THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Brian L. Boger, Special Referee

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Appellate Case No. 2022-000947

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Lisa Cruz,..……..……....…...Respondent,

v.

Heyward Bouknight and Kathy Bouknight……...……Appellants.

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PETITION FOR REHEARING OR REHEARING *EN BANC*

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Appellants, Heyward and Kathy Bouknight ("the Bouknights"), hereby respectfully move and petition, pursuant to Rules 219 and 221(a), SCACR, as well as all other applicable law, for an order granting rehearing or rehearing *en banc* in this case and submit the memorandum below in support of the same.

## ARGUMENT[1]

A panel of this court has affirmed the special referee's decision that the Bouknights' home, despite it never having been equipped to be trailed behind a vehicle, is a trailer and affirmed the special referee's directive that the Bouknights remove their house from their property. This was all based on restrictive covenants, executed and recorded in 1954, which state that "[n]o trailer, basement, tent shack, garage, or barn shall at any time be used as a residence, either temporary or permanent[,]" at property

[1] The Bouknights' briefs are incorporated herein by reference.

subject of the covenants. (R. pp. 34, 132.) The panel engaged in what, respectfully, seems like a contorted analysis. It was not the analysis the law required. The required analysis of the covenant provision is that it be interpreted most strongly in favor of the free use of the property – in other words, in favor of the Bouknights' position. Stretching the definition of *trailer* to include a structure that has never been equipped to be trailed does not comport with the South Carolina law's existing requirements about how real property covenants are interpreted.

Rehearing is warranted because the opinion affirms on an unelaborated, imprecise, vague, and misconstrued claim of historical-linguistic equivalence that, for reasons of established covenant interpretation law, does not control. South Carolina law supplies precise definitions that place the subject house outside the meaning of *trailer*, and the record shows the subject structure is not and never has been towable.

To affirm the special referee's decision is at odds with the law. The law requires reversal. This court should grant rehearing and change its decision, which is wrong.

## I. Stretching to include this house within the definition of trailer contravenes precedent that requires a narrow interpretation of restrictive covenants.

"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." Hamilton v. CCM, Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980) (citations omitted). "Restrictive covenants are to be construed most strictly against the grantor and persons seeking to enforce them, and liberally in favor of the grantee, all doubts being resolved in favor of a free use of the property and against restrictions." Stanton v. Gulf Oil Corp., 232

S.C. 148, 151, 101 S.E.2d 250, 251 (1957) (internal quotation marks omitted). "It is still the settled rule in this jurisdiction that restrictions as to the use of real estate should be strictly construed and all doubts resolved in favor of free use of the property." Taylor v. Lindsey, 332 S.C. 1, 4, 498 S.E.2d 862, 864 (1998).

Though the author of this petition is sure that it does not always seem like it, he respects this court and its awesome responsibility a great deal. It is because of that respect, not in spite of it, that he must point out the error of this court's thinking in plain terms. What is even more deserving of respect than the court is the law it exists to uphold. Unfortunately, the panel's opinion here does not uphold the law.

The law in this state is that "where the language of the restrictions [in real property covenants] is equally capable of two or more different constructions that construction will be adopted which least restricts the use of the property." Id. When more than one logical interpretation of a restriction is possible, a court must adopt the interpretation that is the least restrictive. Id.; see Anderson v. Buonforte, 365 S.C. 482, 617 S.E.2d 750, 758 (Ct. App. 2005).

"*[W]ill be* adopted" – not *can be*, not *may be*. Taylor, 332 S.C. at 4 (emphasis added). It is not optional. Id. Binding Supreme Court precedent requires that the least restrictive reasonable reading of the word *trailer* in these covenants be the one used by any court evaluating it. Id. And, if there is nothing else that is obvious here, it is obvious from the numerous definitions found by the parties that there exists a reasonable reading of *trailer* in these covenants that does not have it include a manufactured home that was never equipped to be trailed.

So, even if one could reasonably construe the term "trailer" to embrace the idea of a manufactured home but one could also reasonably construe the term trailer *not* to include a manufactured home (which we know is a possible reasonable construction), the "settled rule" in South Carolina required the special referee and this court to adopt the construction "which least restricts the use of the property." Id. Here, that means a construction of *trailer* that does not include the Bouknights' manufactured home, because there are recognized definitions of *trailer*, including specifically by South Carolina statute, that do not embrace the structure at hand and, thus, restrict the use of the property less than the definition employed by the special referee and now by this court. Taylor, 332 S.C. at 4; S.C. Code Ann. § 56-19-10(34).

The court is *required* to employ the construction of *trailer* "which least restricts the use of the property." Taylor, 332 S.C. at 4. This court does not have the option – well, the lawful option – to shoo that interpretation away. Id. The court must have overlooked or misapprehended the law in reaching its decision in this regard, and rehearing should be granted.

## II. Trailers are things that are designed to be trailed, *equipped* to be hauled on roads behind a motorized vehicle. The house involved in this case was never so equipped and has never met the definition of trailer.

The opinion relies on general dictionary sources and the idea of broad synonymy between historical "house trailers," "mobile homes," and "manufactured homes," but it does not engage the dispositive South Carolina definitions emphasized by the Bouknights nor the record evidence cited below that the home at issue was not equipped as a towable vehicle. The Bouknights' briefing pointed out record testimony that the home lacked wheels, axles, and a tongue – not just now, but at the time it was

brought to the real property – and therefore was not equipped to be towed at any known time. That is the *only* evidence in the record about whether this house has ever been capable of being trailed. The sole and uncontradicted content of the record on this point is Kathy Bouknight's testimony to the effect that the Bouknights' house has *not* been equipped with wheels, axles, a tongue, or any other parts necessary for it to be towed. (R. p. 78 ln. 12 through p. 79 ln. 7.)

The deciding panel of this court, strangely, looked in its opinion to usages of the word *trailer* in the mid-20th century that themselves illustrate the term refers to an object equipped to be hauled behind a motor vehicle on streets and highways. E.g., "mobile home," Oxford English Dictionary, https://doi.org/10.1093/OED/5739007532 (citing that, in 1954, the New York Herald Tribune Book Review mentioned "[b]ooks pertaining to trailer houses – or mobile homes – published within the last five years" and in 1940, H.G. Wells' book *New World Order* stated, "[i]n such large open countries as the United States there has been a considerable development of the mobile home in recent years. *People haul a trailer-home behind their cars* and become seasonal nomads") (emphasis added by this petition's author). The logic underpinning this panel's decision is faulty. That reasoning seems to be that a mobile home is a trailer and a manufactured home is a mobile home, so this manufactured home is a trailer – even though this manufactured home has never met the definition of a trailer.

The panel, frankly, mischaracterizes the Bouknights' argument on what the least restrictive reasonable construction of the word *trailer* is. The panel writes that the Bouknights "argue their home is not a mobile home or a trailer because manufactured homes are not intended to be transported along the roads."

It is because this petition's author thirsts for proper application of the law and owes a duty of zeal to his clients, and not out of any disrespect, that this petition must note that the panel's characterization is a straw man. See State v. Smith, 298 P.3d 1138 (Kan. App. 2013) ("straw man argument is where the arguer wishes to respond to an argument of his or her choosing and not one that is actually presented").

*Any* object (except perhaps the very largest) is capable of being *transported* on streets or highways. The Bouknights' argument is and was that, consistently with dictionary sources, South Carolina statutes, and this state's decisional law, a *trailer* is something that is made to be *towed* (i.e., hauled, drawn, trailed) down streets and highways. Under South Carolina statutory law, "'[t]railer' means every vehicle with or without motive power, other than a pole trailer, designed for carrying persons or property and for being *drawn* by a motor vehicle and constructed so that no part of its weight rests upon the towing vehicle." S.C. Code Ann. § 56-19-10(34) (emphasis added).

> "House trailer" means:
>
> (a) a trailer or semitrailer which is designed, constructed, and equipped as a dwelling place, living abode, or sleeping place, either permanently or temporarily, and is *equipped* for use ***as*** *a conveyance* on streets and highways; or
>
> (b) a trailer or a semitrailer whose chassis and exterior shell is designed and constructed for use as a house trailer, as defined in subitem (a) of this item, but which is used instead permanently or temporarily for the advertising, sales, display, or promotion of merchandise or services or for another commercial purpose except the transportation of property for hire or the transportation of property for distribution by a private carrier.

S.C. Code Ann. § 56-19-10(10) (emphasis added).

The panel relies heavily on Heape v. Broxton, 293 S.C. 343, 360 S.E.2d 157 (Ct. App. 1987), for the proposition that, as a matter of law, a manufactured home is a mobile home and a mobile home is a trailer, so the Bouknights' manufactured home must be a trailer. But a look at the words of Heape belies that notion. This court in Heape concluded that the mobile home in that case met the definition of trailer, which the court defined as "a nonautomotive highway vehicle designed to be hauled by a tractor, truck, or automobile." Id. at 345. The Heape court did so *because the mobile home there was designed to be hauled by a tractor, truck, or automobile*. Id.

To the extent that Heape actually does stand for the proposition that something that is not capable of being trailed is a trailer, it is an absurdity that cries out to be overruled. But, as the Bouknights noted in their brief and as explained above, the Bouknights do not see Heape as actually standing for such a proposition.

Since there exist recognized, context-reasonable definitions of *trailer* that do not embrace the structure at issue, covenant interpretation law supplies the answer: the covenants do not prohibit this structure. See Taylor, 332 S.C. at 4. It really is as simple as that. Id.

The court must have overlooked or misapprehended the law, the record, or both in reaching its decision in this regard, and rehearing should be granted.

## III. The panel's issue preservation analysis fails to take into account that, by upholding his previous ruling directing the removal of the Bouknights' house, the special referee *did* effectively rule on the Bouknights' request to change the ordered remedy.

The panel's opinion decides that the issue of whether the special referee erred in ordering the Bouknights to remove their house is unpreserved for this court's review. When an order grants relief not previously argued for or contemplated by what was

presented to the court, the aggrieved party must address the new issue through a motion made under Rule 59(e), SCRCP, to preserve the issue for appeal. Stevens Aviation, Inc. v. DynCorp Intern. LLC, 394 S.C. 300, 307, 715 S.E.2d. 655, 659 (Ct. App. 2011); Bennett v. Rector, 389 S.C. 274, 284, 697 S.E.2d 715, 720 (Ct. App. 2010). The Bouknights argued the issue of whether removal of the house is the appropriate remedy, without objection, as part of their motion to reconsider. (R. p. 175 ln. 22 through p. 176 ln. 12.) The issue was created by the special referee's order and did not exist beforehand. (R. pp. 17-18.) It is preserved for review. Stevens Aviation, 394 S.C. at 307; Bennett, 389 S.C. at 284.

The court must have misapprehended the law or the record in this regard.

## IV. The opinion misapprehends the parties' burdens and the summary judgment standard by treating the absence of proof as supporting Cruz.

The Respondent ("Cruz") brought this case against the Bouknights, not the other way around. The Bouknights are defending Cruz's claim. It was not incumbent on the Bouknights to prove anything at all. It was, rather, incumbent upon Cruz to prove (definitively, at the summary judgment stage) that there exists no reasonable interpretation of the word *trailer* in the covenants other than one that prohibits the Bouknights from using their manufactured home as a residence.

The party bearing the burden of proof must prove, with evidence, each material allegation that the opposing party does not admit. See Williams v. Metro. Life Ins. Co., 202 S.C. 384, 25 S.E.2d 243, 246 (1943) (every essential fact must be pled and proven); Baugh & Sons Co. v. Graham, 150 S.C. 398, 401, 148 S.E. 220 (1926) (plaintiff bears burden of proof in civil case). Restrictive covenants are contracts. Sea Pines Plantation

Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987); Kinard v. Richardson, 407 S.C. 247, 754 S.E.2d 888, 893 (Ct. App. 2014); Queen's Grant II Horizontal Property Regime v. Greenwood Dev. Corp., 368 S.C. 342, 628 S.E.2d 902, 913 (Ct. App. 2006); Houck v. Rivers, 316 S.C. 414, 418, 450 S.E.2d 106, 109 (Ct. App. 1994). A claim that a party has violated a restrictive covenant is a claim that the party has breached the contract embodied in the covenants. See Kinard, 754 S.E.2d at 893; Queen's Grant, 628 S.E.2d at 913. In a breach of contract case, the plaintiff bears the burden of proof to establish each necessary element of the case. McCord v. Laurens Cnty. Health Care Sys., 429 S.C. 286, 292, 838 S.E.2d 220, 223 (Ct. App. 2020).

Cruz failed to establish that the *only* reasonable way to read the record and the law is that this covenant provision applies to the house in question. That is the burden she bore. See Taylor, 332 S.C. at 4. It is improper to uphold summary judgment in a plaintiff's favor when the plaintiff has failed to show that the only way to see the record – here, the *only* reasonable interpretation of *trailer* – is that the plaintiff must prevail. The burden is on the movant seeking summary judgment to demonstrate the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. Kitchen Planners, LLC v. Friedman, 440 S.C. 456, 459, 892 S.E.2d 297, 299 (2023). Cruz did not meet that burden.

Ther panel's opinion here reads like all Cruz had to do to win was show that *some* definition of *trailer* exists that embraces the subject house, even if there are others that do not. Wrong. Taylor, 332 S.C. at 4. Rather, because some definitions of *trailer*, reasonable in context, place this house outside their scope, the law provides that Cruz had to lose her motion and, thus, that the special referee erred reversibly in granting it.

Precedent's mandate that "where the language of the restrictions [in real property covenants] is equally capable of two or more different constructions that construction *will be adopted* which least restricts the use of the property" requires Cruz to lose and the Bouknights to win. Id. (emphasis added).

Because other context-reasonable interpretations of *trailer* exist, it is incumbent on this court to reverse the special referee's decision. The Bouknights did not have to prove the non-existence of ways to construe the word *trailer* against them. See Taylor, 332 S.C. at 4; Williams, 25 S.E.2d at 246 (1943); Baugh & Sons, 150 S.C. at 401. The Bouknights did not have to prove anything. Williams, 25 S.E.2d at 246 (1943); Baugh & Sons, 150 S.C. at 401. In providing the court with various dictionary and legal definitions of *trailer* that were narrower than the sweeping embrace advocated by Cruz, the Bouknights went well beyond what the law required them to do. In so doing, they also demonstrated the impossibility of Cruz's success – if the law is correctly applied. See Taylor, 332 S.C. at 4.

The court must have misapprehended the law or the record in this regard.

## V. Rehearing *en banc* is warranted and advisable.

"A hearing or rehearing en banc is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Rule 219(a), SCACR.

As noted above and in the Bouknight's briefs, this court's existing decision runs counter to Supreme Court precedent. It also, though, points out that clarification of Heape may be needed to ensure that judges and litigants understand what it does and

does not hold. Further, as the parties have noted, there is a split among other jurisdictions about interpretation of the terms *trailer, mobile home,* and *manufactured home* in this context. "What Is 'Mobile Home,' 'House Trailer,' 'Trailer House,' or 'Trailer' Within Meaning of Restrictive Covenant" 83 A.L.R.5th 651 (2000 & Supp.). This split appears fairly even among the states. See id. Some jurisdictions interpret "trailer" broadly, and some do not adopt a broad interpretation that would put a manufactured home within the scope of what a "trailer" is. Id. Cruz provided the special referee with examples of cases from other jurisdictions interpreting the term "trailer" broadly enough to embrace a manufactured home. E.g., White v. McGowen, 364 Ark. 520, 222 S.W.3d 187 (2006); Beacon Hills Homeowners Ass'n, Inc. v. Palmer Properties, Inc., 911 S.W.2d 736 (Tenn. Ct. App. 1995). The Bouknights provided examples of such cases taking the contrary view, that a manufactured home is not a trailer. E.g., Hutchison v. Hill, 3 P.3d 242 (Wyo. 2000); Howell v. Hawk, 750 N.E.2d 452 (Ind. Ct. App. 2001).

In light of all that, this is a question of exceptional importance, more so than it may appear at first blush. Rehearing by this court *en banc* may well be "necessary to secure or maintain uniformity of [this court's] decisions" on an issue that, given the contemporary ubiquity of manufactured homes that have never been equipped to be trailed, is likely to be decided differently by this state's various trial courts and this court until a published opinion definitively addresses it. Rule 219(a), SCACR. That uncertainty bucks against one of the primary purposes of law: that the law tells a person what is and is not prohibited.

Rehearing, preferably in an *en banc* format, should be granted.

WHEREFORE, Appellants pray for an order granting rehearing or rehearing *en banc* in this case.

Respectfully submitted,

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