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**SC Court of Appeals**

IN THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CLARENDON COUNTY  
CIRCUIT COURT

Kristi F. Curtis, Circuit Court Judge

Case No. 2017-CP-14-00127  
Appellate Case No. 2024-001875

Palmetto Air Plantation Homeowners Association, Inc.....Respondent,

v.

Kim Bevier, .....Appellant.

**INITIAL BRIEF OF APPELLANT**

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**STATEMENT OF ISSUES ON APPEAL**

- I. **Did the Circuit Court err as a matter of law in finding that Respondent is authorized to enforce the Declaration of Covenants, Conditions and Restrictions?**
  
- II. **Did the Circuit Court err as a matter of law in finding that the issue of Respondent's authority to enforce the Declaration of Covenants, Conditions and Restrictions was res judicata as it relates to the prior Court of Appeals decision?**

## STATEMENT OF THE CASE

This case arises out of an action by Respondent, Palmetto Air Plantation Homeowners Association, Inc., seeking enforcement of restrictive covenants of a different homeowner's association against Appellant. Respondent filed a summons and complaint in April 2017 (R., p. \_\_\_\_), as amended in June 2017 (R., p. \_\_\_\_), alleging Appellant violated several sections of the Declaration of Covenants that were filed. In his amended answer, Appellant denied his lots were subject to the Declaration of Covenants. (R., p. \_\_\_\_). Thereafter, Respondent moved for partial summary judgment on the issue of whether, as a matter of law, the absence of reference to restrictive covenants in Appellant's deed made the Declaration of Covenants unenforceable against Appellant. (R., p. \_\_\_\_). The parties agreed that the motion for partial summary judgment would be heard without oral argument. The circuit court granted partial summary judgment in favor of Respondent, finding the Declaration of Covenants was enforceable against Appellant. (R., p. \_\_\_\_). Specifically, the circuit court determined the restrictive covenants were created when Mid-Eastern Truckwash Inc., the original developer of this subdivision for aviation enthusiasts built around an airstrip, executed and recorded the Declaration of Covenants July 11, 2001. It further determined Appellant had actual and constructive knowledge of the Declaration of Covenants. Appellant filed a Rule 59(e) motion to reconsider, which the circuit court denied. (R., p. \_\_\_\_). Appellant filed a timely notice of appeal to the Court of Appeals who affirmed in an order filed September 21, 2022. (R., p. \_\_\_\_). The case was then remanded to circuit court for trial. Appellant's counsel filed a motion to be relieved after the Court of Appeals decision which was granted in October 2022 and Appellant proceeded pro se to the trial on April 3, 2024 and retained the undersigned counsel in July 2024.

A notice of pretrial conference was filed January 8, 2024 with the conference scheduled

for February 2, 2024. (R., p. \_\_\_\_). Appellant filed a motion for summary judgment January 18, 2024. (R., p. \_\_\_\_). The trial was before Judge Kristi F. Curtis. The parties at the April 3, 2024 trial both spoke of a pre-trial conference or roster meeting before judge Cothran, but no orders denying Appellant's motion for summary judgment was ever filed and Appellant denied ever hearing his motion for summary judgment being denied. (Trans. of Trial, R., p. \_\_\_\_).

The trial was held April 3, 2024 with an order being issued July 17, 2024.<sup>1</sup> (R., p. \_\_\_\_). Appellant filed a motion to reconsider July 23, 2024 (R., p. \_\_\_\_) that was denied in an order dated October 29, 2024. (R., p. \_\_\_\_). Appellant filed a timely notice of appeal.

### **STATEMENT OF FACTS**

This case arises out of an action by Respondent seeking enforcement of restrictive covenants against Appellant. On July 11, 2001, Mid-Eastern Truckwash Inc. ("Mid-Eastern") filed a declaration of covenants, conditions, and restrictions (the "Declaration of Covenants") with the Clarendon County Register of Deeds office for the as-yet-to-be developed Palmetto Air subdivision. The Palmetto Air subdivision was developed as a community for "aviation enthusiasts" and was built around an airstrip. The Declaration of Covenants allowed for each lot adjoining the taxiway right-of-way to construct a hangar for the storage of private aircraft. Thereafter, on October 9, 2001, Mid-Eastern conveyed the land comprising the Palmetto Air subdivision to Palmetto Air Plantation, LLC; the deed contained covenants of general warranty but did not reference the Declaration of Covenants. Subsequently, Palmetto Air mortgaged the subdivision property to Edward G. Gibbons in February 2002; the mortgage included

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<sup>1</sup> The July 17, 2024 Order indicates that the trial took place April 1, 2024. This led to a significant delay in obtaining the transcript. The Court Reporter ultimately found the transcript in her records from April 3, 2024 and the transcript itself clearly shows that the trial did actually take place on April 3, 2024.

covenants of general warranty without reference to the Declaration of Covenants. The Palmetto Air subdivision plat was recorded on September 19, 2003.

Appellant contracted to purchase two lots in the Palmetto Air subdivision in May 2003, which Palmetto Air conveyed to Appellant by general warranty deed on September 26, 2003, without reference to any restrictive covenants. Prior to purchasing the lots, Appellant spoke with an attorney who sent a letter to him referencing his consideration of the Palmetto Air restrictive covenants. The contract of sale contained a provision stating the conveyance was subject to the Declaration of Covenants. Both the preliminary and final title certificates for Appellant's two lots indicated the lots were subject to the Declaration of Covenants.

In the underlying case, Respondent alleges Appellant has had a large dog running at large and unrestrained and barking excessively. Respondent also alleges that the underground invisible fence he used to restrain the dog is a violation of the Declaration of Covenants. Respondent has also alleged that Appellant has rented his home or a portion of his home as an Air B&B in violation of the Declaration of Covenants. Respondent also alleges that Appellant failed to fully implement a landscaping plan that was proposed in violation of the Declaration of Covenants.

Respondent filed its motion for partial summary judgment that was granted and affirmed on appeal to the Court of Appeals related to whether the Declaration of Covenants filed July 11, 2001 by Mid-Eastern Truckwash Inc. applied to Appellant's properties. Appellant contended that the final trial on April 3, 2024 should have decided the outstanding question as to whether Respondent had the authority to enforce the Declaration of Covenants. The trial court found that this issue was res judicata as it related to the prior Court of Appeals order.

## STANDARD OF REVIEW

S.C. Code §1–23–390 requires an appeal from a “final judgment” of the circuit court and currently provides: “An aggrieved party may obtain a review of a final judgment of the circuit court or the court of appeals pursuant to this article by taking an appeal in the manner provided by the South Carolina Appellate Court Rules as in other civil cases.” S.C. Code Ann. § 1–23–390 (Supp.2011) (emphasis added).

"This [c]ourt reviews all questions of law de novo." *Lollis*, 421 S.C. at 477, 807 S.E.2d at 728 (alteration in original) (quoting *Fesmire*, 385 S.C. at 302, 683 S.E.2d at 807). "In an action at law tried without a jury, an appellate court’s scope of review extends merely to the correction of errors of law." *Temple v. Tec-Fab, Inc.*, 381 S.C. 597, 599-600, 675 S.E.2d 414, 415 (2009). *Crescent Homes SC v. Cjn*, 912 S.E.2d 389, 445 S.C. 164 (S.C. App. 2025).

## ARGUMENT

**I. The Circuit Court err as a matter of law in finding that Respondent is authorized to enforce the Declaration of Covenants, Conditions and Restrictions.**

Appellant’s argument that Respondent has no legal authority to enforce the Declaration of Covenants is based on the fact that the only proper party to enforce such restrictive covenants is the entity named in the Palmetto Air Plantation Declaration of Covenants, Conditions and Restrictions which is Palmetto Air Plantation Property Owners Association, Inc., a name very similar to Respondent, but a distinctly different legal entity. (R., p. \_\_\_\_). A Relevant excerpt from the Declaration of Covenants is as follows:

WHEREAS, the Declarant deems it desirable for the efficient preservation of the values and amenities in said development to create an Owners Association that will be delegated the powers of maintaining and administrating the development properties and facilities and **enforcing the covenants and restrictions** and collecting an disbursing the assessments and charges hereinafter created by incorporating a non-profit corporation under the laws of the State of

South Carolina entitled **Palmetto Air Plantation Property Owners Association, Inc.** (emphasis added).

As a result, the only entity authorized to enforce these Declaration of Covenants is Palmetto Air Plantation Property Owners Association, Inc. Respondent did not begin to exist until 2004 and while its name is similar, Palmetto Air Plantation Property Owners Association, Inc. is not the name of Respondent.

The following three sections of the covenants are especially relevant to this argument:

**Section 1.5** Articles or Articles of Incorporation Shall Mean and refer to the Articles of Incorporation of the Association which *will have been filed* with the Secretary of State to create the Association. (emphasis added).

**Section 1.7** Association shall mean the Palmetto Air Plantation Property Owners Association, Inc. (PAP) a non-profit South Carolina Corporation.

**Section 1.9** By-Laws shall refer hereafter to the By-Laws of Palmetto Air Plantation Property Owners Association, Inc. Attached to the Declaration and incorporated herein by this reference.

No Association was ever incorporated, no Articles of Incorporation were ever filed, and no By-Laws were attached to the recorded Declaration of Covenants. No HOA, by any name, has ever been created by the Declarant, Mid-Eastern Truck Wash.

The Declaration of Covenants, Section 11.2 – Amendments, states,

As long as the Declarant owns 25% of the unsold lots in the subdivision, it shall have the right and authority to modify and amend these covenants and restrictions, without liability or notice or joinder of any other party provided such modification and amendments do not violate the ordinances of the Clarendon County Planning Commission.

Subsequently, amendments to this declaration may be adopted by the membership of the Property Owners Association in the same manner and upon the same vote as required for amendments to By-Laws of the Property Owners Association.

On October 9, 2001, Declarant Sold 100% of Palmetto Air Plantation to Palmetto Air Plantation, LLC (AKA Palmetto Air Plantation Subdivision, LLC), thus forfeiting forever, the above described right and authority to modify and amend the covenants and restrictions. To

this day, the Covenants have never been altered, re-recorded and are offered in their original form on the Palmetto Air Plantation website as the applicable covenants of Palmetto Air Plantation.

The Declarant Representative was, and is, Respondent's President who is also President of MidEastern Truck Wash, a/k/a MidEastern Inc., and Managing Partner of Palmetto Air Plantation, LLC (AKA Palmetto Air Plantation Subdivision, LLC). However, Neither Declarant Representative Joseph Witt nor Palmetto Air Plantation Subdivision LLC or any entity has legal authority to modify the Covenants recorded July 11, 2001.

There has been no attempt by Respondent to explain how Respondent became the legal HOA when the Declarant, Mid-Eastern Truck Wash, ("Declarant") failed to file anything with the Secretary of State for Palmetto Air Plantation Property Owners Association, Inc. and they sold the property giving up their rights to establish a HOA. A HOA that is not properly formed has no legal right to enforce restrictive covenants even if the homeowners are aware of the improperly formed HOA.

The only way Respondent could have created a homeowner's association under S.C. Code §27-30-110 *et. seq.* would have been to have the homeowners vote on it. No vote was taken to establish Respondent as the homeowner's association as required. Very notably, the creator and president of Respondent and the individual responsible for prosecuting this case's, Joeseph Witt, home is excluded from Respondent's HOA. He uses all of the amenities of the HOA, but pays no dues or HOA fees.

Almost three years after the Covenants were recorded, on June 14, 2004, Declarant Representative Joseph Witt, incorporated Respondent as a non-profit corporation. (R., p. \_\_\_\_). On September 4, 2004, with no legal authority, he held an organizational meeting of Respondent

and adopted association By-Laws differing substantially from the rules as recorded in the Covenants. These new rules claimed the lots purchased in October of 2004 from Declarant by his other company Palmetto Air Plantation Subdivision LLC, would not pay lot fees as other lot owners and granted himself four times the voting power per lot as any other previous or subsequent lot owner. (R., p. \_\_\_\_).

Joseph Witt, in his role as Declarant Representative was attempting to change covenants which he had no right or authority to amend or modify in any way per Section 11.2 of the Covenants. He had no authority to change any part of the DCCRs because three years earlier he sold 100% of the subdivision to Palmetto Air Plantation LLC. (Clarendon Deed Book 452, Pp. 144 Bargain & Sale Deed for assumption of two mortgages, etc.).

The burden of proof weighed upon Respondent to prove it is the legal descendent of the never formed Palmetto Air Plantation Property Owners Association nominated by the Covenants. Respondent did not submit any proof of this.

Appellant has shown that the Covenants stated claims of creation of the nominated homeowner organization, filing of Articles of Incorporation and attachment of bylaws never occurred. Respondent is not named by Declaration of Covenants as the homeowners' association authorized to enforce the rules set forth in them. Any contemplation of a contractual method for deferral of creation of the Property Owners Association until some future time after recording of the Covenants is not supported by any evidence within the contract of the Covenants.

Respondent did not exist until three years after Declaration of Covenants were filed, and 18 months after Appellant purchased property subject to the Declaration of Covenants. Declarant lost any right to modify the covenants three months after recording the Declaration of Covenants on July 11, 2001, upon sale of 100% of Palmetto Air Plantation. (Covenants Section 11.2).

Respondent has no privity of contract with Defendant and is not one of the three entities named in Section 12.2 of the Covenants allowed to bring suit for enforcement: the Property Owners Association, the Declarant or a lot owner. S.C. Code §27-30-110 *et. seq.*, The South Carolina Homeowners Association Act of 2018, required all HOAs, if they had not already done so, to record all governing documents of the HOAs, to include Declarations, Master Deeds or Bylaws, in the RMC office where the land described by the Declarations exists. Governing documents mean the Declaration of Covenants recorded by Mid-Eastern Truck Wash on 11 July 2001, as well as the By-Laws of the non-existent Palmetto Air Plantation Property Owners Association. By-Laws have never been recorded because no Property Owners Association was ever created to do so. Pursuant to the SC Homeowners Association Act, the Covenants are unenforceable.

Respondent attempted to pass itself off as the legal HOA of the Covenants by giving itself a similar name, has recorded By-Laws, but no Declaration exists giving them the right to do so, and no Declarant representative existed with the authority to change the name three years after Covenants were recorded as described above.

Respondent has only recorded By-Laws. There are no Declarations giving them the authority to enforce the Covenants recorded by Mid- Eastern Truck Wash on July 11, 2001. Respondent has offered no proof it is the nominated Property Owners Association as set forth in the Declaration of Covenants or legal successor by contractual means and fails to prove it has privity of contract with Appellant and the right to bring legal action as stated in Section 12.2 of the Declaration of Covenants. For these reasons, Respondent has no authority to enforce any restrictive covenants and the court should reverse the Circuit Court award for the injunctions imposed and for monetary damages that result from such wrongful enforcement.

**II. The Circuit Court erred as a matter of law in finding that Appellant's argument related to Respondent's authority to enforce the Declaration of Covenants filed by Mid-Eastern Truckwash Inc. was res judicata as it relates to the prior Court of Appeals decision.**

In order for res judicata to operate as a bar to an argument, the following elements needed to be proven: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. *Riedman Corp. v. Greenville Steel Structures, Inc.*, 308 S.C. 467, 419 S.E.2d 217 (1992). Clearly the parties are the same here and the general subject matter is the same. However, the issue of whether Respondent has the authority to enforce the Declaration of Covenants was not adjudicated in the prior decision on Respondent's motion for partial summary judgment or the subsequent Court of Appeals affirming order.

There are two distinct issues involved in this case. The first is related to grounds of Respondent's motion for partial summary judgment filed July 14, 2018. (R., p. \_\_\_\_). As set forth in Respondent's Brief in Support of Partial Summary Judgment:

The Plaintiff would show that on or about July 11, 2001 the property in question became subject to "Declaration of Covenants, Conditions, and Restrictions Palmetto Air Plantation Clarendon County, South Carolina." (R., p. \_\_\_\_).

Whether Appellant's properties were subject to these Declaration of Covenants was the question before the Circuit Court and later the Court of Appeals. The question as to who the appropriate entity to enforce these Declaration of Covenants was not before the Circuit Court or the Court of Appeals. This was the decision the Circuit Court was to have made at the April 3, 2024 hearing. There is nothing in the Order for Partial Summary Judgment suggesting that the question of what entity has the legal authority to enforce the Declaration of Covenants was

answered. The only ruling was that these Declaration of Covenants do apply to Appellant's properties despite his protests as set forth in his response.

Maybe it was assumed that a company with the name "Palmetto Air Plantation Homeowners Association, Inc." must have the authority to enforce these Declaration of Covenants. Maybe it was thought that these Declaration of Covenants should be able to be enforced and the legal right to do so by Respondent was not investigated.

Regardless of the reasons, it cannot fairly be said that the Circuit Court or the Court of Appeals was asked to rule on whether Respondent had the right to enforce the Declaration of Covenants prior to the April 3, 2024 hearing. Maybe it was inconceivable that covenants and restrictions could apply to a property, but there is no proper, legal entity to enforce them. However, that is exactly the situation in this case. This is a correctable situation if Respondent were to properly follow The South Carolina Homeowners Association Act of 2018, S.C. Code §27-30-110 *et. seq*, but to date it has not.

The question of whether Respondent had the legal right to enforce the Declaration of Covenants was not at issue in its Motion for Partial Summary judgment as shown by its own brief. Nothing in Respondent's brief addresses this question. The only question raised and ruled on was whether the Declaration of Covenants apply to Appellant's property. As a result, the Circuit Court erred as a matter of law in finding that the question as to whether Respondent has the legal authority to enforce the Declaration of Covenants was *res judicata*. This court should therefore reverse the Circuit Court on this issue and either rule on this issue as outlined above or remand the case to Circuit Court for a ruling on this issue.

### **CONCLUSION**

The Declaration of Covenants that Respondent is attempting to enforce in this action themselves clearly show that Respondent is not authorized to enforce these covenants. Respondent

attempted to pass itself off as the legally authorized entity to enforce the Covenants by giving itself a similar name and recording By-Laws. There are no Declarations giving Respondent the authority to enforce the Covenants recorded by Mid- Eastern Truck Wash on July 11, 2001. Respondent has not abided by the S.C. Code §27-30-110 *et. seq.*, The South Carolina Homeowners Association Act of 2018 and should be barred from enforcing covenants and restrictions that it is not authorized to enforce.

The question of whether Respondent had the legal right to enforce the Declaration of Covenants was not at issue in its Motion for Partial Summary judgment as shown by its own brief. The only question raised and ruled on was whether the Declaration of Covenants apply to Appellant's property. As a result, the Circuit Court erred as a matter of law in finding that the question as to whether Respondent has the legal authority to enforce the Declaration of Covenants was res judicata.

Respectfully submitted,

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