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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2024-001510

Elizabeth M. Ferraro, James T. Ferraro, Edward J. Przybyl, Marcella Gleie, John E. Gleie, Jr., Thomas Bowes, Connie Bowes, Moataz Alasadi, Virginia Kirkwood, Bob Kirkwood, Paul Vichroski, Nydza Vichroski, James Montellese, and Roxann Montellese, Individually, Derivatively, and on Behalf of All the Mount Vintage Homeowners Association Members . . . . . Respondents,

v.

LL of SC, LLC, Raiford Topsail Island Investments, LLC, TR Sales Plantation, LLC, and Mount Vintage Plantation Homeowners Association, Inc. *a/k/a* Mount Vintage Homeowners Association, Inc. . . . . Defendants,

Of which LL of SC, LLC, Raiford Topsail Island Investments, LLC, and TR Sales Plantation, LLC are the . . . . . Appellants.

APPELLANTS' FINAL OPENING BRIEF

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STATEMENT OF THE ISSUES ON APPEAL

I. Whether the trial court's decision that Appellant Raiford Topsail Island Investments, LLC acquired developer rights in the Mount Vintage community constitutes reversible error.

II. Whether the trial court's decision divesting Appellant LL of SC, LLC of its property rights and interests in Mount Vintage—including developer rights, expressly acquired by a deed in lieu of foreclosure from the community's prior developer, constitutes reversible error.

III. Whether the trial court's failure to apply the doctrine of merger to uphold the developer rights that Appellant LL of SC, LLC acquired in Mount Vintage by virtue of accepting a deed in lieu of foreclosure from the community's prior developer constitutes reversible error.

STATEMENT OF THE CASE

This is an appeal from the trial court's grant of a motion for partial summary judgment in Respondents' favor, issued on the eve of trial, which errantly found that developer rights to an upscale residential community vested in the wrong party, by virtue of an underlying transactional history that involved foreclosure proceedings, a lis pendens, a deed in lieu of foreclosure, and a foreclosure sale. In light of the causes of action alleged, the identity of the holder of developer rights, as established by the chain through which those rights were conveyed, is of critical importance to the prosecution of, and defense against, Respondents' claim.

The underlying action commenced with the filing of the initial complaint on June 5, 2020. (R. 17.) The complaint has been amended three times since. (R. 41, 149 & 181.)

A jury trial was set to commence on September 16, 2024. (R. 7.) Among the issues to be tried were Respondents' actions against Appellants for negligence and negligent development, and breach of fiduciary duty.

However, in relevant part, on August 16, 2024, Respondents filed a motion for partial summary judgment on the issue of who—as between Appellant LL of SC, LLC and Appellant Raiford Topsail Island Investments, LLC—held the very developer rights that were at the heart of the case to be imminently tried. (R. 647.) By order dated September 4, 2024, and over Appellants' objections, the trial court granted Respondents' motion for partial summary judgment, concluding that Appellant Raiford Topsail Island Investments, LLC had acquired developer rights as a result of the culmination of

foreclosure proceedings in 2013. (R. 1.) That same day, Appellants filed a notice of appeal.

Two days later—on September 6, 2024—the trial court entered an additional Form 4, by which the court concluded that its jurisdiction to try the underlying case had not been affected by Appellants' filing of the notice of appeal, (R. 4); in other words, trial would commence as scheduled the following week. Appellants immediately filed a petition for stay or supersedeas with this Court. On September 10, 2024, this Court denied the petition and dismissed the appeal on the basis that the September 4 order was not sufficiently final for purposes of appellate review. Specifically, this Court observed that the trial court's September 4 order directed Respondents' counsel to prepare a more formal order, and that had not happened.

During the afternoon of September 10, 2024, and as an accommodation to Appellants, the trial court revised its September 4 order to withdraw the directive to Respondents' counsel to prepare a more formal order. (R. 7.) Accordingly, the revised order—dated September 10, which is the order from which this appeal is taken—was sufficiently final for appellate review. On the afternoon of September 10, 2024, and immediately upon the trial court's entry of the revised order, Appellants filed this second notice of appeal. (R. 1021.) The following day, September 11, Appellants filed a renewed petition to stay or for supersedeas. (R. 1026.)

By order entered September 13, 2024, this Court granted a temporary stay of proceedings in the lower court—to include the trial of this matter—pending further briefing from the parties. (R. 11.) Then, on October 9, 2024, this Court formally granted

Appellants' petition to stay or for supersedeas, suspending further activity in the trial court until the disposition of these appellate proceedings. (R. 13.)

STATEMENT OF FACTS

The underlying action is a dispute arising from the development of an upscale residential community located in Edgefield County. The community is known as Mount Vintage. Respondents are residents of Mount Vintage. They have brought suit against LL of SC, LLC ("**LLSC**"), Raiford Topsail Island Investments, LLC ("**Topsail**"), and TR Sales Plantation, LLC ("**TR Sales**"), as well as the Mount Vintage Plantation Homeowners Association, Inc. ("**the HOA**"), under various legal and equitable theories.

LLSC is the holder of developer rights within Mount Vintage.[1] (R. 46 at ¶ 35; R. 79-80 at ¶ 36.) Topsail is a wholly owned subsidiary of LLSC. (R. 722.) TR Sales is a company that has provided various support services for LLSC and Mount Vintage.

Respondents have brought suit against LLSC, Topsail, and TR Sales under various legal and equitable theories for Appellants' allegedly wrongful conduct pertaining to Mount Vintage; the legal theories include negligence and negligent development, and breach of fiduciary duty. Because of these legal theories, it is critical for Respondents to establish which Appellants owed duties to Respondents, in their capacity as homeowners, and what wrongful acts are capable of attribution to the pertinent Appellant, in order for liability to be established. (R. 1319.) These appellate proceedings were necessitated by the September order of the trial court that errantly injected Topsail into the chain of holders of developer rights at Mount Vintage.[2]

The Mount Vintage community was established in the mid-to-late 1990s. (R. 45 at ¶ 28.) LLSC did not acquire developer rights until 2013. (R. 666.) The developer

[1] This proposition, however, is the central issue of these appellate proceedings.

[2] The reason why this decision constitutes prejudicial error is discussed below in Argument Section IV.

immediately preceding LLSC (who was not the initial developer, either) obtained a loan from LLSC in 2010 in the amount of $2,500,000.00. (R. 666 & 709.) In relevant part, the loan was secured by a priority, first-position mortgage given in favor of LLSC, in which the mortgagor pledged the totality of its property rights and interests in Mount Vintage as collateral. (R. 662-63 at ¶ 12; R. 666.) The mortgage was duly recorded in the property records of Edgefield County.

By the latter half of 2012, the mortgagor was in default of its loan obligations to LLSC. Accordingly, on October 23, 2012, LLSC commenced a debt collection and foreclosure action against the debtor-developer. (R. 659.) At the same time as the foreclosure complaint was filed, LLSC also caused a lis pendens to be duly recorded. (R. 653.)

During the course of the foreclosure action, the debtor-developer gave LLSC a deed in lieu of foreclosure "in full satisfaction of any and all debt evidenced by" the aforementioned mortgage. (R. 666.) The deed in lieu expressly conveyed all the debtor's developer rights in Mount Vintage to LLSC. The deed in lieu was executed on September 13, 2013, was accepted by LLSC that same day, and that same day, was duly recorded in the property records of Edgefield County.

However, despite having accepted the debtor-developer's deed in lieu, LLSC was concerned that other, subordinate liens (or claims of liens) may exist that would impair LLSC's rights to transfer any of the parcels of real property it had just acquired through the deed in lieu.[3] Accordingly, on November 4, 2013, and pursuant to a previously issued order of foreclosure entered by the special referee, a foreclosure sale was held. (R.

[3] See the discussion below in Argument Section III.D.

679.) LLSC attended the foreclosure sale, and was the winning bidder. After the conclusion of the foreclosure sale, LLSC paid the funds required to perfect its winning bid, and further, filed an assignment of bid requesting that the referee's deed convey any property that was acquired by LLSC at the foreclosure sale to Topsail, (R. 678). The assignment of bid was executed by an individual named J. Wayne Raiford, who is identified as a member of LLSC. Mr. Raiford was also a member of Topsail.[4]

In any event, on November 11, 2013, the special referee executed a foreclosure deed in favor of Topsail. (R. 680.) The deed was duly recorded in the Edgefield County property records on November 18, 2013.

Since September 13, 2013, with the acceptance of the deed in lieu, and continuing to the present, LLSC has understood itself to be the sole and exclusive holder of developer rights within Mount Vintage. (R. 1127 at ¶ 6.) It has acted as developer. The covenants recognize LLSC as developer. (R. 586.) Even Respondents have acknowledged LLSC's status as developer. (R. 732.)

However, on September 10, 2024—within one week before the trial of this matter was set to commence—the trial court entered an order granting summary judgment in favor of Respondents, holding that the special referee's deed of November 13, 2013 not only superseded LLSC's deed in lieu, but nullified it, resulting in the circumstance whereby Topsail—and not LLSC—was the holder of developer rights in Mount Vintage. (R. 7; see also R. 647.)

This appeal followed.

[4] Topsail did not become a wholly owned subsidiary of LLSC until the following month. (R. 722.)

ARGUMENT

The trial court's Order acknowledging developer rights in Topsail and divesting LLSC of the rights it acquired by deed in lieu, and all in derogation of the transactional history and applicable law, constitutes prejudicial error and must be reversed.

I. IDENTIFICATION OF RELEVANT PORTION OF ORDER FROM WHICH APPEAL IS TAKEN

The order from which this appeal is taken is set out on a Form 4 dated September 10, 2024 ("**the Order**"). Because it is short, the relevant portion of the Order is quoted in its entirety:

> Based upon the deed in lieu of foreclosure (09/13/13), the assignment of bid (11/18/13), the Master's report (11/18/13), the Special Referee's deed (11/18/13) corrective Special Referee's deed (8/4/14), the Court finds that LL of SC assigned "developer's rights" to Raiford Topsail Island Investments during this period of time and accordingly grants Plaintiff's [sic] motion for partial summary judgment that LL of SC assigned its developer's rights to Raiford Topsail Island Investments during this period. The Court makes no further findings or rulings other than as stated. No formal order is requested. Trial is set for September 16, 2024 in Edgefield County.

(R. 9.)

The trial court's construction of each of the documents cited above constitutes reversible error.[5] Topsail has never been in the chain of holders of developer rights for the Mount Vintage community, and did not receive an assignment of such rights by virtue of the transactional history relied upon by the Order.

[5] The trial court has indicated that its decision rests on the legal construction of the documents and instruments referenced. To the extent the trial court's decision was based on any application of disputed facts, then this by itself should have resulted in the denial of Respondents' motion for partial summary judgment.

II. THE APPLICABLE STANDARD OF REVIEW IS DE NOVO.

As a general proposition, deeds are subject to the same rules of construction as contracts.[6] See, e.g., Rhodes v. Black, 170 S.C. 193, 170 S.E. 158 (1933). "In construing or interpreting a contract, it is axiomatic that the main concern of the court is to ascertain and give effect to the intention of the parties. . . . If a contract's language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect." Portrait Homes-S.C., LLC v. Penn. Nat'l Mut. Cas. Ins. Co., 442 S.C. 515, 577-78, 900 S.E.2d 245, 279 (Ct. App. 2023) (citations and internal quotations omitted). The interpretation of an unambiguous contract is a question of law, and the appropriate standard of review is de novo. See, e.g., Baugh v. Columbia Heart Clinic, P.A., 402 S.C. 1, 12, 738 S.E.2d 480, 486 (Ct. App. 2013) (citations omitted).[7]

III. THE TRIAL COURT'S HOLDING THAT TOPSAIL ACQUIRED DEVELOPER RIGHTS IN THE MOUNT VINTAGE COMMUNITY BY VIRTUE OF THE FORECLOSURE SALE CONSTITUTES REVERSIBLE ERROR.

To divest LLSC of the developer rights it obtained through by deed in lieu, the trial court's Order ostensibly held that LLSC's continuation of foreclosure proceedings through sale nullified the deed in lieu, because the deed in lieu was given after LLSC's lis pendens attached to the property that secured its debt. These conclusions constitute legal error and must be reversed.

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[6] A deed-in-lieu of foreclosure would seem to fit equally in each category. See, e.g., Stewart Title Guar. Co. v. Fallgatter, 2006 WL 562202, at *4 (Cal. Ct. App. Mar. 9, 2006) (unpublished opinion) ("A deed in lieu is a contractual transaction . . . .").

[7] To the extent the trial court's Order could be construed as equitable in nature, the standard would remain de novo. See, e.g., Sloan v. Greenville County, 356 S.C. 531, 546, 590 S.E.2d 338, 346 (Ct. App. 2003).

A. The purposes and limitations of the lis pendens mechanism.

A lis pendens does not create, or otherwise evidence, the filing party's ownership of an interest in land. "The purpose of a notice of pendency of an action is to inform a purchaser or encumbrancer that a particular piece of real property is subject to litigation" that may affect the owner's title. Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 16-17, 567 S.E.2d 881, 889 (Ct. App. 2002). The validity of an adverse party's claim of ownership against the affected property may be established, if at all, by developments in subsequent legal proceedings. Accordingly, a properly filed lis pendens notifies potential purchasers of an adverse claim against the ownership of the property being considered for purchase, and that such a purchaser—if he elects to proceed with the transaction—will be bound by all proceedings "evolving from the litigation," S.C. Nat'l Bank v. Cook, 291 S.C. 530, 532, 354 S.E.2d 562, 562 (1987), "to the same extent as if he were made a party to the action," S.C. Code § 15-11-20; see also Horry County v. Ray, 382 S.C. 76, 80-81, 674 S.E.2d 519, 522 (Ct. App. 2009).

B. The purposes and limitations of settling a foreclosure action by accepting a deed in lieu.

"A deed given by the [mortgagor] to the [mortgagee] to avoid the inconveniences suffered on both sides by a formal foreclosure is often called a 'deed in lieu of foreclosure' or a 'deed in lieu.'" Decon Group, Inc. v. Prudential Mortg. Cap. Co., 227 Cal. App. 4th 665, 670 (Cal. Ct. App. 2014) (citation and internal quotation omitted). "The deed in lieu of foreclosure may be advantageous to both parties by, for example, allowing the [mortgagee] to avoid the delays and costs of foreclosure and saving the [mortgagor] to some extent the embarrassment and impaired credit rating a public foreclosure sale produces." Id. (citation, internal quotations, and internal alterations

omitted). "The Restatement Third of Property, Mortgages (Restatement Third) describes this transaction as a commonly used and socially desirable foreclosure substitute." Id. (quoting Restatement (Third) of Property, Mortgages, § 8.5, cmt. b.).

"A deed in lieu is, for a great many purposes, the functional equivalent of a formal foreclosure. A deed in lieu essentially involves an alternate method of the collection of security. The lender accepting a deed in lieu, just like the lender exercising strict foreclosure, has the security interest mature into real ownership without any requirement of public sale. Perhaps most importantly, the deed in lieu is, in effect, the settlement of foreclosure litigation. The deed in lieu therefore can be the business equivalent of formal foreclosure." Maloney v. Boston Five Cents Sav. Bank FSB, 663 N.E.2d 811, 813 (Mass. 1996) (internal citations and quotations omitted). "The mortgagor's ordinary expectation in giving a deed in lieu of foreclosure (unless otherwise provided for by agreement) is that the mortgagee is taking the deed in satisfaction of the debt and to save the expenses of a judicial foreclosure. Meaning, all rights in the property are supposed to transfer to the mortgage lender at the time the deed in lieu of foreclosure is executed, unless otherwise provided for by agreement between the parties." Kunesch v. Andover Twp., 32 N.J. Tax 407, 417 (2021) (internal citation, quotation, and alterations omitted).

"A deed in lieu of foreclosure may carry potential risks, however . . . ." Decon Group, 227 Cal. App. 4th at 670. One such risk arises when there are junior encumbrances against the property. Whereas a traditional foreclosure—in which title passes through a foreclosure sale—ordinarily extinguishes subordinate liens, the same is not true with respect to deeds in lieu. In fact, the rule is just the opposite: a party who

takes title to property through a deed in lieu does so subject to any existing junior encumbrances. Accordingly, it has been said that "an experienced and careful lender will only rarely find the acceptance of a deed in lieu of foreclosure to be an appropriate avenue for settling or concluding a foreclosure action." CIT Bank, N.A. v. Buono, 2019 WL 5895473, at *2 n.3 (E.D.N.Y. Nov. 8, 2019) (unpublished decision) (quoting 3 Bergman on New York Mortgage Foreclosures § 25.09 (2019)). To properly guard his security against the risks of persistent subordinate liens—be they known or unknown, it may be necessary and appropriate for an "experienced and careful lender" who wishes to accept a deed in lieu of foreclosure to also continue its pursuit of a foreclosure action through its traditional conclusion—a sale. See, e.g., Fed. Land Bank of Wichita v. Colo. Nat'l Bank of Denver, 786 P.2d 514 (Colo. Ct. App. 1989) (affirming decision of trial court that lender who had accepted a deed in lieu from debtor could maintain foreclosure action to extinguish junior liens).

C. A lender's acceptance of a deed in lieu implicates the doctrine of merger.

"Ordinarily, when equitable and legal titles unite in the same person, merger occurs and the equitable encumbrance ceases to exist." First Fed. Sav. & Loan Ass'n of S.C. v. Finn, 300 S.C. 228, 231, 387 S.E.2d 253, 254 (1998) (quoting Thompson v. Hudgens, 161 S.C. 450, 159 S.E. 807 (1931)). In other words, when a mortgage lender accepts a deed to the very same property that has been pledged as security for indebtedness, it may be the case that the mortgage has been extinguished, and that the lender has been promoted to the status of owner.

However, as with all things in the law, the proper view of the foregoing proposition is "it depends." And there is authority in South Carolina on this very point.

In McCraney v. Morris, 170 S.C. 250, 170 S.E. 276 (1933), a mortgage foreclosure action was resolved by plaintiff's acceptance of a deed from defendant in satisfaction of the debt—a deed in lieu. However, after plaintiff accepted the deed in lieu, plaintiff discovered that there were two subordinate lienholders. One lienholder's interest was established by a second mortgage; the other's was established by a judgment. It was the argument of these junior lienholders (and mainly, the second mortgagee) that plaintiff's acceptance of the deed in lieu constituted a merger, such that plaintiff's lien was extinguished, resulting in the elevation of each junior lien's priority, with the second mortgagee becoming the first. In short, because of merger, the second mortgagee could foreclose against the property that plaintiff had just acquired by deed in lieu; and, if plaintiff wished to protect her newly acquired property from the second mortgagee's foreclosure, she would have to also satisfy the second mortgagee's outstanding interests.

Although the position of the junior lienholders prevailed in the lower court, the decision was reversed on appeal. An extended quote from the Supreme Court's opinion explains why:

> After reviewing many, if not all, of the former decisions of this court on the law of merger . . . , Mr. Justice Woods, for this court, said: "From this review we think it clear the later cases in this state establish the proposition, which we have seen is in accord with the doctrine universally recognized in other jurisdictions, that in equity at least merger will not take place if opposed to the intention of the parties, affirmatively proved, or to be implied from the fact that merger would be opposed to the interest of the person in whom the different estates or interests became united." . . . Speaking on the subject of the effect of the acceptance by a mortgagee of a conveyance of the equity of redemption, the learned author . . . says: "The expressed intention will control; but in the absence of such express intention on the part of the mortgagee his intention will be presumed in accordance with his interests." Further, it is said: "When there is no evidence of the intention of the owner in uniting the legal and equitable estates in himself, it is proper to presume that he intended that effect which is the most beneficial to himself. Therefore, if the estate be subject

> to other incumbrances, which he is under no obligation to pay, and it is better for him to preserve the lien of the prior mortgage rather than to extinguish it, and let the next subsequent incumbrance into its place of priority, these facts may be taken as sufficient ground for inferring that his intention was to preserve the mortgage rather than to extinguish it." . . .
>
> "Where a conveyance of mortgaged premise is made to the mortgagee in satisfaction of the mortgage debt, he taking the same in ignorance of a subsequent judgment lien thereon and canceling the mortgage of record, equity will not treat the conveyance as a merger of the mortgage lien in the absolute estate but will revive such lien as against a purchaser on execution sale."

McCraney, 170 S.E. at 279-80 (citations omitted).

The Supreme Court affirmed these principles nearly 60 years later:

> An intention to prevent merger may be implied from facts indicating merger would be opposed to the interest of the person in whom the legal and equitable interests became unified and that such an intention existed at the time of the merger. This rule has been applied in cases where a mortgagee forgives a mortgage debt in exchange for receiving mortgaged property equal in value to the debt only to discover subsequent liens asserted against the property exceeding its value.

First Federal, 300 S.C. at 231, 387 S.E.2d at 253 (citing McCreary) (additional citations omitted).

These principles have been affirmed in other jurisdictions, and recently. See, e.g., Decon Group, 227 Cal. App. 4th 665; Kunesch, 32 N.J. Tax 407. And, by all accounts, they continue to apply with equal force today—even in South Carolina.[8]

In sum, it would seem to be the law of this State that the union of legal and equitable interests in real property in the hands of one person—such as when a foreclosing lender accepts a deed in lieu—may merge those interests into a single unified title, depending primarily on what the terms of the deed in lieu instrument are, and secondarily, on what is in the foreclosing lender's best interests. And, importantly, "[t]he

[8] At least, there is no decision from our State's appellate courts that suggests otherwise.

burden rests on the party opposing merger to prove a contrary intention existing at the time the two interests came together." First Federal, 300 S.C. at 231, 387 S.E.2d at 253 (citations omitted).

D. Upon its acceptance of the deed in lieu, LLSC's legal and equitable interests to the property pledged as security in Mount Vintage merged.

Consistent with the foregoing authorities, LLSC's acceptance of the deed in lieu culminated in a union of its legal and equitable interests in the Mount Vintage property pledged as security, yielding unified title in LLSC. This proposition was explicitly raised to the trial court, and rejected. (R. 325-39 & 698.)

Respondents may suggest that evidence of non-merger may be provided by the fact that LLSC proceeded with foreclosure after receiving a deed in lieu. After all, *why proceed with foreclosure if LLSC acquired title through the deed in lieu?* That point has been made both above and to the trial court, but for the sake of clarity, Appellants will reiterate: Appellants wanted clear and marketable title to the Mount Vintage property, unencumbered by subordinate liens, or claims of liens, whether known or unknown. This was evidenced by the deposition testimony of Mary Guynn, Esq., who conducted the foreclosure proceedings on behalf of LLSC:

> Q: And what is this?
>
> . . .
>
> A: This is a deed in lieu of foreclosure.
>
> Q: And what's the purpose of this document?
>
> A: This document was K&H Development deeding over to LL of SC all of the property that was subject to the foreclosure action as well as developer rights.

Q: Okay. And is—why would this not halt the action—the foreclosure action?

A: We elected to proceed forward and complete the sale for two purposes—to ensure that title was clean. It would estop anyone that had filed a claim against the properties post-filing of the lis pendens, and it would also give any other named creditor the opportunity to voice or to assert a lien on the properties.

Q: So in your understanding, did developer rights transfer with this deed in lieu of foreclosure, or did they transfer with the special referee's deed at the conclusion of the foreclosure action.

A: They transferred with this deed in lieu of foreclosure.

. . .

Q: Do you believe that this document, the special referee deed, transferred developer rights to Raiford Topsail Island Investments?

A: No.

Q: And why is that?

A: The developer rights had already been transferred to LL of SC with the deed in lieu of foreclosure.

. . .

Q: So the special referee's deed that in essence finalized the foreclosure proceeding that was filed in 2012, why is—why does this special referee deed not supersede the deed in lieu of foreclosure?

A: The deed in lieu of foreclosure, which was filed after the foreclosure action had been instituted, transferred all of the property to LL of SC at that point.

Q: Well, that what was the—I guess, again, what was the purpose of going through the foreclosure proceedings and then assigning a bid—a successful bid to RTI?

A: If any creditor claimed an interest in the properties post lis pendens, filing of the lis pendens or if any named defendant claimed an interest in the properties, they would have the opportunity at the final hearing to assert the claim. And then the special referee or the master would determine whether there was a residual claim on the lots that were transferred to LL of SC.

. . .

Q: So does this deed, this special referee deed, does it grant anything to Raiford Topsail Island?

A: In my opinion, it does not.

Q: And why is that?

A: There was—the property had already been conveyed over to LL of SC with the deed in lieu of foreclosure.

(R. 712.)

As discussed above, an "experienced and careful lender" will be cautious in relying only upon a deed in lieu to resolve foreclosure proceedings. An "experienced and careful lender" will be wary as to whether the title received by deed in lieu is clear and

marketable, or whether it may be subject to junior encumbrances that persist after acceptance. An "experienced and careful lender" may deem it necessary, advisable, and prudent to continue foreclosure proceedings even after accepting a deed in lieu, if for no other reason than to have the confidence in the cleanliness of its title that can only be achieved by completion of the foreclosure process.

These concerns aren't hypothetical, but are evidenced—even within this State—by cases like McCreary. The Supreme Court's decision in that case explains that plaintiff took a deed in lieu in order to resolve the underlying foreclosure action, but that after accepting the deed in lieu, plaintiff discovered two subordinate lienholders. Certainly, McCreary was a victory for the plaintiff in the sense that her superior title to the property acquired by deed in lieu was upheld by the Supreme Court. But it was not a clean win. After all, the Court did not invalidate the junior encumbrances. Nor was there reason to; the junior liens were valid. Consequently, even though the plaintiff's ownership of the property was vindicated by the Supreme Court, the plaintiff's ownership was still burdened by the junior encumbrances. The property was not freely alienable; if it were to ever be conveyed, the subordinate liens would have to be satisfied. The only way that the McCreary plaintiff could have avoided this situation and still take a deed in lieu is to accept the deed in lieu and complete foreclosure, specifically to extinguish inferior liens, or claims of liens, whether known or unknown. See, e.g., Federal Land Bank, 786 P.2d 514 (illustrating this very procedure).

E. The deed in lieu accepted by LLSC expressly conveyed developer rights.

This is made plainly evident by the face on the deed in lieu:

KNOW ALL MEN BY THESE PRESENTS:

That **K&H Development Company, LLC A/K/A K&H, LLC F/K/A PARK MERIDIAN HOLDINGS SC FUND 2009-2, LLC**, a South Carolina limited liability company, (hereinafter called "Grantor"), for fair and adequate consideration, such being the full satisfaction of any and all debt evidenced by that certain Mortgage executed by Grantor in favor of **LL OF SC, LLC F/K/A LL, INC.**, (hereinafter called "Grantee") dated April 19, 2010 and recorded in Mortgage Book 1292, page 191, Edgefield County Records in the original principal amount of $2,500,000.00 (the "Mortgage"), the receipt of which is hereby acknowledged, has absolutely grated, bargained, sold and released, and by these presents does grant, bargain, sell and release unto Grantee, its successors and assigns, the following described real estate, to wit (the "Land") more particularly described on Exhibit A attached hereto and incorporated herein, together with those certain rights, to wit (the "Rights"; the Land and the Rights being collectively referred to as the "Property") more particularly described on Exhibit B attached hereto and incorporated herein.

(R. 666.)

Exhibit B to the deed in lieu provides as follows:

THE RIGHTS

All rights appurtenant to the Property, including, but not limited to, all developer rights held by K&H Development Company, LLC as to Mount Vintage Plantation, including but not limited to any and all rights set forth in the Assignment of Developer's Rights recorded in Book 1331, Page 199, Edgefield County Records (the "Assignment"), all reserved rights held by K&H Development Company, LLC under the Covenants (as defined in the Assignment), the Class A membership interest, including voting privileges, in Mount Vintage Plantation Homeowners Association, Inc., options, conditions and powers including, but not limited to, the right to levy assessments and dues against lots subject to the Covenants, lot owners and members of nay [sic] entities or organizations within the Land as established or as may be established and the right to control the "Preferred Builder" program in Mount Vintage, including the right to collect any and all fees assessed to or for such Preferred Builder program.

(R. 675.)

F. The foreclosure sale did not divest LLSC of any property right acquired through the deed in lieu, nor did it result in a transfer of any property right to Topsail.

It was Respondents' argument to the trial court, which the trial court accepted, that the foreclosure sale superseded the deed in lieu, and that—because the foreclosure sale related back to the filing of the foreclosure complaint and its associated lis pendens—the delivery and acceptance of the deed in lieu was a legal nullity. (R. 651.) When Respondents made this argument to the trial court, they did not present a single judicial decision from any jurisdiction that would support such a sweeping proposition.

Appellants wish to draw the Court's attention back to the language of South Carolina Code § 15-11-20, which provides that a "subsequent purchaser or encumbrancer [] shall be bound by all proceedings taken after the filing of [a lis pendens] to the same extent as if he were made a party to the action." S.C. Code § 15-11-20 (emphasis added).

To begin with, LLSC was not a "subsequent purchaser or encumbrancer" within the meaning of this provision. LLSC is the party who filed the lis pendens. LLSC filed the lis pendens because it was the party to whom the prior developer was justly indebted, and who had a first-priority security interest in the totality of the prior developer's property and appurtenant rights within Mount Vintage. The prior developer defaulted on its debt to LLSC, leading LLSC to commence debt collection and foreclosure proceedings against the developer, and to file a lis pendens to protect its collateral. In other words, the lis pendens didn't place LLSC on constructive notice of an adverse claim against the prior developer's property interests within Mount Vintage; LLSC was putting the rest of the world on constructive notice of its own adverse claim against the prior developer's property interests. LLSC didn't need to be made a party to the

foreclosure action; it was the plaintiff in the foreclosure action, and it was seeking to vindicate its own rights.

And it was successful in that endeavor. In furtherance of protecting its own financial interests, LLSC accepted a deed in lieu from the prior developer in full satisfaction of the developer's debt obligation to LLSC. The lis pendens placed the world on notice that LLSC was asserting a claim to ownership of the prior developer's property interests in Mount Vintage, and the deed in lieu—particularly once it was recorded—placed the world on notice that LLSC had acquired the prior developer's property interests in Mount Vintage.

None of this was disturbed by the foreclosure sale. It cannot be forgotten that LLSC was the winning bidder at the sale, or that it paid the funds required in order to conclude the sale. It was only after the sale had been concluded that LLSC asked the special referee to issue any resultant deed from the sale (for whatever interest remained to be foreclosed upon) to LLSC's nominee—Topsail.

To Respondents, and ostensibly to the trial court, LLSC's post-sale assignment of interests acquired through the sale to Topsail was not merely an important fact; it was the dispositive fact. After all, according to the reasoning that gives rise to these appellate proceedings, the completion of the foreclosure sale, by relating back to the lis pendens, nullified the deed in lieu—despite the fact that LLSC filed the lis pendens, accepted a deed in lieu in satisfaction of the underlying debt that sustained the very legal basis on which the deed in lieu was filed, and was the high bidder at the foreclosure sale which allegedly divested LLSC of the rights it obtained through the deed in lieu.

None of this makes any sense. If LLSC's post-sale assignment were to have nullified the deed in lieu, then the prior developer's debt obligation to LLSC would not have been satisfied; if the prior developer's debt obligation to LLSC was not satisfied, then LLSC's lien was not extinguished, nor was its position in lien priority; accordingly, any property interest that could have passed at the foreclosure sale (to any party other than LLSC) would have extinguished subordinate lienholders, but would have been subject to LLSC's continuing superior lien position; yet this would have been resolved, and had already been resolved, by LLSC's acceptance of a deed in lieu from the prior developer, fully satisfying the underlying debt, and merging legal and equitable interests into one unified title. In short, even under the trial court's errant reasoning, the court should have held that LLSC was, since the acceptance of the deed in lieu, the holder of the prior developer's rights in the Mount Vintage community, and that its position was not disturbed by the subsequent foreclosure sale.

G. Section Concluding Statement

Consistent with the foregoing discussion, the trial court's Order is contrary to law. Topsail did not acquire developer rights in Mount Vintage as a result of LLSC's foreclosure proceedings against the prior developer. And it was error for the trial court to divest LLSC of the rights it acquired by virtue of its deed in lieu. This decision must be reversed.

IV. THE IMPACT OF THE ORDER ON THE ANTICIPATED COURSE OF TRIAL IS SIGNIFICANT.

Respondents have plainly stated, in no uncertain terms, why they wanted the trial court to inject Topsail into the chain of holders of developer rights in Mount Vintage, particularly on the eve of trial. Following is their trial presentation strategy:

1. Topsail acquired developer rights from the post-sale assignment, and continues to hold those rights today, (R. 647);
2. Despite holding developer rights, the rights have been wrongfully exercised by LLSC since the foreclosure sale, and Topsail has abdicated its responsibility as developer, (id.);
3. The HOA board of directors is "developer controlled," but it has been controlled by LLSC—who is not the developer—and is instead acting as a "rogue" developer, (R. 909);
4. Because the "rogue" developer has wrongfully appointed members to the HOA board of directors, all current directors are imposters and must be removed, (R. 647);[9]
5. The trial court should install a new board of directors for the HOA under judicial supervision;
6. A new board, emancipated from developer control, would choose to realign from a party-defendant to a party-plaintiff, which would

[9] The HOA board has vigorously disputed the proposition that LLSC is a "rogue" developer, or that the members of the board are not competent to hold office, or that they are mere puppets of the developer. (See, e.g., R. 1015; R. 401-16.) In fact, after Respondents filed a so-called motion in limine for realigning the HOA as a party-plaintiff, the HOA board convened to discuss the matter and voted unanimously to oppose realignment. (R. 403-04.) The developer abstained from participating in that meeting and its vote. (Id.)

allow Respondents' counsel to pursue its SCUTPA action, (R. 909); and,

7. Respondents could more easily satisfy their burden of proving a breach of the developer's fiduciary duty under circumstances where the developer has abdicated its developer function.

For years, both during and before this litigation, there had never been any question as to whether LLSC had held developer rights in Mount Vintage since taking the deed in lieu in 2013. It is reflected in the neighborhood's covenants. It was alleged in three iterations of Respondents' pleadings. It was affirmed by the deposition testimony of several Respondents. Yet, one month before trial was to commence, Respondents asserted for the first time that it was not LLSC—but actually Topsail—who had acquired and retained developer rights, changing the landscape of who was being accused of negligence, of who had breached fiduciary duties, and upon what acts (or failures to take action).

In short, the 11th-hour injection of Topsail into the chain of holders of developer rights in Mount Vintage was nothing more than a late-stage litigation stratagem. And it almost worked.

CONCLUDING STATEMENT

Appellants respectfully request a decision from the Court of Appeals which reverses the trial court's order of September 10, 2025 for any of the foregoing reasons or any basis that may appear from the record, remands the case for further proceedings consistent with such decision, and provides for such other and further relief as the Court deems just and proper.

Respectfully,

s/ Steven Edward Buckingham

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April 1, 2025
Greenville, South Carolina

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM EDGEFIELD COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2024-001510

Elizabeth M. Ferraro, James T. Ferraro, Edward J. Przybyl, Marcella Gleie, John E. Gleie, Jr., Thomas Bowes, Connie Bowes, Moataz Alasadi, Virginia Kirkwood, Bob Kirkwood, Paul Vichroski, Nydza Vichroski, James Montellese, and Roxann Montellese, Individually, Derivatively, and on Behalf of All the Mount Vintage Homeowners Association Members . . . . . Respondents,

v.

LL of SC, LLC, Raiford Topsail Island Investments, LLC, TR Sales Plantation, LLC, and Mount Vintage Plantation Homeowners Association, Inc. *a/k/a* Mount Vintage Homeowners Association, Inc. . . . . Defendants,

Of which LL of SC, LLC, Raiford Topsail Island Investments, LLC, and TR Sales Plantation, LLC are the . . . . . Appellants.

CERTIFICATION OF CONFORMITY

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The undersigned counsel for Appellants hereby certifies that the Final Brief to which this Certification is attached complies with Rule 211(b), SCACR.

Respectfully submitted,

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April 1, 2025