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**Aug 06 2025**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM JASPER COUNTY  
Court of Common Pleas

Carmen T. Mullen, III, Circuit Court Judge  
Trial Court Case No.: 2020-CP-27-00495

Case No. 2023-000277

SLF III - HARDEEVILLE, LLC,.....Respondent,

v.

RSV - HARDEEVILLE, LLC,.....Appellant.

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**APPELLANT’S PETITION FOR REHEARING**

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Attorneys for Appellant

Pursuant to Rule 221(a), SCACR, Appellant RSV-Hardeeville, LLC (“RSV”) hereby files the within petition and respectfully requests a rehearing of Unpublished Opinion No. 2025-UP-263, filed July 23, 2025 (“Opinion”) and/or the issuance of a new opinion addressing points overlooked or misapprehended by the Court, as set forth below.

In its Opinion, the Court held “the Reed-HTI Assignment is ambiguous because it is reasonably susceptible to more than one interpretation as to whether it conveyed all of JPR’s development rights, including conversion rights, or whether it restricted development of the residential acreage only to the uses and purposes set forth in Item 1(a).” Having found the relevant document to be ambiguous, the Court “remand[ed] for trial because ‘the determination of the parties’ intent at the time they executed the contract is a question of fact that should not have been decided on summary judgment.’” RSV agrees that the circuit court should not have granted summary judgment, but believes that a remand for a trial is not in accord with South Carolina precedents concerning restrictive covenants.

The Court in its Opinion acknowledges that RSV argued that the circuit court erred in “failing to strictly construe the Reed-HTI Assignment and resolve doubts and ambiguities therein in favor of RSV’s free use of the property.” RSV made arguments to that effect throughout its Brief and Reply Brief. However, the Court’s Opinion does not explicitly address or rule on the arguments made by RSV on this point. RSV respectfully requests that the Court do so.

As a matter of contract law generally, construction of an ambiguous contract is a question of fact to be decided by the trier of fact. *Wallace v. Day*, 390 S.C. 69, 74, 700 S.E.2d 446, 449 (Ct. App.2010)(citing *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App.2009)). Once the court decides that the language is ambiguous, evidence of the parties’ intent

may be admitted and the determination of the parties' intent is a question of fact for the jury. *Hawkins v. Greenwood Development Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878-879 (Ct. App.1997). RSV submits that these principles do not apply to this case.

This is not a breach of contract case. SLF did not plead a cause of action for breach of contract. As stated by the circuit court in the order under appeal:

Finally, I decline to award attorney's fees because RSV has not breached any contract as of yet, nor has there been any development of the property for light industrial use. SLF III sought a declaration of rights, not a breach of contract, injunctive relief nor specific performance. As such, I believe an award of attorney's fees would be unjust. [Order, R. p. 18]

The questions before the circuit court, and again before this Court, are whether the Reed-HTI Assignment is to be considered a restrictive covenant and, if it is, how is it to be construed? As to the first question, there is little room for doubt. As quoted by this Court in its Opinion, the use restrictions set forth in the Reed-HTI Assignment are explicitly stated to be "a covenant and restriction running with the Property." As such, the ultimate question for decision is how the language of the Reed-HTI Assignment is to be construed. RSV submits that the proper construction of the Reed-HTI Assignment, that the Court has already found to be ambiguous, should be determined by reference to precedents involving the construction of ambiguous restrictive covenants.

It is true that restrictive covenants are contractual in nature and are construed like contracts. *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 361, 628 S.E.2d 902, 913 (Ct. App. 2006) However, restrictive covenants are not ordinary contracts. That is because they "run with the land" and are enforceable by and against subsequent grantees. *Id.* For this reason, "restrictive covenants affecting real property cannot be properly and fully understood without resort

to property law.” *Id.*

Restrictive covenants also differ from ordinary contracts in another important respect. Restrictions on the use of property are “historically disfavored.” *SPUR at Williams Brice Owners Ass’n, Inc. v. Lalla*, 415 S.C. 72, 83, 781 S.E.2d 115, 121 (Ct. App. 2015) (citing *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 270, 363 S.E.2d 891, 893 (1987)). This is because “society’s best interests are advanced by encouraging the free and unrestricted use of land.” *Rhodes v. Palmetto Pathway Homes, Inc.*, 303 S.C. 308, 311, 400 S.E.2d 484, 485 (1991).<sup>1</sup> Accordingly, restrictive covenants are to be construed in light of a presumption of free and unrestricted land use. *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987).

Consideration of this case in light of controlling precedents can lead only to one result.

“A restriction on the use of property must be created in express terms or by plain and unmistakable implication.” *Hamilton v. CCM, Inc.*, 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980) (citing *Edwards v. Surratt*, 228 S.C. 512, 90 S.E.2d 906 (1956)). The Court’s holding that the Reed-HTI Assignment is ambiguous necessarily compels the conclusion that the document did not create a restriction on RSV’s conversion rights in express terms or by plain and unmistakable implication.

When the language of a restrictive covenant is equally capable of two or more constructions, that construction will be adopted which least restricts the property. *O’Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 632 (1992). In its Opinion, the Court expressly held that the Reed-HTI Assignment “is reasonably susceptible to more than one interpretation.” Having reached that conclusion, the Court should adopt the construction of the document that least restricts the property

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<sup>1</sup> On this point, as a matter of fact, the City of Hardeeville has determined that development of the Savannah Tract for light industrial use better serves the public interests of the City. [Snowden Aff., ¶ 25; R. pp. 1355-1356]

and favors RSV's rights to exercise the conversion rights accorded to it under the DA and PDD.

Any doubts or ambiguities are to be resolved against SLF and in favor of RSV's free use of its property. *Hamilton*, 274 S.C. at 157, 263 S.E.2d at 380 (all doubts resolved in favor of the free use of the property); *Sea Pines Plantation Co.*, 294 S.C. at 270, 363 S.E.2d at 894 (1987)(any doubt or ambiguities in a covenant are resolved in favor of the presumption of free and unrestricted land use); *Queen's Grant II*, 368 S.C. at 367, 628 S.E.2d at 916 (Ct. App. 2006) (ambiguities in restrictive covenants must be strictly construed against the party seeking to enforce them). Under controlling precedent, the ambiguity in the Reed-HTI Assignment identified by the Court in its Opinion in respect to RSV's conversion rights must be resolved against SLF. If the Reed-HTI Assignment fails to set forth a restriction on RSV's conversion rights in express terms or by plain and unmistakable implication, *Hamilton*, 274 S.C. at 157, 263 S.E.2d at 380, that defect cannot be cured by parol evidence of the parties' intent presented at a trial.

This rule of strict construction is subject to the proviso that it "should not be used to defeat the plain and obvious purpose of the restrictive covenant." *Seabrook Island Prop. Owners Ass'n v. Marshland Tr., Inc.*, 358 S.C. 655, 662, 596 S.E.2d 380, 383 (Ct. App. 2004)(citing *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 864 (1998)). In this case, the Reed-HTI Assignment does not show a "plain and obvious purpose" to restrict RSV's rights to convert property from residential to light industrial use. If it did, the Court would not have found the document to be ambiguous. There is no reason not to apply the rule of strict construction of restrictive covenants in this case.

In light of the foregoing authorities, this case should be decided in much the same way as cases involving insurance coverage disputes. It is black-letter law that ambiguities in insurance policies are construed against the insurer and in favor of coverage. *See, e.g., USAA Prop. & Cas. Ins.*

*Co. v. Clegg*, 377 S.C. 643, 655, 661 S.E.2d 791, 797 (2008) (“Ambiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer.”) Disputes about coverage in an insurance policy are not resolved at a trial involving competing showings of parol evidence concerning the intent of insurer and insured. If the policy is ambiguous, the insurer loses.

*Hardy v. Aiken*, 369 S.C. 160, 631 S.E.2d 539 (2006) provides an example of how this case should be decided. The restrictive covenants at issue prohibited commercial use of the property. The restrictive covenants, by their terms, were set to expire after 25 years. Prior to the expiration date, a document was filed purporting to amend the restrictive covenants to extend the expiration date. The restrictive covenants included an amendment provision that stated:

Change of Restrictions. Any change or amendment of these restrictions shall be made only by an instrument in writing signed by a majority of the heads of household owning lots in said subdivision.

The outcome of the case turned upon whether the quoted amendment provision allowed an amendment of the duration of the covenants. As summarized by the supreme court in its opinion:

The special referee found the amendment provision in the restrictive covenants ambiguous. He specifically held the amendment provision in the covenants did not expressly allow the amendment of the duration of the covenants. Strictly construing the amendment provision, the special referee held the restrictive covenants expired January 14, 2005, and could not be extended by agreement of less than 100% of the owners.

369 S.C. at 164, 631 S.E.2d at 541.

In a unanimous opinion, the supreme court affirmed the special referee, holding:

Here, the restrictive covenants had a clear expiration date, and there was no express provision for their extension. Further, strictly construing the general amendment provision and resolving any doubts in favor of the free use of the property, we hold the

amendment provision does not allow extending the duration of the restrictive covenants. Accordingly, the purported amendment is invalid and the restrictive covenants expired January 14, 2005.

369 S.C. at 166, 631 S.E.2d at 542.

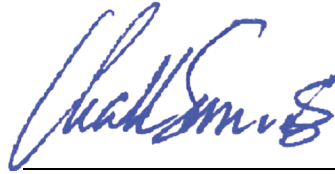
The outcome of *Hardy v. Aiken* is unsurprising in light of the authorities cited in this petition. What is worthy of note is the fact there is no mention or consideration of the possibility of remanding the case to allow the parties to present to the special referee evidence of the parties' intent to resolve the ambiguity in the restrictive covenants at issue. The supreme court could have remanded the matter for a trial, but did not. After what he believes to be a diligent search, the undersigned has found no case resolving ambiguities in a restrictive covenant in that manner. In *Hardy v. Aiken* and in other cases, where restrictive covenants were found to be ambiguous, they were construed in favor of the free use of the property without trials to determine the intent of the parties. This is precisely how this case should be decided.

RSV requests that the Court rehear the case and/or issue a new opinion holding that the Reed-HTI Assignment, properly construed in light of the authorities cited herein, does not restrict or prevent RSV from exercising rights accorded to it under the DA and PDD to convert its property from residential to light industrial use. Doing so would effectively end this declaratory judgment action, as there would be nothing left to decide, and the case should be remanded for entry of judgment in favor of RSV.

Alternatively, RSV requests that Court issue a revised opinion, deleting any reference to a remand for trial and expressly reserving the issues raised herein for consideration by the circuit court on remand. RSV believes it must raise this issue now. Otherwise, the remand for trial to determine the intent of the parties might be considered the law of the case, forever barring any review or

consideration of the issues raised herein by any subsequent court. *See, Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997) (“The law of the case applies both to those issues explicitly decided and to those issues [that] were necessarily decided in the former [appeal].”) However, “[t]he prior adjudication does not preclude consideration on a subsequent appeal of questions expressly left open or reserved by the court.” *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 572, 776 S.E.2d 397, 403 (Ct. App. 2015) (quoting 5 C.J.S. *Appeal and Error* § 994 (2007)). At a minimum, RSV requests that the Court preserve RSV’s ability to make these arguments in subsequent proceedings.

Respectfully submitted,



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August 6, 2025

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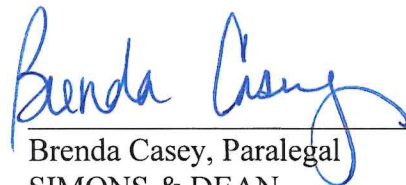
RSV - HARDEEVILLE, LLC,.....Appellant.

PROOF OF SERVICE

I certify that I have served the Appellant’s Petition for Rehearing on counsel of record for Respondent SLF III - Hardeeville, LLC via the primary email addresses provided in the Attorney Information System (AIS).

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August 6, 2025

## Brenda Casey

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**Subject:** SLF III-Hardeeville, LLC vs. RSV-Hardeeville, LLC [Case No.: 2023-000277]  
**Attachments:** Appellant's Petition for Rehearing.pdf; Proof of Service.pdf

Dear Counsel,

Attached is Appellant's Petition for Rehearing and Proof of Service of Appellant's Petition for Rehearing in connection with the above-referenced matter that will be emailed to the Court of Appeals today for filing.

Thank you,  
Brenda

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August 6, 2025

**VIA EMAIL: [ctappfilings@sccourts.org](mailto:ctappfilings@sccourts.org)**

The Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
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Columbia, SC 29201

Re: *SLF III – Hardeeville, LLC v. RSV – Hardeeville, LLC*  
Appellate Case No.: 2023-000277

Dear Ms. Kitchings:

Enclosed for filing is Appellant's Petition for Rehearing and Proof of Service of Appellant's Petition for Rehearing along with the email to all counsel of record for Respondent serving same in the above case. Upon filing, please return a clocked-in copy to me via email.

Additionally, I have mailed our check in the amount of \$50.00 for the filing fee.

With kind regards,

Yours very truly,



Keating L. Simons, III

KLS/bdc

Enclosures

cc: Cheryl D. Shoun, Esquire (via email w/enc.)  
J. David Black, Esquire (via email w/enc.)  
Scott F. Talley, Esquire (via email w/enc.)