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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas
The Honorable Courtney Clyburn Pope
Circuit Court Judge

Appellate Case No. 2024-000898

Albert D. Barwick, Anna Barwick, Gordon G. Holscher II, Billy R. Jeffcoat, Connie M. Jeffcoat, Harriet A. Jones, Ernest J. Matheson, Thomas L. Reading, Kenneth W. Phippen Jr., and Ignas K. Skrupkelis Appellants,

v.

Edisto Lake, Inc., Edisto Lake Ridge, LLC, Edisto Lake Property Owner's Association, Inc. and Terry M. Hutto, Jr., Respondents.

INITIAL BRIEF
OF RESPONDENT TERRY M. HUTTO, JR.

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STATEMENT OF ISSUES ON APPEAL

Pursuant to Rule 208(a)(2), SCACR, the Respondent Terry M. Hutto, Jr. respectfully submits that the Issues on Appeal for this matter are:

1. DID THE TRIAL COURT ERR BY FINDING AND CONCLUDING THAT HUNTING IS NOT ABSOLUTELY PROHIBITED WITHIN THE EDISTO LAKE COMMUNITY?
2. DID THE TRIAL COURT ERR BY FINDING THAT HUNTING IN THE EDISTO LAKE COMMUNITY IS NOT IN AND OF ITSELF A NOXIOUS AND OFFENSIVE ACTIVITY AS DEFINED BY THE RESTRICTIVE COVENANTS?

Pursuant to Rule 208(a)(2), SCACR, the Respondent Terry M. Hutto, Jr. submits the following Statement of the Case for this matter.

STATEMENT OF THE CASE

This case involves the interpretation of certain covenants and restrictions which govern a residential development in Aiken County known as the Edisto Lake Community (referred to herein also as “the Community” or “the development”).¹ (Appellants’ Complaint and Amended Complaint; Respondent Huttos’ Answers to Complaint and Amended Complaint; Transcript of March 21, 2022 Trial). The Appellants and the Respondent Hutto, and his family, are residents of that development.(Transcript of March 21, 2022 Trial).

The Appellants commenced this civil action in August 2019 alleging that Mr. Hutto has violated the covenants and restrictions for the Edisto Lake Community. (Appellants’ Complaint and Amended Complaint). They sought a declaration in that regard and initially recovery of

¹ Part of the “Edisto Lake Community” development includes a section known as “Edisto Ridge”. The parties in this case agree that the covenants and restrictions governing the “Edisto Lake Community” also govern the section known as “Edisto Ridge”. (See Appellants’ Brief, P. 6).

monetary damages from Mr. Hutto. (Appellants' Complaint). Mr. Hutto denies that he, or any member of this family, has violated the covenants and restrictions at any point in time. (Mr. Hutto's Answers to Appellants' Complaint and Amended Complaint).

Following a period of discovery undertaken by the parties a trial for this matter began before the Honorable Courtney Clyburn Pope on March 21, 2022. At that time, Mr. Hutto and Edwin H. Cooper, Jr were the only named Defendants in this case. Before the presentation of testimony their counsel moved to join Edisto Lake, Inc., Edisto Lake Ridge, LLC and the Edisto Lake Property Owner's Association, Inc. (the "POA") as parties in this case. (Transcript of March 21, 2022 Trial).

Edisto Lake, Inc. and Edisto Lake Ridge, LLC are two entities which were formed by Mr. Cooper to develop the property where the Edisto Lake Community is located. (Transcript of March 21, 2022 Trial). Mr. Cooper also prepared the restrictive covenants for the Community. (Transcript of March 21, 2022 Trial). The POA is an association formed to govern the Edisto Lake Community. (Transcript of March 21, 2022 Trial). All residents of the Community are members of the POA. (Transcript of March 21, 2022 Trial).

Counsel for Mr. Cooper also moved to dismiss him from this case, contending that there is no basis to find that he is personally liable in this matter or subject to any declaration issued by the Court. (Transcript of March 21, 2022 Trial). Judge Clyburn Pope took all of the motions under advisement pending the presentation of testimony and other evidence before her.

The Appellants testified at the trial held in March 2022. (Transcript of March 21, 2022 Trial). Mr. Hutto and Mr. Cooper also testified. (Transcript of March 21, 2022 Trial). Several exhibits were introduced into evidence by the parties, including the covenants and restrictions for the Edisto Lake Community and a plat of the development. (Transcript of March 21, 2022 Trial).

At the conclusion of the trial held in March 2022 counsel for Mr. Hutto and Mr. Cooper renewed the motions they presented to the Court before it began. Judge Clyburn Pope then issued her Order dated October 27, 2022.

As part of that Order she found that Mr. Cooper should be dismissed from this case with prejudice. (Order dated October 27, 2022). She further concluded that Edisto Lake, Inc., Edisto Lake Ridge, LLC and the POA should be joined as parties in this case to ensure the full and just adjudication of all of the issues presented in this matter. (Order dated October 27, 2022). Finally, Judge Clyburn Pope ordered that once the additional parties were joined the trial of this case should reconvene for purposes of presenting any additional evidence and testimony needed to allow her to fully adjudicate the issues presented as part of this matter.

None of the parties filed any motions with respect to Judge Clyburn Pope's Order dated October 27, 2022, or appealed that Order.

The Appellants, Mr. Hutto and the newly joined parties then appeared before Judge Clyburn Pope on November 15, 2023 for additional proceedings in this case. Before taking any additional testimony or accepting any other evidence, however, she conducted a pre-trial conference with counsel for the parties.

At that conference counsel for the Appellants stated that his clients do not seek to recover any monetary damages from the Respondents, and further that the Appellants' request for relief in this matter is limited to a declaration setting forth that the restrictive covenants for the Edisto Lake Community prohibit hunting within its boundaries, and further that hunting in the development, in and of itself, is a noxious and offensive activity prohibited by those covenants and restrictions.

During the conference all counsel further agreed that it would be appropriate for Judge Clyburn Pope to include as part of her ruling for this case a finding that all of the residents of the Edisto Lake Community are bound to comply with the covenants and restrictions governing the development, and further that the operation of a hunt club or hunting preserve, or similar business or commercial entity, is prohibited within the development.

Finally, counsel for the parties agreed that it was not necessary for Judge Clyburn Pope to hear additional testimony, or consider any other additional evidence, before she ruled on the merits of the Appellants' claims. She also asked counsel to submit memorandums to her setting forth their respective positions as to the contested issues presented in this case. Thus, this matter was submitted to Judge Clyburn Pope for her rulings based on the testimony and other evidence presented to her during the March 2022 trial, and the statements and arguments presented by counsel.

On May 8, 2024 Judge Clyburn Pope issued her Final Order for this case, and by which she denied the relief requested by the Appellants. (Order dated May 8, 2024). The Appellants then filed a motion asking her to reconsider her decision, which was denied. (Appellants' Motion to Reconsider). The Appellants subsequently and timely filed a Notice of Appeal of Judge Clyburn Pope's Final Order to this Court.

Arguments

I. THE TRIAL COURT DID NOT ERR BY FINDING AND CONCLUDING THAT HUNTING IS NOT ABSOLUTELY PROHIBITED WITHIN THE EDISTO LAKE COMMUNITY.

Mr. Hutto agrees that the standard of review for this matter is properly stated in the Appellants' Brief for this case. That is, this case is an action in equity, and this Court may make findings according to its view of the preponderance of the evidence presented. Townes Assoc. v. City

of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976); S.C. Department of Natural Resources v. Town of McClellanville, 345 S.C. 617, 550 S.E.2d 299 (2001).

Restrictive covenants governing the use of real property in South Carolina are contracts, and subject to the laws of this state governing the interpretation of contracts. As our Supreme Court has explained:

Restrictive covenants are contractual in nature, so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document. The court may not limit a restriction in a deed, nor, on the other hand, will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written. It is still the settled rule in this jurisdiction that restrictions as to the use of real estate should be strictly construed and all doubts resolved in favor of free use of the property, subject, however, to the provision that this rule of strict construction should not be applied so as to defeat the plain and obvious purpose of the instrument. It follows, of course, that where the language of the restrictions is equally capable of two or more different constructions that construction will be adopted which least restricts the use of the property. A restriction on the use of property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property.

S.C. Department of Natural Resources v. The Town of McClellanville, Id.

As set forth in Judge Clyburn Pope’s Final Order for this matter dated May 8, 2024 nothing in the restrictive covenants for the Edisto Lake Community expressly prohibits hunting within the boundaries of the development. (Order dated May 8, 2024). Section 21 of Article VII of those covenants provides:

Section 21. Hunting: No hunting will be permitted on or over Edisto Lake, or on any roads or parkways within the Property.²

² There are private roads and parkways located in the Edisto Lake Community which are used by the residents who live there. Edisto Lake is the body of water surrounded by their properties. (Transcript of March 21, 2022 Trial).

There is nothing ambiguous about this provision - it prohibits hunting in certain areas of the development. Given that hunting is not expressly prohibited by the restrictive covenants of the development, by implication it is allowed except as geographically limited by Section 21 noted above.

As noted above Mr. Cooper drafted the restrictive covenants for the Community. Had he intended to prepare the covenants in a fashion which prohibited hunting outright there, it would have been easy for him to do so. (Transcript of March 21, 2022 Trial).

As our Supreme Court has also stated:

A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation. Hawkins v. Greenwood Development Corp., 328 S.C. 585, 493 S.E.2d 875 (Ct.App.1997). It is a question of law for the court whether the language of a contract is ambiguous. Id. Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties. Id. The determination of the parties' intent is then a question of fact. Id. On the other hand, the construction of a clear and unambiguous deed is a question of law for the court.

Gardner v. Mozingo, 293 S.C. 23, 358 S.E.2d 390 (1987).

Which brings us to Mr. Cooper's testimony at the March 2022 trial. While Judge Clyburn Pope found that the restrictive covenants for the Edisto Lake Community are not ambiguous she also determined that it would be beneficial to the Court and the parties to consider his testimony when ascertaining his intentions as to their meaning.

Mr. Cooper outlined the history of the development of the Edisto Lake Community and the drafting and preparation of the restrictive covenants governing use of the property by residents living there. (Transcript of March 21, 2022 Trial). He testified that the covenants were prepared in a fashion to allow residents to hunt within the Community, with the exception that no one is allowed to do so across Edisto Lake itself or on the roads located within the Community.

(Transcript of March 21, 2022 Trial). He also stated that the covenants were not drafted to prohibit hunting outright in the Community. (Transcript of March 21, 2022 Trial). He further testified, however, that the operation of hunt clubs and preserves within Edisto Lake are expressly prohibited. (Transcript of March 21, 2022 Trial). Thus, and while the restrictive covenants are clear and unambiguous standing alone, Mr. Cooper's testimony is helpful to the Court in resolving the issues presented in this case.

Based upon her review of the covenants, as well as her consideration of Mr. Cooper's testimony and other evidence presented to her, Judge Clyburn Pope found and declared that the covenants and restrictions for the Edisto Lake Community allow hunting within certain areas of the development. (Order dated May 8, 2024). She also found that the covenants prohibit hunting on or over Edisto Lake, or on any roads or parkways located within the Property. (Order dated May 8, 2024).

In addition, Judge Clyburn concluded, as the parties in this case agree, that all residents of the Edisto Lake Community are bound to abide by and with the covenants and restrictions governing the Community, Such restrictions include an outright prohibition of the operation of hunt clubs or preserves. (Order dated May 8, 2024).

Judge Clyburn Pope's decision in these regards is fully supported by the evidence in this case. Mr. Hutto respectfully submits that she correctly ruled that the restrictive covenants for the Edisto Lake Community do not prohibit hunting outright within its boundaries, but do limit where such hunting make take place.

II. THE TRIAL COURT DID NOT ERR BY FINDING THAT HUNTING IN THE EDISTO LAKE COMMUNITY IS NOT IN AND OF ITSELF A NOXIOUS AND OFFENSIVE ACTIVITY AS DEFINED BY THE RESTRICTIVE COVENANTS?

Mr. Hutto does not quarrel with the proposition that the restrictive covenants for the Edisto Lake Community prohibit residents from engaging in “noxious or offensive activity” there. Indeed, he and his family have every desire to live in a community free of such activity.

In essence, however, the Appellants have asked this Court to find that hunting within the Edisto Lake Community is, per se, a noxious and offensive activity as defined by the restrictive covenants. Given the fact that hunting is allowed within certain areas of the Community, it necessarily follows that the covenants do not deem it to be a “noxious or offensive activity” in and of itself.

Mr. Hutto also does not disagree with the proposition that hunting in the Community may rise to the level of being a “noxious or offensive activity.” For example, if it takes place near homes or where children play, regardless of the type of weapon used. There is, however, no evidence in this case of any identifiable individual - including Mr. Hutto - having engaged in hunting in the Community which reaches an offensive or noxious level.

In that regard the Appellants testified at the March 2022 trial that they have heard gunshots during the day which they thought emanated from within the Edisto Lake Community. (Transcript of March 21, 2022 Trial). They also testified that they found spent shotgun shells on property within the development. (Transcript of March 21, 2022 Trial). Upon cross-examination, though, none of the Appellants could point to any particular person, to include Mr. Hutto, as the source of such activity. (Transcript of March 21, 2022 Trial).

Mr. Hutto testified that he and his wife purchased their property in the Edisto Lake

Community with the expectation that hunting would be allowed in certain areas of the development. (Transcript of March 21, 2022 Trial). He also stated that while he has not himself hunted in the development he has allowed his children do so in areas where it is allowed, provided that they are supervised and do so safely in accordance with the laws which govern hunting in South Carolina. (Transcript of March 21, 2022 Trial). He also affirmed that he has never operated a hunt club or any type of hunting preserve within the Edisto Lake Community. (Transcript of March 21, 2022 Trial).

Given this evidence Mr. Hutto submits that it would not have been appropriate for Judge Clyburn Pope to find that hunting within the Edisto Lake Community, in and of itself, is a noxious or offensive activity in violation of the restrictive covenants for the development. Further, there is no evidence in the record for this matter supporting any conclusion that Mr. Hutto has engaged in hunting which constitutes a noxious or offensive activity in violation of those covenants.

CONCLUSION

The parties in this case agree that they are bound to abide by the restrictive covenants for the Edisto Lake Community. They further agree that no hunt clubs or hunting preserves may be operated within the development.

Mr. Hutto submits that the restrictive covenants allow hunting within certain areas of the development, as long as one does not run afoul of Section 21 of Article VII of the covenants or engages in hunting which rises to a noxious or offensive level. There is, however no evidence contained in the record for this case which establishes that he or anyone else has engaged in hunting which violates any part of the covenants. Absent such evidence there is no basis to issue a declaration that such has occurred within the Edisto Lake Community.

Thus, Mr. Hutto submits that Judge Clyburn Pope correctly ruled that the Appellants

are not entitled to the relief they seek in this case, and her Order dated May 8, 2024 should be affirmed in its entirety.

Respectfully Submitted,

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Dated: March 5, 2025