH SPECIAL OR IMPORTANT REASONS FOR WHICH THIS COURT MAY GRANT CERTIORARI.

Rule 242 of the South Carolina Appellate Court Rules specifically sets forth that, "[a] writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring [this] Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:

(1) Where there are novel questions of law.

(2) Where there is a dissent in the decision of the Court of Appeals.

(3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.

(4) Where substantial constitutional issues are directly involved.

(5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Rule 242(b), SCACR. None of these considerations apply in this case. Reliance on any of the latter four of these reasons is plainly foreclosed in this case: there was no dissent in the Court of Appeals' decision; that decision is not in conflict with a prior decision of this Court; and this case raises no constitutional issues or federal questions.

At this late stage of this case, Petitioners seems to be attempting to make a novelty argument regarding the "application of a theory of negative reciprocal easements[…] in the context planned subdivision development" (sic). (Pet. for Cert. p. 5). This argument was not made to the Court of Appeals and therefore unpreserved.[2] Even so, there is no such novelty to the rulings in this case. "It is well settled in this state that where the owner of a tract of land subdivides it and sells the distinct parcels thereof to separate grantees, imposing restrictions on its use pursuant to a general plan of development or improvement, such restrictions may be enforced by any grantee against any other grantee, either on the theory that there is a mutuality of covenant and consideration, or on the ground that mutual negative equitable easements are created." *McDonald v. Welborn*, 220 S.C. 10, 18, 66 S.E.2d 327, 331 (1951). Additionally, "[t]he rule that restrictions as to the use of real estate should be strictly construed and all doubts resolved in favor of the free use of property, should not be applied in such a way as to defeat the plain and obvious purpose of a contractual instrument of restriction." *Id.* at 19, 66 S.E.2d at 331.

Petitioners rely on the same arguments that were presented to and decided by the Court of Appeals. Rule 242 (d)(4) SCACR provides, "[f]ailure of a petitioner to present with accuracy, brevity, and clarity the information and arguments that are essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition." Stonington urges the court to deny the Petition on the basis that the Petitioner has utterly failed to comply with Rule 242 (d)(4) and has failed to provide any "special or important reason" to support the Petition.

[2] The Court of Appeals found that Petitioners waived a different novelty argument – that the *application of mandatory assessments* based on the theory of reciprocal negative easements was novel – due to Petitioners' failure to argue the same on the merits. (March 20, 2024 Order, p. 8-9 citing *See Med Univ. of S.*C. *v. Arnaud,* 360 S.C. 615, 620, 602 S.E.2d 747, 750 (2004); *McCall v. IKON,* 380 S.C. 649, 659-60, 670 S.E.2d 695, 701 (Ct. App. 2008)).

II. PETITIONERS SEEK AN ADVISORY OPINION FROM THIS COURT BECAUSE PETITIONERS DO NOT APPEAL ALL OF THE UNDERLYING BASES FOR THE TRIAL COURT'S RULING.

The trial court found Petitioners and their Lots were subject to and bound by the Stonington restrictive covenants based on *both* a theory of judicial estoppel and implied reciprocal negative easements. (R. pp. 13-23). Petitioners appealed the trial court's ruling and raised five issues to the Court of Appeals: 1. that the trial court erred in finding Petitioners' Lots were subject to Stonington's restrictive covenants based on reciprocal negative easements; 2. that the trial court erred in finding Petitioners Lots were subject to Stonington's restrictive covenants based on judicial estoppel; 3. that the trial court erred in finding Petitioners' Lots were subject to the Original Declaration; 4. that the trial court erred in finding mandatory assessments can be applicable to property under the theory of reciprocal negative easements; and 5. that the trial court erred in granting Stonington summary judgment on Petitioners' counterclaims. (Br. of App. p. 3).

In the Petition to this Court, Petitioners only advance issues 1, 3 and 4. (Pet. for Cert. p. 1). Petitioners make no mention of judicial estoppel – another basis upon which the trial court granted Stonington partial summary judgment. As such, Petitioners have waived the issue of judicial estoppel. Even in the best case for Petitioners – that is, this Court grants the Petition, agrees with Petitioners arguments, and "remand[s] this case to the trial court for further proceedings" (Pet. for Cert. p. 5), the ruling of the trial court, that Petitioners' Lots are subject to the Stonington restrictive covenants, would stand unaffected, on the alternative theory of judicial estoppel. Therefore, even if this Court granted certiorari and reversed on the issues appealed, it would be merely advisory and have no impact on the trial court's ultimate ruling that Petitioners'

Lots are bound by and subject to the Stonington restrictive covenants. As such, the Court should deny certiorari.

III. THE COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT'S FINDINGS THAT THE PETITIONERS' LOTS ARE BOUND BY AND SUBJECT TO THE STONINGTON RESTRICTIVE COVENANTS.

Petitioners' arguments as to the applicability of Stonington's restrictive covenants to the Petitioners' Lots are the same made to the Court of Appeals. (Br. of App. pp. 8-13, 16-17). The purported evidence that Petitioner argues creates genuine issues of material fact is the same cited in their brief to the Court of Appeals. (Br. of App. pp. 10-11, 13, Reply Br. of App., pp. 6-7). For the sake of brevity and judicial economy, Stonington incorporates herein all of its arguments from its brief to the Court of Appeals. (Br. of Resp. pp. 9-24). However, Stonington would also emphasize or add the following to its arguments in response to the Petition. Despite Petitioners assertion that there are "questions of material fact[…] as to the applicability of the restrictive covenants to the Petitioners' properties," none of the "facts" raised in the Petition are in dispute. (Pet. for Cert. p. 3). Therefore, there can be no "questions" as to those facts. Petitioners dimply disagree with Stonington's, the trial court's and the Court of Appeals' interpretation of those facts and the materiality of those facts to the question of whether Petitioners' Lots are subject to the Stonington restrictive covenants.

Petitioners argue Article I, Section 1(R) of the Amended Declaration demonstrate the intent of the Developer not to allow for the application of reciprocal negative easements against Petitioners. (Pet. for Cert. pp. 3-4; R. pp. 191-192). Petitioners' interpretation and application of this provision is simply wrong. The Court of Appeals correctly found that this provision in conjunction with the Declarations as a whole clearly showed the "Developer solely intended for this section to protect it from the obligation (i.e. covenant) to complete the development of

Stonington Subdivision if it was unable or unwilling to do so," similar to this Court's finding in *Finucan v. Coronet Homes, Inc.*, 259 S.C. 142, 191 S.E.2d 5 (1972) . *Stonington Cmty. Ass'n, Inc. v. Taylor*, Unpublished Opinion No. 2021-000641, (S.C. Ct. App. Mar. 20, 2024).

Petitioners continue to argue that certain actions taken by Developer while it owned Petitioners' Lots raise questions of material fact, to wit: the mortgage the Developer subjected the property to required the lender's prior written consent to any change in "license, restrictive covenant, or easement," and warranted the property was unencumbered except for encumbrances of record." (Pet. for Cert. p. 4); and that Developer was on notice that "the subject properties in Phase II were **not** subject to the restrictions." (Pet. for Cert. p. 5, emphasis in original). These facts are not material to the issue of whether Petitioners' Lots are subject to the Stonington restrictive covenants. The Court of Appeals correctly found that these facts were not "evidence establishing Developer's actions were inconsistent with its intent that the Covenants were applicable to all of Stonington Subdivision." *Stonington Cmty. Ass'n, Inc. v. Taylor*, Unpublished Opinion No. 2021-000641, (S.C. Ct. App. Mar. 20, 2024).

Lastly, Petitioners argue "there is no evidence in the public record that a subsequent purchaser for value would be made aware that specific restrictive covenants run with to the property." (sic) (Pet. for Cert. p. 5). The Court of Appeals agreed with the trial court that the "Covenants 'indisputably run with the land'." *Stonington Cmty. Ass'n, Inc. v. Taylor*, Unpublished Opinion No. 2021-000641, (S.C. Ct. App. Mar. 20, 2024). Both Stonington Declarations expressly stated that the restrictive covenants contained therein run with the land. (R. p. 165, R. pp. 188-189).

CONCLUSION

Petitioners have failed to raise any matter of special importance sufficient to merit the issuance of a writ of certiorari to the Court of Appeals. Petitioners can demonstrate no error in the Court of Appeals' opinion. The Court of Appeals reached the correct result and, therefore, Stonington requests that this Court deny Certiorari.

Respectfully submitted,

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