IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas
The Honorable Thomas L. Hughston Jr.

Appellate Case No. 2024-001547
Case No. 202O-CP-18-1856

Joseph R. Davis and Jennifer Davis, individually
and as representative of all those similarly situated,.....Appellants- Respondents,

v.

River Oaks Homeowners Association, Inc.,.....Respondent-Appellant,

and

Halcyon Real Estate Services, LLC, and
Dorchester Real Estate Services, Inc ..... Respondents.

FINAL BRIEF OF APPELLANTS-RESPONDENTS JOSEPH AND JENNIFER DAVIS

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2. **The court erred in finding the River Oaks Declaration is a restrictive covenant which encumbers and runs with the land of the lots of Woodington I and Woodington II.**

3. **The court erred in finding that River Oaks has the authority to enforce the Woodington Covenants and levy assessments, dues, fines, fees, collection costs, attorney fees, liens and to foreclose upon liens, upon the lots and lot owners of Woodington I and Woodington II.**

4. **The court erred in finding that equity compels River Oaks to continue to act without authority to enforce the Woodington Covenants and levy assessments, dues, fines, fees, collection costs, attorney fees, liens and to foreclose upon liens, upon the lots and lot owners of Woodington I and Woodington II.**

5. **The court erred in granting summary judgment to River Oaks on Appellants' individual cause of action under SCUPTA.**

6. **The court erred in failing to include within the class definition the lots of all 9 neighborhoods identified by plat in the complaint.**

STATEMENT OF THE CASE

Factual Background

In or around 1985, a tract of land in Dorchester County began to be developed by College Properties, Inc. ("College") and was subdivided into fifty-two (52) residential lots evidenced by the recording of a plat titled "Woodington Phase I" ("W1 Plat") ("Woodington I") (R.p. 3111). Woodington I is near more than (10) other residential developments built by multiple developers over a span of approximately 20 years (R.pp. 3002-3126).[1] On June 24, 1985, College recorded in

[1] The ten (10) nearby neighborhoods were built from the mid-1980s to the mid-2000s (R.p. 2607) with their respectively filed covenants and restrictions are as follows: Ansley Point, Bk 910, p. 300; Appian Landing I, Bk 534, p. 390; Appian Landing II, Bk 555, p. 249; Appian Landing III, Bk 612, p. 252; Marsh Hall, Book 2461, p.322; Marsh Side; Palmetto Plantation, Bk 608, p. 508; River Chase, Bk 611, p. 92; Woodington II, Bk. 592, p. 371; and Woodington III, no recorded CCR's (R.pp. 61-103, 148-252; 3002-3126). None of the CCRs for above listed neighborhoods establishes a homeowners' association for their respective neighborhood. (R.pp. 61-103, 148-252; 3002-3126) Ten (10) of the neighborhoods were included

the Dorchester Register of Deeds ("ROD") a limited set restrictive covenants encumbering the lots of Woodington I ("Woodington, I Covenants") (R.p. 3111).

In 1987 Woodington I Covenants were amended by the successor to College, to revise limited land use terms and principally to bind an additional seventy-nine (79) lots, depicted on the recorded plat titled "Woodington Phase II." ("W1 Plat" and collectively hereinafter the WI Plat and W2 Plat shall be referred to as "Woodington Plats") ("Woodington II") (R.p. 3112), to the Woodington I Covenants ("Woodington Amendment") (R.pp. 3019-3021) (Woodington I Covenants and Amendment hereinafter collectively "Woodington Covenants") (Woodington I and Woodington II hereinafter collectively called the "Woodington Neighborhoods").

The Woodington Covenants terms do not establish a homeowner's association. The Woodington Covenants terms do not create an obligation of a lot owner to pay assessments, fees, fines, interest, collection costs, or attorney's fees to anyone. The Woodington Covenants terms do not provide anyone the right to levy a lien upon any lot in the Woodington Neighborhoods. The Woodington Covenants terms do no afford anyone a contractual right to foreclose upon a lien. Section R of the Woodington Covenants states: "said covenants shall be automatically extended for successive periods of ten (10) years unless an instrument signed by a majority of the ***then owners*** of the lots has been **recorded**, agreeing to change said covenants in whole or in part." (R.pp. 3012-3021) The Woodington Plats do not identify separate common area lots distinct from the residential one hundred and thirty-one (131) lots identified therein. (R.pp. 3111-12) The Woodington Neighborhoods do not have a common area lot containing a clubhouse, park, pool,

within the original class definition contained in the Complaint. (R.p. 90 ¶168) The Certified class only involves the Woodington Neighborhoods. (R.pp. 19-32)

pond, playground, community center or any other community common area which would require maintenance separate and distinct from that required to be done by the lot owners of the 131 lots.[2]

In or around April of 1997 a couple homeowners from different surrounding neighborhoods formed River Oaks Homeowners Association, Inc., ("River Oaks") a non-profit association. On April 15, 1997, River Oaks Articles of Incorporation were executed by four (4) individuals and recorded with the Secretary of State. (R.pp. 3576-3580) In 1998, the incorporators of Rivers Oaks began campaigning throughout all the neighborhoods seeking signatures on a document called "Declaration" (R.pp. 1094-1095; 2715-2756; 3524). The latest signature date on the Declaration for a Woodington Neighborhoods' lot owner is March 27, 1999. (R.pp. 2715-56, 2742) On May 26, 2000, the Declaration is filed in the Register of Deeds ("ROD") ("Declaration"). At the time River Oaks filed the Declaration, River Oaks did not own any real property. (R.pp. 3527-30) The Declaration is comprised of three (3) pages of terms and thirty-nine (39) pages, each of which contains four signature blocks, a majority of which are blank or unexecuted. (R.pp. 2715-56). The terms of the Declaration state in relevant parts:

- "Whereas the elected leaders in a number of residential subdivisions…determined that the goals and welfare of their subdivisions could be further served and that their standing in relation to local governments could be strengthened if the subdivisions united...";
- "Whereas the Association desires to give public notice of its existence and purposes, to identify it members, and to establish a funding mechanism for its operations.";
- Provides its purpose is "to provide for the enhancement and maintenance of entryways to the River Oaks community from Dorchester Road, the entryways to the individual subdivisions, the roadside areas along Park Forest Parkway and Appian Way, and of existing roadway islands, and the improvement of street

[2] None of the 9 neighborhoods identified in the complaint, which River Oaks seeks to regulate have a plot of land, club house, park, pool, pond, playground, community center or any other community area for either the individual Neighborhood nor which is common to the neighborhoods as a whole, which was owned by River Oaks at the time it recorded the River Oaks Declaration.

lighting and other safety enhancing measures. . ."[3] ; and to assist subdivision organizations regarding violations of covenants and restrictions, providing it is feasible to do so."

- "Property Affected. The association presently serves[4] the following residential subdivisions: Ansley Point; Appian Landing I; Appian Landing II; Appian Landing III; Palmetto Plantation; River Chase Woodington I; Woodington II; Woodington III [(collectively hereinafter "9 Class Complaint Neighborhoods")]. Additional subdivisions may join the Association. These subdivisions have land use regulations in the form of restrictive covenants declared and impressed on the lots comprising them by their respective developers, and *this Declaration does not cancel or supersede those restrictive covenants, which remain in full force and affect…"*

- The terms of the Declaration conclude by stating: "Witness the hands of the Association's members on the dates indicated on the attached 39 signature pages" (R.pp. 2715-2717)

On September 25, 2001, River Oaks recorded in the ROD an instrument titled "Declaration Supplement 1" ("Supplement 1"), which states in relevant parts:

> River Oaks Homeowners Association (subsequently referred to as Association) recorded a Declaration on May 26, 2000, in Book 2433 at page 92 in the office of the RMC of Dorchester County. The Declaration contained 39 pages of signatures of the owners of lots in the nine residential subdivisions served by the Association. This Supplement #1 is being recorded to add more signature pages for the owners of other lots in the nine subdivisions.

[3] The real property described in the Declaration as entryways to River Oaks community from Dorchester Road is real property owned by the public and/or not owned by River Oaks. The real property described in the Declaration as entryways to individual subdivisions is real property not owned by River Oaks and is not common area as the term is typically defined with regard to subdivisions. The real property described in the Declaration as the roadside areas along Park Forest Parkway and Appian is public property, property not owned by River Oaks, and/or Property not owned by River Oaks at the time Declaration was recorded. The real property described in the Declaration as existing roadway islands is public property not owned by River Oaks. The real property described in the Declaration as real property upon which River Oaks desired to improve street lighting and/or other safety enhancements is public property, property not owned by River Oaks, and/or Property not owned by River Oaks at the time the Declaration was recorded.

[4] The Definition of "serves" is ambiguous, but it is uncontroverted that River Oaks maintains that it did not begin to enforce the Declaration and charge mandatory dues under the Declaration until 2002 (R.p. 3517-18).

Supplement 1 consists of two hundred thirty-five (235) pages. Like the Declaration, there are blank signature blocks and "X" through signature blocks. The second paragraph of Supplement 1 references that the River Oaks Board voted to amend the Declaration to include Marsh Hall as an additional 10th neighborhood to the Declaration. (R.p. 2757)

On April 24, 2002, River Oaks recorded an instrument in the ROD titled "Declaration Supplement 2" ("Supplement 2"). Supplement 2 added eight (8) signature pages, including signatures for one Woodington II lot dated November 13, 2001 (R.pp. 2993-3001, 3001), which is the date of the last signature of a lot owner of the Woodington Neighborhoods contained within the Declaration, Supplement 1, and Supplement 2. (R.pp. 2715-3001). (Supplement 2) Contemporaneous with the recording of Supplement 2, River Oaks commenced to act as if it had authority to regulate all properties within eleven (11) neighborhoods, including the Woodington Neighborhoods. (R.pp. 36-56; 2605; 3517-25) River Oaks began imposing assessments and fines, and generally began enforcement of the Woodington Covenants.

In 2005, Appellant Joseph Davis purchased a home located at 3213 Wynnefield Drive. North Charleston. (hereinafter "Davis Property") (R.pp. 63, 331) Joseph Davis resided there with his wife, Jenifer Davis, until 2013 and thereafter began renting the property. (the "Davis") The Davis Property is located within Woodington I and identified as Lot B-9 on a plat of Woodington I. (R.pp. 63, 331, 3111) River Oaks' property management company, Dorchester Real Estate Services ("DRES") filed a lien against Joseph and Jenifer Davis and the Davis Property on November 12, 2014, in the amount of $170.00, which consisted of a $100 assessment, a $50.00 late fee, and a $20.00 administrative fee. (R.pp. 3475-79, 3494-350) A second lien was filed by

River Oaks' attorneys McCabe Trotter and Beverly, PC[5] in April 2016. The second lien was filed at the request of River Oaks, the property management company, Halcyon Real Estate Services, LLC. ("Halcyon") The total amount claimed owed was $1,035.28. (R.pp. 3475-79, 3494-350).

Procedural History

On October 11, 2017, Joseph and Jennifer Davis filed this matter by asserting class allegations seeking, in part, to declare River Oaks, nor its property management companies DRES and Halcyon had the authority to enforce the nine (9) Class Complaint Neighborhoods developer covenants against approximately 645 homes in nine (9) different neighborhoods or to levy or collect assessment fines, fees or impose liens against those homes pursuant to the Declaration or River Oaks Bylaws (R.pp. 60-105). The Complaint sought on a non-class basis a claim for violation of the unfair trade practices and on a class basis cause of action for unjust enrichment, money had and received, negligent misrepresentation, constructive fraud, slander of title, declaratory judgment, abuse of process, aiding and abetting, and conversion. (R.pp. 60-105)

River Oaks and Halcyon filed responses January 2, 2018, and January 10, 2018, respectively. (R.pp. 2683-84; 106-141) On January 10, 2018, the Davis filed a Request for Rule 55(a), Entry of Default, Affidavit of Default and Affidavit of Service as to DRES. (R.p. 3875-81) On January 23, 2018 a "Rule 5(a) Entry of Default was entered against DRES. (R.p. 3883) On December 14, 2018, Appellants filed a Motion for Class Certification (R.pp. 142-45). The motion states:

> For the time period commencing January 1, 2014 to present for any homeowner who has owned real property identified on the Woodington I Plat, Woodington II Plat, Woodington III Plat Phase I, Woodington III Phase II, Appian I Plat, Appian II Plat, Appian III Plat, Palmetto Plantation Plat, River Chase Plat Phase I, River Chase Plat Phase I Part II, River Chase Plat Phase II, and Ansley Point Plat, who

[5] Appellants filed suit against McCabe Trotter and Beverly, PC on April 3, 2017, for violations of the Fair Debt Collection Practices Act which matter was resolved.

> did not execute the River Oaks Declaration (as defined in Complaint) and from whom River Oaks, Halcyon, and/or DRES have sought to collect or collected from said homeowners assessments, late fees, administrative fees, covenant fines, interest, filing fees, bad check fees, attorney fees, other fees or charges and/or filed a lien against the homeowners real property pursuant to the following covenants, restrictions, and/or declarations: Woodington I, II, and III Covenants, Appian I Covenants, Appian II Covenants, Appian III Covenants, Palmetto Plantation Covenants, River Chase Covenants, Ansley Pointe Covenants, River Oaks Declaration. (as defined in the Complaint)

On November 6, 2019, the parties entered a Consent Order striking the matter from the active roster pursuant to Rule 40(j), SCRCP. (R.pp. 1-6) The matter was restored by order filed November 20, 2020. (R.pp. 7-10).

On December 23, 2020, River Oaks filed a "Motion for Partial Summary Judgement." (R.p. 146).[6] On March 10, 2021, the Davis filed a Motion for Summary Judgment and Supporting Memorandum. (R.pp. 148-299)[7] On March 24, 2021, a hearing was held on the cross motions for summary judgment but was held open with leave for the parties to supplement the record. (2359-2360). On June 4, 2021, the hearing on the pending motions was reconvened before the Honorable Diane Goodstein who states at the ending the hearing:

> There needs to be an evidentiary hearing. These matters need to be set out. Somebody needs to put these things into evidence to make a record so that in the event that these things go up that they go up properly… as we sit here, I'm taking representations of counsel… But the reality is if there's not an evidentiary basis, it's not part of the record. It's not. And so, my concern is that when this matter goes up, if it goes up, I have done you all a disservice because there are things that are not a part of this record that's extremely important, and that might be the most important item… Well, if you all think it makes more sense to just hold on and say, okay, now I'm going to torture you guys some more, and we're going to have an evidentiary hearing, I can certainly hold it. I don't mind doing that. You know, I don't, but there

[6] Supporting memorandum filed March 22, 2021 (R.p. 300) along with opposition to Davis motion for summary judgment. (R.p. 471) and opposing memorandum was filed on March 23, 2021. (R.p. 943)

[7] On March 22, 2021 River Oaks filed a Memorandum in Support of Defendant's Motion for Partial Summary Judgment and in Opposition to Plaintiffs Motion for Class Certification with Exhibits (R.p. 309) and Defendant River Oaks Homeowners Association, Inc.'s Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment. (R.p. 471)

has got to be an evidentiary hearing. There has to be. (R.pp. 2483-2487).

On July 7, 2022, the Court held a "evidentiary" hearing for the continuation and conclusion of the hearings held on March 24, 2021, and June 4, 2021[8] on parties pending cross motions for summary judgment and the Davis's Motion for Class Certification filed on December 14, 2018. On August 16, 2022, the Court entered three (3) Orders: (1) Order Denying Plaintiffs' Motion for Partial Summary Judgment; (2) Order Denying Defendants' Motion for Partial Summary Judgment; and (3) Order granting Class Certification was filed. ("Class Order") The Class Order defined the class as: The Class shall be and is defined as follows:

> For the time period commencing January 1, 2014 to present for any homeowner who owns or has owned real property identified on the Woodington I Plat and Woodington II Plat who did not execute the Declaration and from whom River Oaks, Halcyon, and/or DRES have sought to collect or collected from said homeowners' assessments, late fees, administrative fees, covenant fines, interest, filing fees, bad check fees, attorney fees (R.pp. 19-32).

On August 26, 2022, Plaintiffs filed a "Motion for Reconsideration, In Part" seeking a determination that the class should contain all neighborhoods, not just the Woodington

[8] After the June 4, 2021, hearing on the cross motions for Partial Summary Judgment, and Plaintiffs' Motion for Class Certification, the matter was held in abeyance to give the Parties the opportunity to either bring a live witness from the Register of Deeds ("ROD") for Dorchester County or agree upon a list of Exhibits for the numerous documents filed with the Dorchester ROD referenced at the time of the hearing. May 21, 2021, River Oaks supplemented the record and filed "Defendant River Oaks Homeowners Association Inc.'s Motion for Partial Summary Judgment." (R.p. 1041.) Davis supplemented the record on June 3, 2021, by filing "Plaintiffs Reply to River Oaks Memorandum in Opposition to Defendant's Motion for Partial Summary Judgment" (Pls' R.p. 1066). At the hearing on July 7, 2022, the parties presented to the court a collection of agreed-upon stipulated exhibits (R.p. 2506-2508, 2567) which were subsequently via an Exhibits letter on August 9, 2022. (R.pp. 2708-3874) All of the materials submitted by the Parties were specifically made a part of the record in the within matter by the Order of Class Certification filed 8/16/22 (R.p. 19 fn1).

neighborhoods. (R.p. 1201) The Court denied the Motion for Reconsideration on December 6, 2022. (R.p. 33)

On June 11, 2024, Rivers Oaks filed "Defendant River Oaks Homeowners Association Inc's Pre-Trial Motion for Summary Judgment with Exhibits. (R.p. 1203-1976). On the same day River Oaks also filed "Defendant River Oaks Homeowners Association, Inc.'s Pre-Trial Motion to Decertify the Class." (1977) On following day on June 12, 2024, River Oaks filed "Defendant River Oaks Homeowners Association Inc.'s Amended Pre-Trial Motion to Decertify the Class." (R.p. 2708). Davis filed a cross-motion for Summary Judgment on June 12, 2024. (R.p. 2262)

The matter was set to be tried before the Honorable T. I. Hughston Jr., June 12, 2024. At the commencement of the proceedings, the parties acknowledged that the Defendant, DRES, was in default (R.p. 2664) and liability as to DRES was established as to all causes of action asserted against it on a class basis. Additionally, a settlement with Halcyon on a class-wide basis was placed on the record with the parties acknowledging the need for compliance with Rule 23, SCRCP and further court approval of the settlement. (R.p. 2585-86) The Court then proceeded to hear the cross motions for summary judgment, which, in essence, sought the opposite relief. The Court entered an Order on July 24, 2024, granting Rivers Oaks' motion for summary judgment and denying Davis's Motion for Summary Judgment. (R.p. 36) On August 3, 2024, Davis filed a Motion for Reconsideration. (R.p. 2274). Reconsideration was denied on August 15, 2024. (R.p. R.p. 58). This appeal followed.

STANDARD OF REVIEW

A. SUMMARY JUDGMENT STANDARD.

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder*." George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

Summary judgment should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *E.g., Shelton v. LS&K, Inc*., 374 S.C. 294, 297, 648 S.E.2d 307 (Ct. App. 2007).

To determine whether there exists a genuine issue of material fact, the court views all the properly cognizable evidence in the record in the light most favorable to the nonmoving party. *Dawkins v. Fields*, 354 S.C. 58, 67-68, 580 S.E.2d 433 (2003); *Shelton*, 374 S.C. at 297. This deferential view applies to matters of fact and not to matters of law, which are not subject to factual judgments. *See Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

B. EQUITY STANDARD.

An action to enforce restrictive covenants by injunction is in equity." *Seabrook Island Prop. Owners Ass'n v. Marshland Trust, Inc.*, 358 S.C. 655, 661, 596 S.E.2d 380, 383 (Ct. App. 2004). On an appeal in an action in equity, tried by the judge alone, without a reference, the appellate court has jurisdiction to find facts in accordance with its views of the preponderance of the evidence. *Campbell v. Carr*, 361 S.C. 258, 263, 603 S.E.2d 625, 627 (Ct. App. 2004). Nevertheless, this broad scope of review does not require the appellate court to ignore the findings below when the trial court was in a better position to evaluate the credibility of the witnesses." *Seabrook Island Prop. Owners Ass'n*, 358 S.C. at 661, 596 S.E.2d at 383.

C. CLASS CERTIFICATION STANDARD.

Whether a class should be certified rests in the discretion of the trial court. *King v. Am. Gen. Fin., Inc.,* 386 S.C. 82, 88, 687 S.E.2d 321, 324 (2009). In considering a motion to certify a class, the Court may not look to the merits of the claims when determining whether to certify a class. *Tilley v. Pacesetter Corp*., 333 S.C. 33, 508 S.E. 2d 16 (1998). The Supreme Court of South

Carolina "has expressed the viewpoint that class actions are favored in this state[.]" *Grazia v. S.C. State Plastering,* LLC, 390 S.C. 562, 576, 703 S.E.2d 197, 204 (2011). Plaintiffs bear the burden of proving all five requirements for class certification. *Gardner v. South Carolina Dept. of Revenue,* 353 S.C. 1, 21, 577 S.E.2d 190, 200 (2003).

ARGUMENT

I. THE DECLARATION IS NOT AN AMENDMENT OF THE WOODINGTON COVENANTS.

A. The River Oaks Declaration is not an amendment of the Woodington Covenants because the Declaration terms exceed the scope of the original intent of drafter(s) of the Woodington Covenants.

"Restrictive covenants are contractual in nature, and thus, the language used in the restrictive covenant is to be construed according to its plain and ordinary meaning. However, restrictions on the use of property are historically disfavored. Thus, to enforce a restrictive covenant, a party must show that the restriction applies to the property either by the covenant's express language or by a plain unmistakable implication." *Penny Creek Assoc., LLC v. Fenwick Tarragon Apartments, LLC,* 357 S.C. 267, 271-72, 651 S.E.2d 617 (Ct. App. 2007). "The language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it at the time of execution." *Hardy v. Aiken*, 339 S.C. 160, 166, 631 S.E.2d 539 (2006) (Citations Omitted). "An easement restricting the use of property must be created in express terms or by plain and unmistakable implication. In determining whether an easement exists, the language of the deed, the circumstances surrounding the origin of the covenants and the intent of the parties should be considered." *Butler v. Sea Pines Plantation Co.,* 282 S.C. 113, 120, 317 S.E.2d 464 (Ct. App. 1984). "The court may not limit a restriction, nor 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." *Arcadian Shores Homeowners v Cromer,*373 S.C. 292, 299, 644 S.E.2d 778 (Ct. App. 2007). Courts are to construed restrictive covenants with all doubts resolved in favor of free use of the property. *Seabrook Island Property Owners Ass'n v. Marshland Trust Inc*., 358 S.C. 655, 661, 596 S.E. 2d 380, 383 (Ct. App. 2001)

Amendments to covenants and restrictions are subject to the same scrutiny. Amendments are not instruments that can be used to expand the scope of covenants. In *Erkes v. Kasparek,* 303 S.C. 70, 399 (Ct. App. 1990), this Court, addressing the validity of a purported subsequent lot owner amendment to the original developer-imposed restrictive covenants states:

> ***{T}he residents may not impose additional restrictions on the undeveloped land but may only amend those restrictions contained in the restrictive covenants***. The residents' purported amendments do not amend the restrictive covenants, but improperly add to them.
>
> The restrictive covenants state that "any of the conditions, restrictions, and covenants herein contained may be changed, or amended...." The residents cannot place new restrictions on the land under the guise of amendment. Restrictions on the use of property are strictly construed, with all doubts resolved in favor of the free use of the property. *Hamilton v. CCM, Inc.*, 274 S.C. 152, 158, 263 S.E. (2d) 378, 381 (1980). In the first and second sets of amendments, the developers amended existing restrictions contained in the restrictive covenants. They did not add new restrictions. The restrictive covenants do not contain any restriction establishing lot size. Therefore, the purported amendment by the residents cannot restrict lot size on the unsubdivided land under the terms of the restrictive covenants. *Id.* at 73. (emphasis added)

The South Carolina Supreme Court has recognized further limitations for amendments to restrictive covenants. In *Gates at Williams-Brice v. DDC Const.,* citing its northern sister court's decision in *Armstrong v. Ledges Homeowner's Association, Inc.,* 360 N.C. 547, 633 S.E.2d 78, 87 (2006), acknowledged "a provision authorizing a homeowners' association to amend a declaration of covenants does not permit amendments of unlimited scope; rather, every amendment must be reasonable in light of the contracting parties' original intent." *Gates at Williams-Brice v. DDC Const.*, 418 S.C. 282, 298, 792 S.E.2d 240 (2016).

Numerous other jurisdictions, like South Carolina, have employed a standard of reasonableness to the scope of amendments to restrictive covenants to determine their validity. Courts have routinely determined amendments invalid when they exceed the intent of the original covenant and substantive terms. See *Lakeland Property Owners Ass'n v. Larson*, 121 Ill.App.3d 805, 77 Ill. Dec. 68, 459 N.E.2d 1164 (1984)(where a majority of lots owners executed and recorded an amendment of the covenants to establish dues assessable against lot owners, the nonpayment of which would cause a lien upon the property, the lower court was correct in judging the amendment terms were not changes in the original covenants but rather entirely new and different in character therefore the HOA had no authority to make a binding assessment upon defendant because the terms of the amendment went beyond the intent of the original covenant drafting parties.); *Caughlin Ranch Homeowners Assoc. v. Caughlin Club*, 849 P.2d 310 (Sup. Ct. Nevada 1993) ("[w]here a deed contains restrictive covenants but also permits their future alteration, the language employed determines the extent and scope of that provision" and finding the amendment to the covenants unenforceable because "the provision in the CC & R's providing for their amendment is properly construed to refer to amendments of existing covenants as opposed to the creation of new covenants unrelated to the original covenants."); *Boyles v. Hausmann*, 17 N.W.2d 610, 618, 246 Neb. 181 (Sup. Ct. Nebraska 1994) (, a majority did not have the authority to adopt new and different covenants which restricted the use of the land); *Webb v Mullikin,*142 S.W.3d 822, 825-27 (Missouri Ct. App. 2004) ("may amend these restrictions" as permitting a majority of lot owners to change existing covenants but not to add new or different covenants, as is the case with the amended agreement *Armstrong v. Ledges Homeowner's Association, Inc.,* 360 N.C. 547, 633 S.E.2d 78, 88 (2006) (finding the HOA's amendment of the developer covenants to authorize broad assessments for general purposes of promoting the safety, welfare" of members

and “as more specifically authorized from time to time by the board is unreasonable” because the amendment “grants the association practically unlimited power to assess lot owners and is contrary to the original intent of the contracting parties.”); and *Wilkinson v Chiwawa Communities Association*, 327 P.3d 614, 622 180 Wash.2d 241 (Sup. Ct. Washington 2014) (interpreting a covenant that permitted changes to the said covenants in whole or in part as permitting changes not the addition of new covenants which have no relation to existing ones finding “for amendments by majority vote to be valid in Chiwawa, such amendments must be consistent with the general plan of development and related to an existing covenant.”).

The lower court erred by ignoring and contradicting these principles. The Court found the Declaration added restrictions to the Woodington Neighborhood's lots and Woodington Covenants. The Court found that the Declaration adds the additional burdens upon the lots, of having to comply with a homeowner association, and authorizes River Oaks to enforce the Woodington Covenants and levy assessments, fines, fees, costs of collection, attorney fees, liens and foreclosure on the Woodington Neighborhoods lots. (R.p. 53) This is in direct opposition to *Erkes*. These additional restrictions greatly exceed the original intent of the developers who imposed the Woodington Covenants upon the Woodington Neighborhoods. Amendments are not a vehicle to add new restrictions to land beyond the scope and intent of the original restrictions the amendments purport to amend. If amendments add restrictions beyond the original covenant drafter’s intent, they are unenforceable. The court erred as a matter of law.

The Woodington Covenants do not expressly state or imply through unmistakable intent that a homeowner’s association should be created as an overarching authority of the Woodington Neighborhoods and Woodington Covenants in their totality. As the lower court notes the later creation of a homeowner’s association is ***contemplated*** by stating the "Declarant shall have the

right to assign this easement to a neighborhood homeowners association or garden club." (R.p. 50) The Woodington Covenants do not use the words assessments, fines or foreclosure. It is impossible to contemplate or extrapolate from the expressed language of the Woodington Covenants these additional restrictions. Again, these are additions by way of amendment, which is contrary to the established law found in both *Erkes* and *Gates*. *See also, Taylor v. Lindsey,* 332 S.C. 1, 4, 498 S.E.2d 862, 864 (1998)(The court should not insert, enlarge, or extend a restriction 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.) The trial court erred by adding restrictions that do not expressly exist. The trial court should be reversed.

Appellants cited *Erkes* to the court and asserted the developer's original intent and limited scope of terms of the Woodington Covenants preclude River Oaks and/or lot owners of Woodington I and II from legally amending the Woodington Covenants to provide for the creation of a homeowners' association authorized to enforce the Woodington Covenants and levy assessments, fines, late charges, interest attorney fees, lien and foreclose upon the lots and lot owners of Woodington I and II (R.pp. 2631-2635).

The purported amendment of the Woodington Covenants in the form of the River Oaks Declaration does not revise the existing terms of Woodington Covenants in anyway. Rather the Declaration seeks to add new restrictions. Therefore, the River Oaks Declaration's attempted amendment of the Woodington Covenants, for the purpose of placing these additional restrictions and burdens upon the lots of Woodington I and II is legally unenforceable and void. For these reasons the lower court erred in determining River Oaks Declaration is a legally enforceable amendment of the Woodington Covenants.

B. The Declaration does not make reference to the Woodington Covenants, revise the Covenants, or relate to the subject matter of the Covenants and therefore, is not an amendment of the Woodington Covenants.

The Declaration does not reference, revise, nor relate to the subject of the Woodington Covenants and therefore the court erred in determining the Declaration is an amendment of the Woodington Covenants.

"Where instruments entered into by the same parties at different times relate to the same subject matter, the instruments will be construed together to determine the entire agreement between the parties. If the provisions of one instrument limit, explain, or otherwise affect the provisions of the other, they will be given effect to accomplish the entire agreement between the parties….Any modification of a written contract must satisfy all the requisites of a valid contract." *Bishop Realty & Rentals, Inc. v. Perk, Inc.*, 292 S.C. 182, 184-85, 355 S.E.2d 298 (Ct. App. 1987). "Restrictive covenant cases present such wide differences in circumstances that, in the main, each case must be decided on its own facts." *Nance v. Wallace*, 258 S.C. 69, 76, 187 S.E.2d 226 (1972) (Justice Brailsford writing in dissent). An 'amendment' is "a formal revision or addition proposed or made to a . . . instrument." *Black's Law Dictionary, Third Pocket Edition 2006*. In *Brown v Bass*, our Supreme Court dealt with the issue of whether residential restrictive covenants had been properly amended, concluding that an amendment to a restrictive covenant must state that it is an amendment to a specific covenant term and specifically reference the covenant it is amending. The Court states, "The petition is clearly inadequate on its face to amend the covenant prohibiting trailers. Nowhere does the petition purport to serve as an amendment to the subdivision restrictions; in fact, there is no reference whatsoever to the existence of any such restrictions. One lot owner testified that he signed the petition without knowledge that any covenants even applied to the land." 267 S.C. 211, 216, 277 S.E.2d 480 (1981).

In this case the Appellants raised these issues to the court multiple times (R.pp 2415-2427; 2527-32 ; 2633-2648). The terms of the Declaration and the Woodington Covenants concern different subject matter. The Declaration is a funding mechanism for River Oaks, and by contrast the Woodington Covenants are land restrictions which impact the mode of enjoyment of the Woodington Neighborhoods lots by their owners. The provisions of the Declaration in no way limit, explain, or otherwise affect the provisions of the Woodington Covenants. In fact, the Declaration terms expressly state: "this Declaration does not cancel or supersede those restrictive covenants, which remain in full force and affect…" Nowhere within the terms of the Declaration does it make reference to or specifically identify the Woodington Covenants at all and the trial court refused to address these points. The lack of terms in the Declaration which identify the Woodington Covenants for purposes revision, relation, and/or reference is a fatal flaw to any determination that the Declaration is an amendment of the Woodington Covenants, and it was an error of law for the court to find otherwise.

C. A majority of valid lot owner signatures imparted upon the Declaration were not obtained in compliance with the terms of the Woodington Covenants and as such the Declaration is not an amendment of the Woodington Covenants.

In the case the lower court finds as a matter of law:

> The Court finds as a matter of law that the Woodington I & II neighborhoods are part of River Oaks because their homeowners properly bound their homes to the River Oaks Declaration by a majority of the then-homeowners in accordance with the applicable covenants and restrictions (R.p. 43)…

To reach this determination the court relies upon the express terms of Section "R. Terms." of the Woodington Covenants executed and recorded by the original developer, College.[9] The express terms are:

[9] Filed 6/28/85 BK 540 PG 460 (R.p. 3007)

> These covenants are to run with the land and shall be binding upon all parties and all persons claiming under them for a period of thirty (30) years from the date these covenants are recorded; after which time said covenants shall be automatically extended for successive periods of ten (10) years unless an instrument signed by a majority of *then owners* of the lots has been *recorded*, agreeing to change said covenants in whole or in part.

The record does not support the proposition that a true majority of valid signatures existed at signing or recording of the Declaration and thereafter through its supplements.

River Oaks failed to validly amend the Woodington Covenants through *then* lot owners signing the Declaration. River Oaks failed for the following reasons: 1) a majority of *then* lot owners never contemporaneously signed a single instrument; 2) the three documents, the Declaration, Supplement 1 and Supplement 2 were signed at separate and unique times and recorded at distinct times; 3) none of the three documents were contemporaneously recorded upon execution; 4) signatures of individuals who did not possess legal title at the time of their executing any instrument were included; and 5) signatures were included on Supplement 1 for lot owners who did no acquire title to a lot until after the River Oaks Declaration was executed by each of the limited number of Woodington lots owners, who actually executed the Declaration, had already signed the declaration. Moreover, in multiple instances these subsequent signors, relied upon by River Oaks, did not even acquire legal title to a lot until after the River Oaks Declaration had already been recorded.

With regard to Woodington I, the lower court found[10]:

[10] The reality of this case is that the Woodington Covenants are comprised of two instruments Therefore, the appropriate method of calculate a simple majority of "then owner" lots pursuant to the terms of Section "R" of the Woodington Covenants is actually to add the 52 lots (R.p. 3111) of Woodington I together with the 79 lots (R.p. 3112) within Woodington II and that results in a total number of lots of 131. Therefore, a simple majority of the lots subject to the Woodington Covenants wood be 66. However, both River Oaks and the lower court in its Order, make determinations what a simple majority of lots are by calculating the numbers for the 52 lots in Woodington I (Majority 27) and calculating the numbers for the 79 lots in Woodington II (Majority

> Woodington I is comprised of 52 single-family residential lots. (See River Oaks' Motion at Exhibit K.) A majority vote of the Woodington I homeowners would therefore require 27 votes in favor of any change, not 52 as asserted by Plaintiff. The River Oaks Declaration and its supplements contain the signatures of at least 27 Woodington I owners stating their intentions to impress the Declaration upon their property. (See River Oaks' Motion at Exhibits A to C.) While the parties dispute the timing and legal implications of lot ownership and signing of the River Oaks Declaration, the parties all agree that these are matters of publicly filed documents for the Court to interpret. Documents on file with the Dorchester County Register of Deeds are records of which the Court may take judicial notice… River Oaks has presented this Court with the names of 27 signatories who executed the River Oaks Declaration as lot owners within Woodington I. (See River Oaks' Motion at Exhibit A-C.) Each of these signatories identified their respective lots by address and lot number.[11] River Oaks has also submitted their respective deeds of conveyance as exhibits for this Court's review. (See River Oaks' Motion at Exhibit L.) Although the Plaintiffs have identified other signatories who did not own their lots either at the time of signing or filing, which River Oaks has conceded, the only objections as to the ownership of these 27 signatures concern the ownership of just two. The Court is informed that two of the 27 signatories took legal title to their lots at some point after the River Oaks Declaration was filed. (River Oaks' Motion, p. 11 n. 4.) (R.pp. 47-48).

1. Signatures on the Declaration for Woodington I are insufficient

First, it should be noted that throughout the history of this matter, River Oaks has attempted to conflate three separate and distinct instruments recorded in three separate years[12] as a single

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40) separately. Therefore, to attempt to ease the review of this Court Appellant is addressing the "valid signatures obtained issue" below in the same manner as distinct calculations the lower court did in its Order.

[11] The court erred in making this factual finding. The Declaration and/or it supplements do not correctly identify every lot and/or corresponding neighborhood for a lot, for all signors. For example: 1) Michael Mack signed the Supplement 1 on 10/22/00, stating he was signing for Woodington I Lot 1C (R.p. 2785). However, the Mack purchase deed evidence Mack owner Woodington I Lot 1B (R.p. 3629); 2) Pamela Minton signed the Supplement 1, *though her signature is not dated,* stating she was signing for Woodington I Lot 2C (R.p. 2785). However, the Minton purchase deed evidences Minton owned Woodington I Lot 2B (R.p. 3756); 3) Henry Black signed the Declaration on 1/28/99 stating she was signing for Woodington I Lot 9 (R.p. 2743). However, the Black purchase deed evidences Black owned Woodington I Lot B9 (R.p. 3586). The Woodington I Plat indicates that the 52 lots are separated into alpha blocks, A, B, C, and each lot is identified by both an alpha and a numeric symbol. (R.p. 3111).

[12] 1) Declaration filed May 26, 2000, BK2433 PG092 (R.pp. 2715-2756); 2) Declaration Supplement 1 filed September 25, 2001, BK2831 PG101 (R.pp. 2757-2992); 3) Declaration Supplement 2 filed April 24, 2002, BK 3064 PG 352 (R.pp. 2993-3001).

instrument contemporaneously executed and recorded the "then owners". Therefore, the lower court was in error when it states: "River Oaks has presented this Court with the names of 27 signatories who executed the River Oaks Declaration as lot owners within Woodington I." (R.p. 48).[13] Previously the lower court in its order granting class certification filed on August 16, 2022, defines the River Oaks Declaration as one only that instrument recorded by River Oaks in the Register of Deeds for Dorchester County in BK 2433 PG 092 on May 26, 2000, and attached to Appellant's Motion for Summary Judgment filed on March 10, 2021 in this matter as Exhibit "J" (R.pp. 23; 256).[14] On January 28, 1999, and March 27, 1999, signatures were placed upon the River Oaks Declaration for 2[15] out of 52 lots. Moreover, the Declaration was not contemporaneously recorded with the execution of these signatures because the executions occurred in the first quarter of 1999, but the Declaration was not recorded until May 26, 2000. Therefore, the court erred in finding a simple majority of 27 out of 52 lots had "then owner" signatures executed upon the Declaration. The record before this court is clear signatures adorning the Declaration for 2 out of 52 lots within Woodington I, is not a simple majority as River Oaks contends and the lower court finds.

[13] The order fails to specifically identify the lots or "then owners" it is referencing when referring to the 27 signatories.

[14] Supplement 1 to the Declaration is a separate and distinct instrument which was recorded separately on September 25, 2001, in the Dorchester County Register of Deeds (R.pp. 2757-2992). (Supplement 2 to the Declaration is again a separate and distinct instrument which was recorded separately on April 24, 2002, in the Dorchester County ROD in BK 3064 at PG 352 (R.pp. 2993-3001).

[15] Henry and Betty J Black 1/28/99 (the Black's lot # is misidentified) (R.pp. 2743 vs. 3586); Yvonne M. and Robert R. Reynolds 3/27/99 (R.p. 2742).

2. Signatures on Supplement 1 are insufficient.

The Order does not identify the 27[16] Woodington I lots referenced. However, based upon River Oaks list of 27 Woodington I lots, Appellants would note the signatures for 25 of those lots are executed upon Supplement 1, record September 25, 2001, not the Declaration recorded on May 26, 2000.[17] Additionally, all 25 of those signatures postdate the filing of the Declaration. (R.pp. 2757-2292)

The court's Order states:

> *While the parties dispute the timing and legal implications of lot ownership and signing*…Although the Plaintiffs have identified other signatories who did not own their lots either at the time of signing or filing, which River Oaks has conceded, the only objections as to the ownership of these 27 signatures concern the ownership of just two. The Court is informed that two of the 27 signatories took legal title to their lots at some point after the River Oaks Declaration was filed (River Oaks' Motion, p. 11 n. 4). (R.pp. 46-47)

This finding is an error. Appellants raised issues with many of the 27 Woodington I lots numerous times.[18] Supplement 1 contains signatures of alleged "then owners" for 7 of the 27 Woodington I lots, each of whom did not possess legal title to their respective lots at the time the Blacks and the Reynolds signed the Declaration in the first quarter of 1999.[19] "Words of a restrictive covenant

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[16] Two additional Woodington I lots bear signatures on Supplement 1, but River Oaks does not even identify these signors within its 27 identified lots because River Oaks previously acknowledged to the court (R.pp. 2523-24, 2531-32, 2596-97) that the signatures are invalid as result of lot sale and/or purchase dates. The additional two are James and June Barbee who acquired titled to their lot on November 27, 2000 (R.pp. 3710-3712), after the Declaration was recorded. The Barbee's executed Supplement 1 on March 24, 2001 (R.p. 2849). The second lot corresponds to Ricky and Marcia Lee who executed Supplement 1 on March 25, 2000, (R.p. 2784) and thereafter sold their lot on November 30, 2000 (R.pp. 3608-3611), roughly a year before Supplement 1's recording date on 9/25/01.

[17] Though the Order doesn't identify the 27 lots, River Oaks Motion filed 6/11/24, Pages 11-13, identifies 27 lots (R.pp. 1213-1215).

[18] (R.pp. 2429-2434; 2517-2527; 2617-2626; 958; 1070, 1078-1085; 3897-3900).

[19] 1) Kevin Alston: purchase deed 8/2/99 Bk2255 PG001 (R.pp. 3644-3648);
2) Gayenell Magwood: purchase deed 11/12/99 BK2317 PG089 (R.pp. 3733-3736); 3) William J. Bryan: Purchase deed 7/30/99 BK2288 PG284 (R.pp. 3750-3752); 4) Gary N. Jones: Purchase

will be given the common, ordinary meaning attributed to them at the time of their execution…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." *Taylor*, at 4. The relevant term states: "unless an instrument *signed by a majority of then owners of the lots has been recorded*, agreeing to change said covenants in whole or in part." The language is not ambiguous it conceptualizes a specific group of people, namely the Woodington I lot owners, who owned their lots at a specific time, all signing one specific instrument and recording that one specific instrument. Perhaps the court could find the time period between when Blacks signed the Declaration on January 28, 1999, and March 27, 1999, when the Reynolds signed the declaration constitutes a single ownership time period such that it would fall within the meaning of the original intent of the developer in 1985 for the meaning of the terms "a majority of the then owner." However, not one of these 7 lots signors possessed legal title to a lot in Woodington I in either in January or March of 1999. Some did not acquire title until nearly a year later, some two years later, and in one instance nearly two decades later. Additionally, Vanhoy, Marsh, and Pelkey all acquired legal title to their respective lots months and/or years after the Declaration was recorded, which is even this is roughly a year and a half after the Blacks and the Reynolds signed the Declaration.

Deed 11/1/99 BK2310 PG185 (R.pp. 3719- 3722); 5) Christopher M. Vanhoy: Purchase Deed 1/3/01 BK2583 PG161 (R.p. 3743); 6) Robert and Tracy Marsh: Purchase Deed 12/26/01 BK2958 PG213 (R.p. 3703); and 7) David and Tomlyn Pelkey: Purchase Deed 2/20/18 BK11263 PG325 (R.p. 3767)

3. Alleged Equity Title does not validate signatures.

The Order states:

> Although the Plaintiffs have identified other signatories who did not own their lots either at the time of signing or filing, which River Oaks has conceded, the only objections as to the ownership of these 27 signatures concern the ownership of just two. The Court is informed that two of the 27 signatories took legal title to their lots at some point after the River Oaks Declaration was filed. (River Oaks' Motion, p. 11 n. 4.) At all relevant times, however, these signatories had equitable ownership of their lots by nature of installment sales contracts… Equitable owners may encumber land which they have an interest in. (R.p. 47)

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Summary judgment should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. E.g., *Shelton v. LS&K, Inc*., 374 S.C. 294, 297, 648 S.E.2d 307 (Ct. App. 2007). To determine whether there exists a genuine issue of material fact, the court views all the properly cognizable evidence in the record in the light most favorable to the nonmoving party. *Dawkins v. Fields*, 354 S.C. 58, 67-68, 580 S.E.2d 433 (2003)

First, of the twenty-seven (27) lots referenced three (3) (not 2) of those lots had alleged "then owners" who acquired legal title to a Woodington I lot and sign Supplement 1 after the Declaration was recorded.[20] Second, the court finds two (2) lots were signed off on by unidentified individuals who had entered into installment land sales contracts and therefore possessed equitable but not legal title to their respective Woodington I lots at the time these individuals signed Supplement 1. Upon information and belief, the court is referring to the David Pelkey and his wife and Robert Marsh and his wife who all signed the Supplement 1 prior to receiving legal deeded

[20] 1) Christopher Vanhoy: Deed 1/3/01 BK2583 PG161(R.p. 3743), signed Supplement 1 4/7/200 (R.p. 2848); 2) Robert and Tracy Marsh: Deed 12/26/01 BK2958 PG213 (R.p. 3703), signed Supplement 1 3/24/01 (R.p. 2843); 3) David and Tomlyn Pelkey: Purchase Deed 2/20/18 BK11263 PG325 (R.p. 3767), signed Supplement 1 but did not date the signatures (R.p. 2783).

title to their respective lots (See FN 19). There is no evidence in the record before the court for this finding and thus the finding is in error. Appellants previously raised this issue to the lower court noting these individuals signed Supplement 1, before they were deeded title to their respective lots (See FN's 18 & 19). River Oaks in an attempt to refute this, asserted these individuals entered into land installment contracts regarding the lots. However, River Oaks did not enter into the record any such land installment contract as evidence. Therefore, it was an error of the court to find that anyone, including Marsh and Pelkey could bind the River Oaks Declaration to any Woodington I lot based upon an unidentified land installment contract.[21]

The court erred in expanding the original intent of the Woodington Covenants drafter's unambiguous, plain, temporal meaning for the terms "an instrument *signed by a majority of then owners of the lots has been recorded."* River Oaks did not obtain a majority of signatures upon the Declaration of "then owners" of Woodington I lots, nor did it obtain a majority of signatures by combing the distinct instruments of the Declaration and Declaration Supplement 1. It was an error for the court to find otherwise.

4. An amendment is not a revolving or evergreen instrument.

The Court erred in holding signatures on the Amendment could be obtained over a period of years or indefinite period of time. The Woodington Covenants clearly state "unless an instrument *signed by a majority of then owners of the lots has been recorded,* agreeing to change said covenants in whole or in part." The Order, however, concludes: "The Plaintiffs further argue that the timing of the signatures renders them invalid. The Plaintiffs argue that the signatories

[21] Moreover, it is a clear violation of the summary judgment standard to make a factual determination about an individual's real property rights in the context of a land installment contract, when there is no evidence of the alleged terms of said contract. See. *Brooks v Council of Co-Owners*, 445 S.E.2d 630 (1994)

cannot be considered the "then owners" because they were not all obtained simultaneously. The Plaintiffs argue that the first signatory signed the River Oaks Declaration in 1999 while the last signatory signed in 2001." (R.p. 48) Thereafter, the Court "finds as a matter of law that the homeowners of Woodington I adequately obtained approval of the River Oaks Declaration by a majority of the then-owners in compliance with the Woodington I covenants." (R.p. 48) This finding is an error.

Of the twenty-seven (27) Woodington I lots referenced in the Order only two (2) of those lots evidence "then owner" signatures on the Declaration all of which were executed on January 28, 1999 and March 27, 1999. (R.pp. 253-294) The Declaration was recorded May 26, 2000. (R.pp. 253-294) *Thereafter,* Supplement 1 was executed and contains the remaining signatures for twenty-five (25) lots of the twenty-seven (27) referenced in the Order. (R.pp. 2757-2992, specifically 2783-2787, 2840-2848, 2955-2964) The signatures for all twenty-five (25) of those lots postdate the Recording of the Declaration on May 26, 2000. (R.pp. 2783-2787, 2840-2848, 2955-2964). The Amendment terms of the Woodington Covenants are unambiguous. It is impossible to interpret compliance with the terms, when the record shows signatures for twenty-five (25) Woodington I lots, are contained on Supplement 1, and the signatures for all twenty-five (25) lots are dated after the River Oaks Declaration was recorded on May 26, 2000. Therefore, the court erred in holding "as a matter of law that the homeowners of Woodington I adequately obtained approval of the River Oaks Declaration by a majority of the then-owners in compliance with the Woodington I covenants."

5. Signatures on the Declaration for Woodington II are insufficient.

With regard to Woodington II the lower court found:

> The Woodington II homeowners properly obtained approval by a simple majority. Woodington II is comprised of 79 single-family residential lots. (See River Oaks'

> Motion at Exhibit M.) A majority vote of the Woodington II homeowners would therefore require 40 votes in favor of the River Oaks Declaration. The River Oaks Declaration and its supplements contain the signatures of 42 Woodington II owners stating their intentions to impress the Declaration upon their property. (See River Oaks' Motion at Exhibit A-C.)…(R.pp. 48-49)

The Court does not identify the forty-two (42) Woodington II lot owners. The Declaration clearly evidences, however, that only three (3[22]) of those forty-two (42) lots bear owner signatures upon the Declaration, with Ann K Healy being the last of the three lots to sign the Declaration on January 28, 1999. Three (3) out of seventy-nine (79) is not a majority of the "then owners." Of the forty-two (42) lots referenced thirty-eight (38) of those lots have "then owner" signatures found in Supplement 1, and not the Declaration. After Supplement 1 was recorded on September 25, 2001, Dwight and Beverly Shamblee signed on November 13, 2001, Supplement 2, which was subsequently recorded on April 24, 2002. The Shamblees became the last of the forty-two (42) referenced Woodington II lot owners to impart their signatures to a declaration supplement.[23] Of the thirty-nine (39) lots referenced in the Order who were to be "then owners" who did not execute the Declaration, eleven (11)[24] of those "then owners" did not acquire title to their respective lots

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[22] 1) Ann K Healy (R.p. 2745) signed the Declaration 1/28/99; 2) Clifton Dawson Harmon (R.p. 2746) signed the Declaration 12/16/98; 3) Kenneth and Susan Stempert (R.p. 2747) signed the Declaration 12/16/98.

[23] Dwight and Beverly Shamblee: Deed 6/19/01 BK2733 PG012 (R.p. 3859), signed Supplement 2 11/13/01 (R.p. 3001).

[24] 1) Dwight and Beverly Shamblee: Deed 6/19/01 BK2733 PG012 (R.p 3859), signed Supplement 2 11/13/01 (R.p. 3001);
2) Donald G. Marshall title acquired 5/23/00 BK2431 PG097 (R.p. 3822);
3) Donald and Amanda Holt title acquired 9/3/99 BK2277 PG104 (R.p. 3825);
4) Rex and Meredith Perdue title acquired 5/19/00 BK2430 PG040 Ex.8/9/22 Bates: (R.p. 3852);
5) Edward and Elizabeth Blanton title acquired 7/30/99 BK2254 PG335;
6) Helen H. Peters title acquired 8/18/00 BK2498 PG154;
7) John and Lena Gilley title acquired 3/5/01 BK2625 PG282 (R.p. 1901);
8) John T. Balish title acquired 5/17/99 BK2198 PG144 (R.p. 3848);
9) Walter B. Varella 11/5/99 BK2314 PG245 (R.p. 1962);
10) Tabathia Tam: Deed 1/29/99 BK2130 PG233 (R.p. 3833);

until after January 28, 1999, the date Healy the last Woodington II lot owner signed the Declaration. , Three (3) of the eleven (11) "then owners" did not acquire title to their respective lots until after the Declaration was recorded on May 26, 2000 (see Fn. 24).

The Court erred in expanding the original intent of the drafters of the Woodington Covenants unambiguous and plain temporal meaning for the terms "*then owners."* River Oaks did not obtain a majority of signatures of "then owners" of Woodington II lots in recorded Declaration. River Oaks nor did obtain a majority of signatures on Supplement1 or Supplement. Likewise, by treating the three (3) distinct documents as one, the desired results were not achieved. The Court erred by concluding a sufficient number of "then-owners" signatures were obtained.

II. THE DECLARATION DOES NOT CONSTITUTE A RESTRICTIVE COVENANT.

The Court erred in holding as a matter of law that the River Oaks Declaration recorded May 26, 2000, is a restrictive covenant which is bound to and runs with the land of the lots of Woodington I and Woodington II. The Declaration is not a restrictive covenant because: 1) it does not relate to, touch, or concern the lots of Woodington I and Woodington II; and 2) it does not contain the requisite formality of terms necessary to convey an interest in real property.

1. The Declaration Does Not Touch and Concern the Land.

"Restrictive covenants, sometimes referred to as "real covenants," are agreements "to do, or refrain from doing, certain things with respect to real property." *Kinard v. Richardson,* 407 S.C. 247, 257, 754 S.E.2d 888 (Ct. App. 2014). In *Runyon v. Paley,* the North Carolina Supreme Court states:

> A restrictive covenant is a real covenant that runs with the land of the dominant and servient estates only if (1) the subject of the covenant touches and concerns the land, (2) there is privity of estate between the party enforcing the covenant and the party against whom the

11) James and Rachel Walker 3/2/99 BK2148 PG101 D6/11/12EX. N

> covenant is being enforced, and (3) the original covenanting parties intended the benefits and the burdens of the covenant to run with the land. As noted by several courts and commentators, the touch and concern requirement is not capable of being reduced to an absolute test or precise definition. Focusing on the nature of the burdens and benefits created by a covenant, the court must exercise its best judgment to determine whether the covenant is related to the covenanting parties' ownership interests in their land.
>
> For a covenant to touch and concern the land, it is not necessary that the covenant have a physical effect on the land. It is sufficient that the covenant have some economic impact on the parties' ownership rights by, for example, enhancing the value of the dominant estate and decreasing the value of the servient estate. It is essential, however, that the covenant in some way affect the legal rights of the covenanting parties as landowners. Where the burdens and benefits created by the covenant are of such a nature that they may exist independently from the parties' ownership interests in land, the covenant does not touch and concern the land and will not run with the land.
>
> Although not alone determinative of the issue, the nature of the restrictive covenants at issue in this case (building or use restrictions) is strong evidence that the covenants touch and concern the dominant and servient estates. As recognized by some courts, a restriction limiting the use of land clearly touches and concerns the estate burdened with the covenant because it restricts the owner's use and enjoyment of the property and thus affects the value of the property. 416 S.E.2d 177, 183, 331 N.C. 293 (Sup. Ct. N.C. 1992) (citations omitted).

"Covenants to pay assessments have been held to be merely personal where the assessments were for very limited purposes, and the assessments had no beneficial effect on the value of the homeowners' properties. See *Harbison Community Ass'n Inc., v. Mueller,* 319 S.C. 99, 459 S.E. 2d 860 (Ct. App. 1995) . In *Harbison*, the Harbison assessments paid for maintenance of common areas in the community, including parks, walkways, landscaping, an athletic center, and tennis courts. These common areas enhance the value of all of the properties in the community." *Id.* 459 S.E.2d 860, 862 (Ct. App. 1995). "[A real] covenant must relate to the realty demised, having for its object something annexed to, or inherent in, or connected with the land; that its performance or non-performance must affect the nature, quality, value, or mode of enjoyment of the demised premises; and in this State, certainly, the mere fact of its being a part of the consideration is not sufficient. The covenant must have relation to the interest or estate granted, and the act to be done must concern the interest created or conveyed. So, if a lessee covenants for

himself and his assigns to make a new wall upon a part of the thing demised, the assignee is bound. But if the thing to be done is collateral to the land and does not touch or concern the thing demised, then the assignee is not charged although named in the covenant. A covenant is merely personal if it does not affect the land demised. Covenants which are personal and collateral to the land do not run with the land." *Epting v. Lexington WaterPower Co.*, 177 S.C. 308, 320 (1935)

The Order states:

> In opposition of River Oaks motion and in support of its own motion, the Plaintiffs argue that the River Oaks Declaration does not "touch and concern the land" nor does it adequately identify the property it impacts. The Court is not persuaded by these arguments. Covenants requiring property owners to pay fees for improvements, maintenance or other services to a homeowners association run with the land. The evidence offered to the Court is that the annual dues for River Oaks serve, at least in part, for the improvement and maintenance of the community entryway and greenways. (See River Oaks' Motion at Exhibit A.)" (R.p. 50).

The Court erred in determining that the terms of the River Oaks Declaration touch and concern the land of the lots of Woodington I and II. The issue before this Court is twofold. First, do the terms of River Oaks Declaration relate to the lots of Woodington I and Woodington II, such that performance or non-performance of the terms of the Declaration affect the nature, quality, value, or mode of enjoyment of the lots of Woodington I and II by the lot owners. If the answer to the first question is no, then the second question is do the terms of the River Oaks Declaration though they do not specifically relate to the Woodington I and II lots, relate to maintenance common area lots, connected to the chain of title of the Woodington I and II lots, such that the maintenance use and enjoyment of the common area lots directly benefits the value of the Woodington I and II lots.

The record leaves no question or ambiguity as to the answers; both of these questions must be answered with a "NO." First, none of the terms of the Declaration require a Woodington I or II lot owner to do, or refrain from doing any act directly relating to the lots of Woodington I and II

(R.pp. 2715-2716). Therefore, the only question that remains is does the vague reference to assessments within the terms of the Declaration directly attributes a value enhancement to the individual lots of Woodington I and II. The Declaration states: "Dues and assessments shall be levied by the Association's in order to fund it operation. The timing, amount, and purposes of the dues and assessments are set out in the Bylaws."

Asked, another way, are their common area lots identified on the Woodington I or Woodington II plats that requirement maintenance to enhance the value of the individual residential lots of Woodington I and Woodington II? The answer is no. A review of the Woodington I and Woodington II plats shows that there are no common area lots in Woodington I or Woodington II. River Oaks does not own any lots in Woodington I or Woodington II which would require any maintenance expenses, whether it be landscaping or retention pond maintenance, or any other maintenance (R.p. 3111-3112). There is no common area lot which is a pool, or park, or playground within Woodington I and Woodington II. River Oaks responses to discovery evidence that at the time River Oaks was incorporated in 1997, through the recording of Declaration in 2000 and up until December 17, 2003, River Oaks did not own any real property or common area.[25] However, the Court in its Order states: "The evidence offered to the Court is that the annual dues for River Oaks serve, at least in part, for the improvement and maintenance of the community entryway and greenways. (See River Oaks' Motion at Exhibit A.)" (R.p.50). This finding is an error. Exhibit A to River Oaks Motion filed 6/12/24 is the River Oaks Declaration. As already stated, the record is clear River Oaks did not own any real property or common area which it would

[25] River Oaks did thereafter acquire a number of real property lots located in Marsh Hall and Marsh side (R.pp. 3526-3527) River Oaks also acquired a common area drainage easement lot in 2017, which is identified on the Palmetto Plantation Plat as being part of that neighborhood, which is separate and distinct from Woodington I and Woodington II (R.p. 3122). It was an error for River Oaks to identify the lot as Woodington lot in its discovery responses.

have a duty to maintain prior to or when the Declaration was recorded May 26, 2000. As stated repeatedly entryways to the River Oaks community are all public lands or public roadways, not located within Woodington I or Woodington, and are not and have never been owned by River Oaks. (R. pp. 2362-2676; R. pp. 148-299; R. pp. 943-965). There is no evidence to refute this position. The Court erred in finding the assessments were used to maintain real property lots located in Woodington I and Woodington II when the evidence in the record is that there are no common area lot in Woodington I and II and River Oaks does not own any lot in Woodington I and II and did not own any real property at the time the Declaration was recorded.

The Court erred in determining that the River Oaks declaration is a restrictive covenant that touches and concerns and binds the land of the lots located within Woodington I and Woodington II. The Declaration is not a restrictive covenant.

2. The River Oaks Declaration is Not a Restrictive Covenant because it Lacks the Requisite Formalities Necessary to convey and interest in Real Property.

"A restrictive covenant, of the nature involved here, is contractual in nature and restricts in some particular the free use of land by its owner. Restrictive covenants are commonly created by a declaration of restrictive covenants, which is executed and recorded in the same manner as a deed." *Smith v. Commissioner of Public Works*, 312 S.C. 460, 466, 441 S.E.2d 331, 335 (Ct. App. 1994). A power over property can be conferred only by an instrument executed with the same formalities as would be necessary for the disposition of the property it purports to restrict. *Home Sales v City of N. Myrtle Beach*, 299 S.C. 70, 77, 382 S.E.2d 463, 467 (Ct. App. 1989). No one can exercise a power over property they were never given. *Erkes v. Kasparek*, 303 S.C. 70, 72 399 S.E.2d 6 (Ct. App. 1990).

"No authority is necessary for the proposition that title to and incidents of title to real estate in South Carolina can only be passed by a deed of conveyance, devise or inheritance. It is also the

well-recognized law in this nation and state that a power can be conferred only by an instrument executed with the same formalities as would be necessary for the disposition of the subject matter of the power." *Home Sales, Inc.,* 299 S.C. at 78. 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." *Taylor*, 332 S.C. at 4-5.

Certain formalities of a conveyance are found at S.C. Code Anno. §27-7-10 et. seq. and S.C. Code Anno. §30-9-30 et. seq. These formalities are mandatory in restrictions, just as they are in deeds of conveyance. *Smith v. Commissioner of Public Works*, 312 S.C. 460, 466, 441 S.E.2d 331, 335 (Ct. App. 1994).

A South Carolina instrument of conveyance must, amongst other things, identify the current owner (S.C. Code Anno. §27-7-10 and S.C. Code Anno. §30-9-30) and identify the transferred real property by including a complete legal description. S.C. Code Anno. 30-5-35(a)[26]. A deed may satisfy the legal-description requirement by referencing the book-and-page number of a recorded plat that sets forth a metes-and-bounds description of the property. S.C. Code Anno. §30-5-250.[27]

The Declaration does not contain the requisite formalities necessary for the conveyance of an interest of lots of Woodington I and Woodington II. The Declaration does not identify any real

[26] (a) All deeds conveying an interest in land and all mortgages of real estate executed after July 1, 1976, must include a derivation clause in the property description and there must be inscribed on the deed or mortgage the mailing address of the grantee or mortgagee. When the grantor's or mortgagor's title was acquired by deed, the derivation clause must include the name of the grantor and the recording date of that deed.

[27] The River Oaks Declaration filed May 26, 2000, Declaration Supplement 1 filed September 25, 2001, and Declaration Supplement 2 filed April of 2002, contain mis identified lot numbers misidentified lot owners, for corresponding signatures of alleged then lot owners in Woodington I and Woodington II.

property with requisite specificity to connect to or form a link in the chain of title of every lot within Woodington I and Woodington II. The Declaration does not reference any deed or plat, provide a property description evidencing meets and bounds, or identify a deed or plat by reference to recording book and page. The Declaration does not contain a derivation clause.

However, the Order states in error: "the River Oaks Declaration provides the name of the property owner, the property address, the neighborhood in which the property is located, the county in which the property is located, and a geographic location of its location within the county. (See River Oaks' Motion at Exhibit A.) This is more than sufficient for a person to conduct a title examination of the property affected by the River Oaks Declaration." (R.p. 51)

The information provided in the Declaration and the Supplements regarding individual lots is not specific and/or accurate enough to convey an interest in real property. Moreover, a number of lots are misidentified in the Declaration and its Supplements. (R. pp. 2715-3001) Additionally, for all the lots that do not have respective signatures, in the Declaration, Supplement 1 or Supplement 2, they lack, the name of the property owner, the property address, the neighborhood in which the property is located. (R. pp. 2715-3001) The same is true for Woodington II. Thus, for each property that does not have an owner signature, it lacks the express language required to identify each real property lot within Woodington I and Woodington II. The Declaration does not have the necessary descriptive requirements to convey an interest in real property therefore it is not an enforceable restrictive covenant and does not run with the lots of Woodington I and Woodington II. It was an error of law for the court to find otherwise.

III. RIVER OAKS LACKS THE AUTHORITY TO ENFORCE THE WOODINGTON COVENANTS AND TO LEVY UPON THE LOTS OF WOODINGTION I AND II.

The Order states:

> The Court finds, as a matter of law, that the governing documents of River Oaks, namely its Declaration and Bylaws, and the covenants of Woodington I and II authorize River Oaks to enforce the Woodington I and II Covenants; charge annual association dues, fines, or fees; and place and foreclose upon liens on properties in the Woodington I and Woodington II neighborhoods. (R.p. 53).

"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." *Taylor*, 332 S.C. 4-5, and *Hamilton v. CCM, Inc*., 274 S.C. 152, 157, 263 S.E. 2d 378, 380 (1980). "The language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it at the time of execution." *Hardy*, 369 S.C. at 166. "[W]here the language of a restrictive covenant is equally capable of two or more constructions, that construction will be adopted which least restricts the property. *Hamilton v.*, 274 S.C. at 158.

There are no terms in the Woodington Covenants authorizing River Oaks to enforce the Covenants. Nor are there any terms that by their plain and unmistakable implication in the grant River Oaks enforcement authority of the Woodington Covenants.

The same is true for the Declaration. The plain and ordinary meaning of the terms of the Declaration does not grant River Oaks the authority to enforce the Woodington Covenants or any other covenant for reasons, including the Declaration terms do not reference the Covenant terms. The court erred in finding as a matter of law that River Oaks has the authority to enforce the terms of the Woodington Covenants.

There is not a single instrument in the record before the Court which by its express terms gives River Oaks the authority to foreclose upon anybody for any reason. Even River Oaks has

acknowledged to its own members at an annual membership meeting that River Oaks does not have the authority to bring an action for foreclosure. (R. pp. 985-994). It was an error of law for the court to find River Oaks has the authority to foreclose upon liens levied upon the lots of Woodington I and Woodington II neighborhoods (R. pp 2274-87; R. pp. 148- 299; R. pp. 2362-2676).

The lower Court found that River Oaks has the authority to levy fines, penalties, fees, late fees, interest, costs of collection and attorney fees upon the lots and owners of Woodington I and II. Again, there are no express or implied terms of the Woodington Covenants, the Declaration, Supplement 1, nor Supplement 2, or any other instrument recorded in the Dorchester County Register of Deeds that authorize River Oaks to levy fines, penalties, fees, late fees, interest, costs of collection and attorney fees upon the lots and owners of Woodington I and II (R. pp. 160-179; R. pp. 2715-3001; R. pp.. 1054-1059[28]; R. pp. 2289-2676; R. pp. 242-299; R. pp. 943-965; R. pp. 2274-2288; R. pp. 3884-3908). The Order finds the unrecorded, unexecuted bylaws grant River Oaks the authority to levy fines, penalties, fees, late fees, interest, costs of collection and attorney fees upon the lots and owners of Woodington I and II. River Oaks and/or an agent acting on its behalf have never recorded an executed set of bylaws or their amendments in the R.O.D. for Dorchester County. *S.C. Code Ann*. § 27-30-130 makes it illegal to enforce unrecorded bylaws (R.p. 3430-3458). *See Also*, *Rawlinson Road Homeowners Assoc v. Jackson,* 395 S.C. 25, 716 S.E.2d 337 (Ct. App. 2011) (FN. 1, noting that the relevant bylaws and amendments "were not notarized or subscribed by a majority of property owners. Consequently, the authority of those documents to alter the scope of the Declaration's restrictive covenants is questionable.") Courts

[28] Exhibit B to River Oaks Mtn filed 5/21/21 is a copy of unexecuted Bylaws that were recorded as an Exhibit to Restrictive Covenants for Marsh Hall by the Marsh Hall developer (R.p. 3101-3110).

generally find that restrictive covenants prevail over bylaws adopted pursuant to those covenants if there is a conflict between them (See AG Op. Ltr R.pp. 1192-1200). Though there is no South Carolina case law directly on point in *Kiekel v. Four Colonies Homes Ass'n*, 38 Kan.App.2d 102, 107 (Kan. Ct. App. 2007), the court found restriction on the right of a homeowner to rent his property found in the terms of a the HOA's bylaws were an unenforceable restriction because the applicable restrict covenants neither expressly prohibited or permitted lot owners to rent their property. The court found the HOA could not circumvent the intent of the restrictive covenants (the enabling document) by subsequently amending the bylaws. *Id* at 110. *Kiekel*, therefore, stands for the rule that where the bylaws of an HOA purport to restrict the use of property further than contemplated in the covenants, there is a conflict and the covenants will control. A long line of South Carolina jurisprudence points to restrictive covenants as the controlling document in determining the authority of a grantor or a homeowners' association to regulate use of property. As early as 1950, the South Carolina Supreme Court held in *Forest Land Co. v. Black* that the power of a grantor to reasonably regulate a common area cannot exceed the authority reserved in the deed to make such rules. *Forest Land Co. v. Black*, 216 S.C. 255, 262, 57 S.E.2d 420, 424 (1950). While the *Forest Lake Co.* decision predates the rise of the modern HOA, it remains good law for the rule that while property rights may be regulated by subsequently-amended rules pursuant to a deed, the rules are constrained by the restrictive covenants in the underlying deed (R.pp. 1192-1200).

Appellants raised before the lower court the distinction between restrictive covenants and bylaws. Appellants contend if the alleged applicable restrictive covenants did not give River Oaks the express authority to levy charges and fees, then River Oaks could not subsequently create that authority by amending unrecorded bylaws to create that authority. (R.pp. 952; 1085-1088 1192-1200; 2275-2279; 2436-2441, 2465-2467; 2508-2511, 2528, 2547-2549; 2640-2643, 2659-2661;

3430-3458). It was an error of law for the lower court to find that unrecorded, unsigned Bylaws or amendments provided River Oaks the authority to levy fines, penalties, fees, late fees, interest, costs of collection and attorney fees or liens for any of these amounts claimed due upon the lots and owners of Woodington I and II.

The lower court also erred in finding that River Oaks derives from Bylaws its authority to levy assessments and liens upon the lots and owners of Woodington I and Woodington II.[29]

IV. EQUITY DOES NOT PERMIT THE CONTINUATION OF BAD ACTS.

He who seeks equity must do equity, and, he who comes into equity must come with clean hands." *Hemingway v. Mention*, 228 S.C. 211, 217, 89 S.E.2d 369, 372 (1955). Unclean hands preclude a party from recovery if he acted unfairly in a matter that is the subject of the litigation. *See Ingram v. Kasey's Associates*, 340 S.C. 98, 107 n. 2, 531 S.E.2d 287, 292 n.2 (2000). The rule must be understood to refer to some misconduct concerning the matter in litigation of which the opposing party can, in good conscience, complain in a court of equity. *Wachovia Bank, NA. v. Coffey*, 389 S.C. 68, 75, 689 S.E.2d 244 (Ct. App. 2010). "The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. In case any action is brought which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract." *McMullen v. Hoffman*, 174 U.S. 639, 654, 19 S. Ct. 839, 845, 43 L. Ed. 1117 (1899).

In this case the court found "equity does not permit a ruling that would alter the landscape of Woodington I and Woodington II. In the view of this Court, even if River Oaks failed to properly

[29] Neither the Bylaws nor the Declaration enable River Oaks to levy assessments and liens against the lots of Woodington I and II because as stated herein above the Declaration is not an enforceable restrictive covenant restricting the lots of Woodington I and II.

form, it would be inequitable to now hold that River Oaks cannot serve as the homeowners' association for Woodington I and II because it has done so for more than twenty-two years…To determine now, after all these years, that River Oaks was void ab initio would undo the obvious progress of the community and run contrary to the interests of its current inhabitants…It is clear to this Court that River Oaks was a benefit to the Plaintiffs when they resided in the Woodington I neighborhood. To remove that benefit to current Woodington I and Woodington II residents now at the request of nonresidents would not serve the interests of justice or equity." (R.pp. 53-55)

First the Court makes numerous findings of fact that are not supported by evidence or testimony in the record There is no evidence that River Oaks improved and benefited the Woodington Neighborhoods. To make such factual findings on a summary judgment basis is an error of law.

The Court in its Order essentially states while its possible River Oaks has been acting illegally without authority for an extended period of time, it is justification to impair and restrain Woodington I and II lot owners free use of their property. This is contravention to the policy of unclean hands and illegality doctrine. It was an error of law for the court to find that equity requires River Oaks to continue to act illegally and without authority.

V. HOMEOWNER ASSOCIATIONS ARE ENGAGED IN A TRADE AND COMMERCE.

The Court erred in determining homeowner associations are not engaged in a "trade" or "commerce." (R.pp. 42-43) A homeowner's association is not just merely enforcing covenants and restrictions therefore precluded from being able to commit an unfair or deceptive acts under the South Carolina Unfair Trade Practices Act. ("SCUTPA")

The terms trade and commerce are broadly defined under SCUTPA. "'Trade' and 'commerce' shall include the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State." S.C. Code Anno. 39 5-10(b)." The statute's use of the words 'shall include' clearly suggests the legislature did not intend to limit "trade' and 'commerce' to only the listed transactions." *Baker v. Chavis*, 306 S.C. 203, 208-209, 410 S.E. 2d. 600 (Ct. App. 1991) (the acquisition of a lease when done by purchasing a club's equity, constitutes "trade" and "commerce" within meaning of UTPA). Regular day to day collection of dues, fees, and fines involving allegedly unfair acts constitute debt collection practices which are business activities in or affecting commerce. *See Davis Lake Community Association v. Feldman,* 530 S.E.2d 865, 138 NC App. 292 (N.C. App. 2000).

Homeowner associations routinely engage in the following activities; they collect monies including annual assessments, special assessments, fines and interest; they provide services including landscape and maintenance; they contract with vendors including property management companies, maintenance businesses, landscape companies, and general contractors; they buy insurance; they have employees; they rent facilities and venues; and they engage in services to perform their primary purpose which is to maintain the aesthetics and property values of neighborhoods. The Court erred by concluding a homeowner association's actions were limited to enforcing covenants and restrictions.

Contrary to the court's determination, homeowner associations do not operate in a bubble. It has consistently been determined that homeowner associations assessments constitute a debt pursuant to the Fair Debt Collection Practices Act. ("FDCPA") *See Newman v. Boehm, Pearlstein*

& Bright Ltd., 119 F.3d 477, 481 (7th Cir 1997) ("By paying the purchase price and accepting title to their home, the [plaintiff] became bound by the Declaration of Covenants, Conditions, and Restrictions of their homeowners association which required the payment of regular and special assessments imposed by the association. . . Regardless of whether the assessment or the service comes first, the obligation to pay is derived from the purchase transaction itself. The assessments at issue in this case therefore qualify as "obligation[s] of a consumer to pay money arising out of a transaction"); *Ladick v. Van Gemert*, 146 F.3d 1205 (10th Cir.1998); *Agrelo v. Affinity Management Services, LLC*, 841 F.3d 944 (11th Cir. 2016) (a homeowners association covenant fine was a debt pursuant to the Florida Consumer Collection Practices Act) In addition to being subject to the FDCPA, homeowner associations are required to abide by the American with Disabilities Act, 42 U.S.C. §12101; the Fair Housing Act, 42 U.S.C. §3604; the Freedom to Display the American Flag Act of 2005, Pub. L. 109-243; the Over-the-Air Reception Devices Rule, 47 CFR § 1.4000; the United States Bankruptcy Code, 11 U.S.C. §362; and the Service Members Civil Relief Act. 50 U.S.C. §§ 3901. Homeowner associations activities are not limited to the single activity of "enforcing restrictions" and the trial court committed err by making this limiting determination.

In determining universally that homeowner associations are not engaged in trade or commerce the trial court abuse his discretion by relying upon an unpublished Order. Rule 268, SCACR (Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved.) Not only was there no dispositive precedential decision to rely upon, whether River Oaks is engaged in trade or commerce was not subject to disposition on a motion for summary judgment because issue of fact existed as to River Oaks activities. While it is undisputed River Oak routinely hired property

management companies to perform services for it, issues of fact remained as to other potential trade activities. Summary judgment was not proper on the determination as to the engagement of River Oaks in trade or commerce.

VI. THE CLASS MEMBERSHIP SHOULD INCLUDE THE ORIGINAL 9 CLASS COMPLAINT NEIGHBORHOODS WHOM RIVER OAKS CLAIMS IT HAS THE ABILITY TO REGULATE.

The Court correctly determined, in its discretion, that all the necessary elements under Rule 23, SCRCP were met for class certification. *See, King v. Am. Gen. Fin., Inc.*, 386 S.C. 82, 88, 687 S.E.2d 321, 324 (2009). The class definition, however, should not have been limited to the Woodington I and Woodington II but rather should have included all homeowners within the nine (9) neighborhoods identified in the complaint, which River Oaks contends fall under the purview of the Declaration.[30]

River Oaks claims the Declaration entitles it to regulate and restrict each of these nine (9) different neighborhoods including the Woodington Neighborhoods. The broader claimed expanse of the Declarations warrants the inclusion of all the applicable lots and lot owners within these nine neighborhoods which River Oaks claims the Declaration places restrictions upon, as Appellants originally plead and moved for. The Court erred in limiting the class membership only to part of those impacted within the Woodington Neighborhoods. If the Declaration enforceable restrictive covenant nor encumbrance upon the lots of the Woodington Neighborhoods, it is not an enforceable covenant as to any other seven (7)

[30] Ansley Point, Bk 910, p. 300; Appian Landing I, Bk 534, p. 390; Appian Landing II, Bk 555, p. 249; Appian Landing III, Bk 612, p. 252; Marsh Hall, Book 2461, p.322; Marsh Side; Palmetto Plantation, Bk 608, p. 508; River Chase, Bk 611, p. 92; Woodington II, Bk. 592, p. 371; and Woodington III, no recorded CCR's (R.p. 63-102; 300-308, 3002-3110, 3111-3126).

neighborhoods identified in the Complaint. The class membership should include all neighborhoods sought in the Class Certification Motion.

CONCLUSION

Appellants, Joseph and Jennifer Davis, respectfully ask this Court to reverse the lower court's finding of partial summary judgment in favor of River Oaks as to both their class and individual causes of action. Appellants request that this Court make a legal determination that the River Oaks Declaration is not an amendment of the Woodington Covenants; Appellants request this Court make a legal determination that the Declaration is not an enforceable restrictive covenant that runs with the land and encumbers the lots of the Woodington Neighborhoods; Appellants request this Court make a legal determination that neither the terms of Woodington Covenants nor the terms of River Oaks Declaration, nor the terms of the River Oaks Bylaws authorize River Oaks to enforce the terms of the Woodington Covenants; Appellants request this Court make a legal determination that River Oaks lacks the authority to levy assessments, dues, fines, penalties, fees, late fees, interest, costs of collection, attorney fees and liens upon the lots and lot owners of the Woodington Neighborhoods and cannot impose assessment, fines or liens against the Woodington Neighborhoods; and Appellants request this Court make a legal determination that River Oaks lacks the authority to bring an action for foreclosure of a lien against the lots and lot owners of the Woodington Neighborhoods. Further, Appellants request this Court make a legal determination that genuine issues of fact remain as to whether River Oaks is engaged in trade or commerce; and Appellants request this Court reverse in part the lower court's order of class certification and find the class definition should include the applicable lots of the additional seven neighborhoods in

addition to the Woodington Neighborhoods as set forth in Appellants Motion for Class Certification filed on December 14, 2018.

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