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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Honorable Steven C. Kirven, Master-In-Equity

Case No. 2019-CP-37-00143
Appellate Case No.: 2026-000245

Roger B. Thomas and Diane M. Thomas ..... Appellants,

v.

Camala Hinkle f/k/a Camala Hinkle Houck, Individually and as Trustee of the R. Larry Hinkle Revocable Trust dated July 10, 2014 And as Trustee of the March Hinkle Revocable Trust dated July 10, 2013, Benjamin E. Ferguson, Cheryl Ann Ward, Morgan Greer, Brady G. Ward, Daniel C. Polstra, and Karen L. Polstra, ... Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

1. Did the Master correctly determine that all lot owners within Foster Vaughn Subdivision and the owner of the Hinkle Property have equal rights to use the dock attached to the Common Area, except for Mr. and Mrs. Thomas's exclusive use of the wet slip and specified tie-up rights of the non-lakefront lot owners, when the only portion of the dock that has ever been identified as "exclusive" to the Thomases is the wet slip?

2. Did the Master correctly determine that creation and use of access to Lot 4 of Vaughn Subdivision by Lot 15 of Jocassee Acres is permissible when the owners of Lot 15 also own Lot 4 within Vaughn Subdivision and have full, indisputable rights to use Vaughan Road?[1]

3. Did the Master correctly determine that the enlargement of Lot 4 when it was sold to Benjamin Ferguson and David Ward did not violate the restrictive covenants of Vaughn Subdvision when the restrictive covenants specifically permit subdivision of lots for the purpose of enlarging adjoining lots?

4. Did the Master correctly award attorney's fees and costs to Respondents as prevailing parties when the First Amendment expressly provides for attorney's fees "determined in the same manner as in a SC mechanics lien action" and when Respondents prevailed on all issues presented at trial?

STANDARD OF REVIEW

"When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal." J & W Corp. of Greenwood v. Broad Creek Marina of Hilton Head, LLC, 441 S.C. 642, 663, 896 S.E.2d 328, 340 (Ct. App. 2023) (citations omitted). The applicable standard of review for each issue is contained in the Argument section pursuant to Rule 208(b)(1)(D), SCACR.

[1] Perhaps more challenging than any issue in this case is determining the proper spelling of "Vaughn" or "Vaughan." Foster B. Vaughan, III's name is spelled differently in different documents. Furthermore, Vaughan Road includes the additional "a," whereas Vaughn Subdivision omits it.

ARGUMENT

I. Dock Issue

A. Standard of Review

"Restrictive covenants are construed like contracts and may give rise to actions for breach of contract. An action to construe a contract is an action at law reviewable under an 'any evidence' standard. On appeal of an action at law tried without a jury, this court's review is limited to correction of errors of law. The master's findings are equivalent to a jury's findings in a law action. Questions regarding credibility and weight of the evidence are exclusively for the master. We must look at the evidence in the light most favorable to the respondents and eliminate from consideration all evidence to the contrary." Snow v. Smith ex rel. Stoudenmire, 416 S.C. 72, 88, 784 S.E.2d 242, 250 (Ct. App. 2016) (citations and quotations omitted).

"Whether the language of a contract is ambiguous is a question of law for the court. A contract is ambiguous when the terms of the contract are reasonably susceptible to more than one interpretation. Once the court decides the language is ambiguous, evidence may be admitted to show the intent of the parties. The determination of the parties' intent is then a question of fact. 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. Restrictions on the use of property will be strictly construed with all doubts resolved in favor of free use of the property, although the rule of strict construction should not be used to defeat the plain and obvious purpose of the restrictive covenant." Id., 416 S.C. at 89, 784 S.E.2d at 250 (Ct. App. 2016) (citations and quotations omitted).

Likewise, "[i]n South Carolina jurisprudence, settlement agreements are viewed as contracts." Pee Dee Stores, Inc. v. Doyle, 381 S.C. 234, 241-42, 672 S.E.2d 799, 802-03 (Ct. App. 2009) (citations and quotations omitted). "General contract principles are applied in the

construction of a settlement agreement because, as stated above, a settlement agreement is a contract." Id. "Whether the language of a contract is ambiguous is a question of law for the court. A contract is ambiguous when the terms of the contract are reasonably susceptible to more than one interpretation. The uncertainty in interpretation can arise from the words of the instrument, or in the application of the words to the object they describe. Whether a contract is ambiguous must be determined from the entire contract and not from any isolated clause of the agreement." Id. 381 S.C. at 242, 672 S.E.2d at 803 (citations and quotations omitted).

B. The Master correctly determined that the lot owners within Vaughn Subdivision have equal rights to the dock except for the Thomases' exclusive rights to use a wet slip and specified tie-up rights of non-lakefront lot owners.

One of the more contentious disputes among the litigants is the right to access and use a boat dock attached to the Common Area. For many years, and in previous and current litigation, the Thomases have sought to exclusively control the dock and limit the rights of other owners. In the trial of the case and in this appeal, the Thomases seek to have this Court modify the language in the Settlement Agreement and First Amendment to grant them exclusive use *of the entire dock* (subject to certain tie-up rights) rather than exclusive use *of the wet slip* as stated in the governing documents. The trial Court properly determined that the wet slip is the only portion of the dock that is exclusive to the Thomases and that the dock is generally intended for the use and enjoyment of all lot owners.

The current dispute arises from the 2006 Consent Order which settled the 2004 litigation and the 2014 First Amendment to the Covenants, which reads in relevant part:

1. DOCK. The owners of Lot 1 are entitled to install and maintain one private boat dock attached to the Common Area, with a wet slip for their exclusive use, provided that the owners of the three (3) other non-lakefront Subdivision lots shall have tie-up rights to the dock.

(Exh. 102 at 3, R. at ___).

This single sentence has been the genesis of multiple ongoing practical and legal disputes. The problem is that this sentence, as drafted, is subject to two very different interpretations, which lead to two very different conclusions:

- Respondents' Interpretation: the provision does nothing to strip away historical dock-usage rights held by all subdivision lot owners and implicitly grants all Subdivision lot owners access to and use of the dock, restricting only the tie-up rights of non-lakefront lot owners and the use of the wet slip.

- Appellants' Interpretation: the provision implicitly denies all Subdivision lot owners access to and use of the dock and grants all of those rights to the owners of Lot 1 (as opposed to merely the wet slip as stated in the First Amendment), except for the right of the non-lakefront lot owners to tie-up boats to the dock.

The disputed provision does not *expressly* grant or deny anyone access to and use of the dock; as a result, the Court must determine whether the provision implies a grant of access and use or implies a denial of access and use. The Master properly considered extrinsic evidence (which was also introduced at trial by the Thomases) to resolve this ambiguity.

The Thomases argue, in part, that the word "dock" is immediately preceded by the word "private." The argument fails for numerous reasons. The word *private* is itself ambiguous in this context. First, *private* does not mean *exclusive* to Plaintiffs; the words are not interchangeable. In fact, both words are used in the disputed provision, "private" is used immediately preceding "dock," while the Thomases' right to use the wet slip is expressly qualified as "exclusive." These two different words have two different meanings as evidenced by the drafter's use of both words within the disputed provision. Had the drafter of the First Amendment intended to grant the Thomases exclusive use of the dock, then the drafter could have easily stated that "the owners of Lot 1 are entitled to install and maintain one private dock attached to the Common Area *for their*

exclusive use, …" The *absence* of such clear and unambiguous language cannot form the basis for limiting the rights of the other lot owners.

Second, private does not define extent or scope of use. Any event or organization can describe itself as "private," but still be open to tens, hundreds, or even thousands of individuals. In the context of the Subdivision, the dock is private insofar as it is available to be used only by Subdivision lot owners to the exclusion of all other boats on Lake Jocassee. This interpretation of the word *private* is confirmed in the permitting documents themselves discussed below.

Third, the dock permit was approved under the Duke Energy Lake Services "Private Facilities Program," and the permit approval expressly states that the dock "shall be for private access of the owner(s) of the project front lot … This is a common use dock." (Exh. 520, R. at ___). Duke Energy Lake Services representative, Brett Garrison, addressed this issue in his trial testimony.[2] Mr. Garrison explained that when Duke issued a permit for the subject dock, it was issued to the three owners of the Common area "for their private use." (Tr. 380:13-381:7, R. at ___). Furthermore, the owners of the subdivision lots and common area (in which the owners of the Hinkle Property owned a 1/7 interest) were required to provide a confirmation to Duke Energy that the common area lot was classified as "Private Use Only." (Exh. 515, R. at ___). Mr. Garrison explained that "private use" referred to issuance of the permit to the multiple lot owners of the project front lot (Common Area) as opposed to a marina or HOA, which would have taken it out of the "private" classification. (Tr., 375:7-376:2, R. at ___). The word *private* as used in the First Amendment does nothing more than track the characterization of the dock utilized by Duke Energy

[2] The Thomases, who now complain about the Master considering extrinsic evidence on the dock issue, called Mr. Garrison as a witness in their case in chief.

Lake Services. The use of the word *private* in the Covenants is reasonably construed as nothing more than a reference to the program under which the dock was permitted, not a word of exclusion.

Fourth, Plaintiffs' interpretation of the disputed provision could only be supported by the absurd notion that the owners of five of the six lots in the Subdivision and the owners of the Hinkle Property willingly and knowingly gave up the right to use a then-existing dock for the benefit of *all* lot owners in exchange for a dock located off the Common Area that could be used by only *one* lot owner. The Thomases ostensibly take the position that all lot owners gave up their rights to generally use the dock attached the Common Area without mentioning the relinquishment of such rights in any document or conversation. The very idea is nonsensical; the facts are to the contrary. If the parties, including the Thomases, intended for such rights to be relinquished or that the Thomases had exclusive rights to use something other than the wet slip, the documents should have included such language. It would not have been difficult to draft. At all stages, including the 2006 Consent Order, 2013 Settlement Agreement, and 2014 First Amendment, the Thomases were represented by counsel and freely and voluntarily entered into each agreement. (Tr. 204:18-208:5, R. at ___).

For the Court to adopt the interpretation of the Settlement Agreement and First Amendment that is advocated by the Thomases, it would require the Court to re-write the document and substitute the existing phrase *"*The owners of Lot 1 are entitled to install and maintain one private boat dock attached to the Common Area, *with a wet slip for their exclusive use*" with the following: "The owners of Lot 1 are entitled to install and maintain one private one private boat dock attached to the Common Area, *for their exclusive use*" (with the exception of tie-up rights as provided in the documents). It cannot be disputed that the only language of exclusivity related to the use of the dock pertains to the wet slip.

The Master properly considered extrinsic evidence including the history of the docks on the Common Area, according to the following timeline:

1. May 6, 1994: Foster Vaughn enters into a contract to sell Lot 1 to the Thomases. The contract provides that Mr. Vaughn is obligated to install a boat dock (attached to the Common Area) with one slip assigned to the Thomases. (Exh. 1401, R. at ___).

2. January 20, 2004: Foster Vaughn files a Summons and Complaint against the Thomases for poisoning Mr. Vaughn's trees and violating restrictive covenants for Vaughn Subdivision. (Exh. 903, R. at ___).

3. March 30, 2004: The Thomases filed a counterclaim disputing the applicability of the restrictive covenants to Lot 1. Furthermore, the Thomases alleged that Mr. Vaughn "was obligated to provide a water boat dock *with one slip assigned to the Thomases*." (emphasis added). (Exh. 904, R. at ___).

4. October 31, 2006: The Hon. J. Cordell Maddox, Jr. signed a Consent Order which resolved the 2004 lawsuit and provided, in pertinent part, as follows: "Upon approval of [the Thomases's application for a new dock], the [Thomases] shall build a boat dock attached to the common area. *The boat dock may have a wet slip which will be exclusive to the Defendants. The other three (3) non lakefront subdivision lot owners shall have tie up rights to this dock.*" (emphasis added). (Exh. 907, R. at ___).

5. May 2007 (approximate): Following Duke Energy approval which required removal of the previous dock, the Thomases install a boat dock connected to the Common Area as contemplated by the October 31, 2006 Consent Order. (Tr., pp. 212:8-213:3, R. at ___).

6. August 13, 2008: Thomases file a Summons and Complaint against Foster Vaughn, Larry Hinkle, Mary Hinkle, Camala Hinkle, and the Vaughan Property Owners Association. In

Paragraph 61 of the Complaint, the Thomases sought a declaration that: "The Thomases boat dock, gangway, and stairs are for the exclusive use of the owners of the Thomas Lot and their guests and no other Subdivision Lots have tie up rights to the dock." (Exh. 1001, R. at ___).

7. June 1, 2013: Settlement Agreement resolving the 2008 litigation is executed by all parties. The Settlement Agreement provided, in part, as follows: "Tie-up rights. Non-water lots have tie-up rights as provided in the settlement order of prior lawsuit subject to the following rules: boats secured in a manner that will not damage dock; boat can under no conditions be tied-up for more than one week without use; boat cannot exceed appropriate size for this dock." The Settlement Agreement further provided that amended covenants for Vaughan Subdivision would be recorded. (Exh. 102 at 8, R. at ___).

8. July 18, 2014: First Amendment to the Declaration of Covenants, Conditions & Restrictions for Foster Vaughn Subdivision were executed and subsequently recorded. The First Amendment contains the language that is the subject of this action. (Exh. 102, R. at ___).

9. March 11, 2019: Thomases filed this action.

The origin of the Thomases obtaining an exclusive, covered wet slip was the 2006 Consent Order that resolved the 2004 litigation. At trial, Foster Vaughan's deposition testimony was introduced regarding the settlement.[3] Mr. Vaughan testified as follows:

> Q: And was the idea that ultimately when that lawsuit was settled was the idea that the Thomases could build at their own expense a type of dock they desired so long as the dock proposed by the Thomases could be used and enjoyed by the Hinkle family and all the subdivision lot owners?

[3] As of the date of Mr. Vaughan's deposition on June 14, 2023, he had not owned property within Vaughn Subdivision for many years. Accordingly, Mr. Vaughn had no interest in the outcome of the litigation at the time he provided sworn testimony that was later introduced at trial.

A: That's exactly it, yes.

Q: And was the only restriction that was agreed upon that the Thomases would be allowed to use the wet slip and any other lot owners who needed to tie up to the dock would not use the wet slip while it was in use by the Thomases?

A: That's correct.

Q: And if Mr. Thomas had taken the position that he was the only one who was allowed to use the dock?

A: It wouldn't have happened.

Q: And when you say it wouldn't have happened –

A: I wouldn't have, I wouldn't have permitted it.

Q: You wouldn't have agreed to it?

A: I would not have agreed to it.

(Tr., 545:13-546:7, R. at ___)[4]

Furthermore, in Roger Thomas's testimony, he acknowledged that he and Mrs. Thomas received something of "considerable value" when they received exclusive use of the covered wet slip. (Tr. 220:23-221:1, R. at ___). Mr. Thomas acknowledged that the wet slip is the only area on the dock that is covered and that Lot 1 (the Thomases' lot) is the only lot that can keep a boat on the dock for weeks, months, or even years, regardless of use or lack thereof, if the lot owners choose to do so. (Tr. 221:11-16, R. at ___). Furthermore, the Thomases introduced a witness, Don Haynie, to testify at trial. Mr. Haynie has extensive experience in dock building and installation. Mr. Haynie testified that the wet slip is the most preferred part of the dock, is the only part of the

[4] The questions and answers within the transcript have been reformatted for ease of reference.

dock that is covered, and is the part of the dock that offers protection of boats from boat wakes and weather because it can be tied off on both sides. (Tr. 323:17-324:24, R. at ___).

Camala Hinkle also testified regarding the history of the two docks. With regard to the first dock that was removed in 2007, she explained that there was no limitation at all on the use of that dock by the lot owners other than one slip that was reserved for the Thomases. (Tr. 404:24-405:17, R. at ___). She explained that it was never her or her family's intention to give up rights to use the dock other than the wet slip that was exclusive to the Thomases and the specified tie-up rights of non-lakefront lot owners. (Tr. 405:19-406:13, R. at ___).

Despite the history of the usage of the dock, the fact that the rights of the various lot owners to use the dock were never explicitly removed, the fact that the only right "exclusive" to the Thomases is the right to have an exclusive wet slip, the fact that Duke Energy's representative explained the dock permit was issued for the use of the project front lot owners, the fact that the lot owners' rights to general use of the dock were never taken away, and the fact that the Thomases have exclusive use of the most valuable part of the dock, the Thomases take the position that other lot owners cannot use the dock to swim, fish, walk on the dock to greet boaters, etc. (Tr. 225:1-23, R. at ___).

In its Final Order which followed a three-day trial and careful consideration of all the evidence, the Master correctly summarized the bargain that the Thomases reached when they settled the prior litigation: "Mr. Thomas simply wanted a dock in the Common Area with a wet slip assigned to Lot 1/Thomas. Through negotiation and settlement, Thomas was able to install a dock which met his desires for a covered wet slip and the others gave up any ability to install another dock at the Common Area. The other owners did not, however, give up their rights to use the dock installed by Thomas (except for the wet slip which is exclusively for the use of Lot

1/Thomas). In short, while the dock is owned by the Thomases, their ownership is subject to the described use rights of the other owners of the Common Area." (Order at 15, R. at ___).

Given the applicable law, and reading the disputed provision as a whole, the inevitable conclusion is that Respondents' interpretation providing for free and unrestricted use of the dock (except for the exclusive wet slip and specified tie-up rights) must be adopted by this Court.

In their brief, the Thomases take the position that they somehow granted an easement of other lot owners to have tie-up rights to the dock. There is no such easement language contained in any document. The Master properly applied principles of construction for contracts and arrived at the correct conclusion.

Furthermore, the Thomases allege the Master erred in treating the dock like a fixture. For the reasons set forth above, the case should be decided on the aforementioned law applicable to construction of contracts. That said, there is certainly evidence in the record to support a finding that the dock is a fixture. Duke Energy does not permit more than one dock on the Common Area, so the rights of the owners of the Common Area are significantly impacted by decisions relating to the dock. As the Court is well aware, the most recent governing document relating to the dock is the First Amendment to the Declaration of Covenants, Conditions & Restrictions for Foster Vaughn Subdivision which is recorded in Oconee County Register of Deeds Office. The only persons who are allowed to have ownership and rights to the Common Area and dock are the subdivision lot owners and owners of the Hinkle Property. Lot 1's exclusive use of the wet slip and the non-lakefront lot owners' tie-up rights are described as "appurtenant" to those lots "and shall be automatically deemed to be conveyed" with the conveyance of Lot 1 or the non-lakefront lots, as the case may be. (Exh. 102, R. at ___). Furthermore, Mr. Haynie testified that the anchor system for this dock, which consists of steel pipes anchored in poured concrete on the Common

Area land, is "a little exorbitant" and "heavy duty" (Tr. 321:7-322:8, Exh. 527, R. at ___). He also acknowledged that when a lakefront property with a dock attached is sold, the dock typically is included with the sale of the property. (Tr. 323:12-16, R. at ___). Although the outcome of this case should not be decided based on the question of whether the dock is a fixture, the evidence in the record would certainly support such a finding. Rights in the dock are granted to owners of the Common Area through the documents that govern Vaughn Subdivision.

The Master properly applied the rules of contract construction and properly considered extrinsic evidence to resolve any ambiguities therein. There is ample evidence in the record to support the Master's finding, and therefore this Court should affirm his Order declaring that all subdivision lot owners have unrestricted access to and use of the dock, subject to Lot 1's exclusive use of the wet slip and specified tie-up rights of non-lakefront owners as expressly stated therein.

II. Access between Lot 4 and Lot 15

A. Standard of Review

"An action seeking an injunction to enforce restrictive covenants sounds in equity. In an equitable action, this court may make findings according to its own view of the preponderance of the evidence. However, this court is not required to disregard the master's factual findings or ignore the fact that the master was in the better position to assess the credibility of the witnesses. Moreover, the appellant is not relieved of the burden of convincing the appellate court that the trial court committed error in its findings. Consequently, [the appellate court] will affirm the findings of the trial court in an equity case unless the appellant satisfies this court that the preponderance of the evidence is against the findings of the trial court." Regions Bank v. Wingard Props., Inc., 394 S.C. 241, 248-49, 715 S.E.2d 348, 352 (Ct. App. 2011) (citations omitted and quotations omitted).

B. The Master correctly determined that the owners of Lot 4 of Vaughn Subdivision do not violate the restrictive covenants by accessing Lot 4 directly from Lot 15 of Jocassee Acres, and vice versa, as long as they own property within Vaughn Subdivision.

As an initial matter, the owners of Lot 4 who are Respondents in this appeal acknowledge the only reason they can access Lot 4 in Vaughn Subdivision directly from Lot 15 in Jocassee Acres is because they own Lot 4. They do not take the position that such right of access is appurtenant to Lot 15 of Jocassee Acres. In other words, their right of access arises from their ownership of Lot 4 in Vaughn Subdivision and not from their ownership of Lot 15 in Jocassee Acres.

The following is an image (facing west) that shows the "driveway" on Lot 4 that enables Ferguson and Ward to access Lot 15 from Lot 4. The Thomases' storage shed on Lot 1 and the Addingtons' home are shown in the distance.

(Exh. 1114, R. at ___).

The Thomases make three arguments regarding the use of Lot 15 by Ferguson and Ward.[5] First, they argue that the Master impermissibly expanded the scope of an access easement to allow access by lots outside the Foster Vaughn Subdivision. Second, they argue that the driveway violates the Original Covenants and the First Amendment. Third, they argue the creation of Parcels A and B to facilitate the construction of the driveway violated the Original Covenants. For the reasons set forth in the Master's Order and herein, the Master ruled correctly on this issue, and his ruling should be affirmed.

i. There has been no impermissible expansion of an easement.

Similar to the Thomases' longstanding attempts to gain complete control over the shared dock, the Thomases are bound and determined to control Vaughan Road. However, the history and the record firmly establish that the entirety of Vaughan Road within Vaughn Subdivision is intended to be owned, shared, used, and maintained equally by the six lot owners plus the owner of the Hinkle Property, which is not part of Vaughn Subdivision.

The Original Covenants were signed by the Thomases and recorded in connection with settlement of the 2004 Litigation – approximately twelve years after the Thomases acquired Lot 1 from Foster Vaughan. They provide as follows: "The road shown on the subdivision plat and the area shown as 'Common Area' thereon are hereby declared to be common areas for the benefit and use of all lot owners. Each lot owner shall have a fractional undivided interest equal to the number of lots on the plat including the Ralph L. Hinkle property which in [sic] not shown as a numbered lot." (Exh. 101 at 7, R. at ___). Accordingly, when the Original Covenants were recorded, the

[5] Due to the untimely death of David Ward during the pendency of this case, his interest in the property has been distributed to three heirs. For clarity and ease of reference, the owners of Lot 4 are simply referred to as "Ferguson and Ward."

road was declared common area owned 1/7 by the six lot owners plus the owner of the Hinkle Property. The owners of Lot 4 own 1/7 of Vaughn Road from beginning to end, and easement principles do not apply – particularly following the recording of the Original Covenants.

For the sake of argument, even if the Thomases are considered to own the portion of Vaughn Road that crosses Lot 1 and the other owners have an easement for that portion of the road, the Master properly found "The Vaughan Road easement has not been extended at all. Ferguson/Ward, as owners of Lot 4, have every right to utilize Vaughan Road to access their lot just as Thomas does for his lot. The testimony established that there was not interference with the use of Vaughan Road by the driveway from Lot 4, and the burden on Vaughan Road has not been increased at all. Even though Ferguson/Ward own Lot 15, no additional use of Vaughan Road is required by that fact. Ferguson already has that right." (Order at 19, R. at ___). The Master further found that "because Ferguson and Ward have unfettered access to Vaughan Road for the purpose of accessing Lot 4, it would be impracticable to glean their intent each time they access Vaughan Road through the gate that precedes Lot 7 of Jocassee Acres (the "Addington Property") and to restrict their access only to Lot 4." (Order at 18, R. at ___).

Due to the configuration of Lot 4 (within the portion of Lot 4 designated "Parcel A"), Ferguson and Ward cannot access Lot 15 of Jocassee Acres from Vaughan Road without first accessing Lot 4. (Exh. 202, R. at ___). Accordingly, every time Ferguson and Ward enter Vaughn Subdivision on Vaughan Road, they are traveling to Lot 4 or the waterfront Common Area in which they own a 1/7 interest. Nothing prohibits Ferguson and Ward from traveling to Lot 15 after they enter Lot 4.

Mr. Thomas acknowledged in his testimony that the owners of Lot 4 "can come and go and have as many guests as they want to" when traveling on Vaughan Road to Lot 4. (Tr. 255:3-8, R.

at ___). He further acknowledged that he does not know of anything in the restrictive covenants or otherwise that would prevent the owners of Lot 15 from walking directly from Lot 15 to Lot 4. (Tr. 255:9-16, R. at ___). Furthermore, the owners of the Hinkle Property, which is not within Vaughn Subdivision, have unrestricted use of Vaughan Road to access their property, and they drive past Lots 1, 2, 3, 4, and 5 when traveling to the same.

The Thomases argue in this appeal that "[t]he driveway accomplishes indirectly what the covenants forbid directly: it allows access to the private portion of Vaughn Road by properties outside the Foster Vaughan Subdivision which are not subject to its restrictions, obligation, and limitations." (Appellants' Brief at 7). This argument ignores the fact that the Addington property and Hinkle property are not within the Foster Vaughan Subdivision but have access to Vaughan Road through and beyond the gate. It also ignores the fact that if Lot 15 were sold to someone who does not own property within Vaughn Subdivision, the new owners of Lot 15 would not have the right to use Vaughan Road. The Master noted that circumstances could change which would prevent future owners of Lot 15 from accessing Vaughan Road (such as the owners of Lot 15 no longer having any interest in Lot 4 or Vaughan Road). (Order at 19, R. at ___). The Master decided this issue correctly, and his Order should be affirmed.

ii. The driveway does not violate the Original Covenants and First Amendment.

The Thomases argue the access from Lot 15 to Vaughan Road, and vice versa, "enabled non-subdivision property to access a private, gated road that was expressly intended to be limited in use." (Appellants' Brief at 27). The Thomases further argue "the Master's ruling nullifies the practical effect of the gated access provision [of the covenants]." (Appellants' Brief at 27). For the reasons set forth in the Master's Order and herein, the Master properly decided this issue, and his ruling should be affirmed.

"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. Restrictions on the use of property will be strictly construed with all doubts resolved in favor of free use of the property, although the rule of strict construction should not be used to defeat the plain and obvious purpose of the restrictive covenants." Penny Creek Assocs., LLC v. Fenwick Tarragon Apartments, LLC, 375 S.C. 267, 271-72, 651 S.E.2d 617, 620 (Ct. App. 2007) (citations and quotations omitted).

As an initial matter, the Original Covenants do not reference a gate. When the 2008 Lawsuit was settled and the First Amendment was recorded in 2014, a gate for Vaughn Subdivision was supposed to be installed on Lot 1. The installation of that gate was abandoned because there was a Duke Energy gate on Vaughn Road prior to the Addingtons' property, and the installation of a gate beyond the Addingtons' property would result in the owners within Vaughan Subdivision and the owners of the Hinkle Property having to open two gates every time they entered the subdivision. (Tr. 176:17 – 178:19, R. at ___). So, as it currently stands (and has for many years), the owners of lots within Vaughan Subdivision, the Addingtons (outside the subdivision), and the owners of the Hinkle Property (outside the subdivision) all access their properties by traveling through a Duke Energy gate on Vaughan Road prior to Vaughn Subdivision. Like Lot 15 of Jocassee Acres, Lot 7 (Addington Property) also has access to Pinnacle Circle. Accordingly, Lot 7 already provides a physical connection between Pinnacle Circle in Jocassee Acres to Vaughan Road and to Vaughn Subdivision beyond the gate (Tr. 340:17-20, Exh. 203, R. at ___).

The Master properly recognized that "[t]here is not a continuous fence or other barrier around the perimeter of Vaughn Subdivision as one might find in some gated communities." (Order at 5, R. at ___).[6] Also, as noted above, Mr. Thomas has acknowledged that he does not know of anything in the restrictive covenants or otherwise that would prevent Ferguson and Ward from walking directly from Lot 15 of Jocassee Acres to Lot 4 of Vaughn Subdivision. (Tr. 255:9-16, R. at ___). The bottom line is that Ferguson and Ward have the right to access Lot 4 from Vaughan Road whenever, and as many times, as they wish. There is nothing that prohibits them from accessing Lot 15 directly from Lot 4. Ferguson and Ward acknowledge that their ownership of Lot 4 and 1/7 of Vaughan Road gives them rights to use Vaughan Road within Vaughn Subdivision and that their ownership of Lot 15, in and of itself, does not provide such access. If they were to sell Lot 15 to someone who had no interest in Lot 4, any right of access to/from Lot 4 and Vaughan Road would no longer exist.

The Thomases also argue that the driveway and its connection to Lot 15 violates the single-family use restriction found in the Original Covenants. The single-family use restriction is found in the Original Covenants and states as follows: "No lot or other portion of the property shall be used for any purpose other than single family residential purposes, and no commercial activity or business shall be located or conducted on any portion of the property." (Exh. 101 at 1, R. at ___). The provision further prohibits a "duplex residence, garage apartment, apartment house or multi-family housing." (Exh. 101 at 1, R. at ___). There is no evidence whatsoever in the record that any portion of property within Vaughn Subdivision is being used for any purpose other than single-family residential purposes.

[6] Prior to trial and again before issuing his Order, the Master personally visited the property that is the subject of this matter.

The Thomases cite Donald E. Baltz, Inc. v. R.V. Chandler & Co., 248 S.C. 484, 151 S.E.2d 441 (1966) in support of their position. However, Baltz is distinguishable. In Baltz, the property owner used a lot within the subdivision exclusively as a roadway to join property outside the subdivision, and the Court found that "[t]he lot is not useable as a homesite with the roadway through the middle of it."

Here, there has been no change in Lot 4 that would make it less suitable for a single-family residential use. In fact, any opportunity for single-family residential use of Lot 4 has been expanded, rather than limited (through the additions of "Parcel A" and "Parcel B"). The evidence in the record is that Parcels A and B were taken from Lots 2 and 3 and added to Lot 4 to ensure that Lot 4 had adequate access to septic and water – both of which are necessary for single-family residential use of Lot 4. As the Court in Baltz recognized, "It has frequently been pointed out that cases involving restrictive covenants present such wide differences in circumstances that, in the main, each case must be decided on its own facts." Id., 248 S.C. at 489, 151 S.E.2d at 444. The factual scenario in Baltz is vastly different than the situation here and, consequentially, provides no support for the Thomases' position.

In summary, there is nothing in the Original Covenants, the First Amendment, or the Settlement Agreement that prohibits the owners of Lot 4 from accessing Lot 15 once they travel to Lot 4, or vice versa. The Thomases entered into the Settlement Agreement and First Amendment freely and voluntarily and while represented by counsel. (Tr. 207:13 – 208:5, R. at ___). If the Thomases wanted to include additional restrictions beyond what is contained in the documents, they should have done so prior to signing them. The Master decided this issue correctly, and his Order should be affirmed.

III. Enlargement of Lot 4

A. Standard of Review

The standard of review for this issue is the same as the preceding issue pertaining to the driveway access between Lot 4 of Vaughan Subdivision and Lot 15 of Jocassee Acres.

B. The Master correctly determined that the enlargement of Lot 4 did not violate the restrictive covenants of Vaughn Subdivision.

The Thomases argue the Master erred in permitting the enlargement of Lot 4 because (1) Parcels A and B were not combined with Lot 4, and (2) the Master's Order "disregards the obvious intent of the subdivision, which was to create a sliver of land on which to build access to Jocassee Acres." (Appellants' Brief at 29). These arguments are wholly unsupported by, and are contrary to, the evidence in the record.

The Original Covenants provide, in pertinent part, as follows:

> 3. No Subdivision of Lots. No lot may be subdivided or boundary lines within the property changed, without the prior written consent of the Declarant, except that two or more contiguous lots may be merged into a single lot. ***Further, any lot may be subdivided for the purpose of enlarging adjoining lots.*** (emphasis added).
>
> (Exh. 101 at 2, R. at ___).

With regard to the Thomases' first argument (that Parcels A and B were not combined as part of Lot 4), Camala Hinkle and Benjamin Ferguson testified unequivocally at trial that Parcels A and B were combined with Lot 4. (Tr. 415:20-416:3, 561:15-562:1, 575:5-14, R. at ___). Mr. Ferguson agreed at trial that Parcels A and B were combined with Lot 4 and there was no creation of additional lots. (Tr. 575:15-16, R. at ___). To the extent necessary, the parties will stipulate in this appeal that the parcels have been combined into Lot 4. The Master likewise found that Parcels A and B had been combined with Lot 4. No one has sought to create additional lots within Vaughn Subdivision, and this is a non-issue.

With regard to the Thomases' second argument, Camala Hinkle and Benjamin Ferguson testified unequivocally at trial that they never discussed access from Lot 15 in Jocassee Acres prior to enlarging Lot 4 and conveying it to Mr. Ferguson and Mr. Ward and that it was not a consideration at that time. (Tr. 419:5-19, 447:16-21, 560:17-561:14, 569:22-570:4, R. at ___). Furthermore, Mr. Thomas acknowledged that he did not know if the matter had been discussed but he simply has the "impression" that creation of access was the motivation for enlarging Lot 4. (Tr. 243:11-20, R. at ___). Mr. Thomas further acknowledged that he was not a party to any discussions regarding the enlargement of Lot 4. (Tr. 242:8-12, R. at ___). Mr. Thomas also acknowledged in his testimony that there is no restriction on the size or shape that an enlarged lot can be. (Tr. 240:19-25). Accordingly, there is zero evidence in the record that Lot 4 was enlarged for the purpose of creating a "land bridge" for the purpose of creating direct access from Lot 15 in Jocassee Acres to Lot 4 in Vaughn Subdivision.

Assuming, hypothetically, that evidence existed which supports the Thomases' position on this issue, it still would not negate the fact that Lot 4 was enlarged in keeping with the restrictive covenants. The Thomases wish to delve into a deeper level of scrutiny which is to examine the motivations for enlarging Lot 4. In other words, it cannot be disputed that Parcels A and B were combined with Lot 4 for the purpose of enlarging it, but the Thomases seek to scrutinize the *purpose* for enlarging Lot 4. There could be a myriad of reasons that parties within Vaughn Subdivision or other subdivisions with similar restrictions desire to enlarge a lot, but when subdivision of a lot for the purpose of enlarging another lot (as opposed to creating a new lot) is permitted by the covenants, the purpose for such enlargement is beyond the purview of the courts.

In the Master's Order, he properly recognized that "[t]he testimony of Camala Hinkle and Benjamin Ferguson establish that Parcels A and B were created and combined with Lot 4 due to

concerns regarding water and septic access for Lot 4. There was no discussion between Ms. Hinkle, on one hand, and Ferguson and Ward, on the other hand, about creating a 'land bridge' prior to the conveyance of the enlarged Lot 4 to Ferguson and Ward." (Order at 16, Tr. 419:5-19, 560:12-561:14, 569:22-570:4, R. at ___).

The Thomases argue in their brief that "[a]ny utility route could have been addressed by easement without subdividing lots." (Appellants' Brief at 29). Ironically, under cross examination at trial, Mr. Thomas tried to explain why it was important to him to own the section of Vaughan Road that crosses Lot 1, and he said "my experience has been it's a lot better to own something than to have an easement for it, so I would much rather be an owner than somebody with easement rights." (Tr. 246:22-247:11, R. at ___).

If there is any doubt about the application of the covenants to the enlargement of Lot 4, it must be resolved in favor of the property's free use. "Covenants that restrict the free use of property must be strictly construed against limitations upon the property's free use. Where there is doubt, the doubt must be resolved in favor of the property's free use. Cedar Cove Homeowners Ass'n v. DiPietro, 368 S.C. 254, 271, 628 S.E.2d 284, 292 (Ct. App. 2006) (citations omitted).

The Master properly held that that the enlargement of Lot 4 did not violate the covenants, and his Order should be affirmed.

IV. Respondents are entitled to attorney's fees.

A. Standard of Review

"The decision to award or deny attorneys' fees and costs will not be disturbed on appeal absent an abuse of discretion. An abuse of discretion occurs when the conclusions of the trial court are either controlled by an error of law or are based on unsupported factual conclusions." Maybank

v. BB&T Corp., 416 S.C. 541, 579-80, 787 S.E.2d 498, 518 (2016) (citations and quotations omitted).

B. The Master did not abuse his discretion in awarding attorneys' fees to Respondents.

In this case, Respondents' entitlement to attorneys' fees provision arises from a contract. In Herrington v. SSC Seneca Operating Co., LLC, 435 S.C. 243, 248, 866 S.E.2d 579, 581-82 (Ct. App. 2021), the South Carolina Court of Appeals stated the following with regard to contract construction: "We are bound to interpret the agreement by looking at the entire agreement from beginning to end: precedent explains that when construing a contract, all of its provisions should be considered, and one may not, by pointing out a single sentence or clause, create an ambiguity. We do this because presumably, *all portions of a contract are inserted for a purpose* and the contract must be read as a whole, giving appropriate weight to all provisions. We assume the parties intended a meaningful agreement, not a nonsensical or absurd one, so we read agreements in a way that will give effect to the whole instrument and to each of its various parts and provisions, if it is reasonable to do so." Id. (citations and quotations omitted) (emphasis added).

Here, all parties specifically negotiated and included an attorney's fees provision in the First Amendment. Accordingly, attorneys' fees are provided by contract and refer to the mechanics lien statutes to provide guidance on how to determine the manner in which attorneys' fees should be awarded. The mechanics liens statutes, S.C. Code Ann. § 29-5-10 and S.C. Code Ann. § 29-5-20, *require* an award of attorney's fees and costs to the prevailing party, including a defendant who successfully defends an action. See T.W. Morton Builders v. Von Buedingen, 316 S.C. 388, 403, 450 S.E.2d 87, 95 (Ct. App. 1994) (holding that a prevailing party must be awarded its attorney's fees and costs and that the use of the word "may" in S.C. Code Ann. § 29-5-10 should be interpreted as "shall").

South Carolina law provides that in a mechanics lien action "the defendant is entitled to an award of attorney fees as the prevailing party if it is determined that a mechanic's lien cannot be enforced against it." EFCO Corp. v. Renaissance on Charleston Harbor, LLC, 370 S.C. 612, 618, 635 S.E.2d 922, 925 (Ct. App. 2006). In EFCO, the plaintiff failed to file an action to foreclose on a mechanics lien within the prescribed period, and the defendant moved for summary judgment which was granted by the trial court. No pre-trial offers were exchanged, no trial took place, and the trial court never decided what party was entitled to what amount of money in comparison to the amount of the lien sought. Due to the plaintiff's failure to timely file a foreclosure action, the lien was of no effect and was dissolved. Nevertheless, the Court of Appeals found that the defendant was entitled to attorney's fees and costs because of its successful defense of the action.

Furthermore, and perhaps more importantly, S.C. Code Ann. § 29-5-10 and § 29-5-20 specifically contemplate an award of attorney's fees and costs *when parties do not exchange pre-trial offers*. S.C. Code Ann. § 29-5-10 and § 29-5-20 provide that "either party *may* file and serve on the other party an offer of settlement," but do not *require* the parties to do so (emphasis added). Specifically, the statutes provide that "[i]f the plaintiff makes no written offer of settlement, the amount prayed for in his complaint is considered to be his final offer of settlement. If the defendant makes no written offer of settlement, the value of his counterclaim is considered to be his negative offer of settlement. If the defendant has not asserted a counterclaim, his offer of settlement is considered to be zero." Here, the parties stated their respective positions in their pleadings and at trial, and there is no question that the Respondents are the prevailing parties.

It is indisputable that certain provisions within the mechanics lien statute could never be applicable to the restrictive covenants for Foster Vaughan Subdivision. For example, there will never be a situation in which a laborer or supplier of materials is seeking a mechanics lien under

Section 7 of the First Amendment (which is the entire thrust of the mechanics lien statutes). Accordingly, a reasonable interpretation of Section 7 is that attorneys' fees will be determined by the Mechanics Lien Statute *to the extent applicable* to the claims and defenses in the action. If Section 7 is not read in such a manner, Section 7 will be meaningless because it could never possibly apply to an action to enforce the restrictive covenants and would be limited to mechanics liens. Pursuant to Herrington, supra, the Court should interpret Section 7 of the First Amendment "in a way that will give effect to the whole instrument and to each of its various parts and provisions, *if it is reasonable to do so*." Id. (emphasis added). It is entirely reasonable for this Court to find that if monetary damages are not sought, then provisions within the mechanics lien statute which cannot be applied outside the context of monetary claims are simply not applicable.

Furthermore, Section 7 of the First Amendment does not limit the type of relief a lot owner must seek in order to recover attorney's fees. Section 7 simply states that a lot owner "may enforce these Restrictive Covenants through litigation . . ." Nothing in Section 7 suggests that a lot owner must seek monetary relief to be entitled to attorney's fees. There is no question that Plaintiffs' action was initiated, and litigated extensively at Plaintiffs' behest, for the purpose of enforcing the restrictive covenants and that Section 7 specifically contemplates an award of attorneys' fees for the prevailing party.

Additionally, the Thomases alleged their entitlement to attorneys' fees and costs in various filings. When they originally filed this case, they alleged the following in their Fifth Cause of Action (Paragraphs 94 and 95 of their Complaint):

> 94. The Restrictive Covenants provide that when a lot owner enforces the covenants, "attorneys' fees will be determined in the same manner as in a SC mechanics lien action." Ex. B at Par. 7.
>
> 95. The Plaintiffs brought this action to enforce the Restrictive Covenants and they are therefore contractually entitled to recover from the Defendants all

> reasonable attorneys' fees and costs as provided for in the SC Mechanics Lien Act, § 29-5-10 of the South Carolina Code of Laws.

(Exh. 903, R. at ___).

The Thomases initiated this action with the expectation, and the express claim, that it was an action to enforce restrictive covenants and the prevailing party would recover attorney's fees and costs – in spite of the fact that no monetary damages were sought in their Complaint. All parties sought attorneys' fees and costs in their respective, subsequent pleadings. Although the Thomases' claims do involve enforcement of restrictive covenants, when the Thomases signed the Settlement Agreement, it stated "Restrictive Covenants will be amended so that **any disputes heretofore** must be resolved through litigation . . ." (emphasis added). Exh. 102 at 8, R. at ___). "In South Carolina, two contracts executed at different times relating to the same subject matter, entered into by the same parties, are to be construed as one contract and considered as a whole." Ellie, Inc. v. Miccichi, 358 S.C. 78, 92, 594 S.E.2d 485, 492 (Ct. App. 2004) (citations omitted).

Nothing in Section 7 of the First Amendment or in the Settlement Agreement suggests that a monetary claim or award is a prerequisite to recovering attorneys' fees and costs. Presumably, if the parties (while represented by counsel) had intended to limit the availability of attorneys' fees to situations in which monetary damages were sought, they would have included such a limitation in Section 7 of the First Amendment.

S.C. Code Ann. § 29-5-10 and § 29-5-20 provide that, in an action to foreclose on a mechanics lien, "the fee and court costs cannot exceed the amount of the lien." Here, because no monetary award was sought, there is no "lien amount" that could be applied as a cap. It would lead to an absurd result to have a contract (Section 7 of First Amendment) expressly provide for an award of attorneys' fees, and reference a statute that *requires* the Court to award attorneys' fees

and costs to a prevailing party, but to then apply the same statute for the purpose of imposing a cap of $0 on the award of attorneys' fees and costs.

The general rule is that the determination of the amount of attorney fees that are required to be awarded under the mechanic's lien statute is addressed to the sound discretion of the trial court. See EFCO Corp. v. Renaissance on Charleston Harbor, LLC, 370 S.C. 612, 621, 635 S.E.2d 922, 926 (Ct. App. 2006). The first two factors of the well-established, six-factor analysis for attorney's fees specifically address the proportionality of the fees to the case. Specifically, the first two factors require the Court to consider (1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case. Accordingly, protections are in place and were applied by the Master to ensure that attorney's fees in this case are reasonable under the circumstances.[7]

As discussed in detail above, provisions within the mechanics lien statute that cannot be applied outside the context of monetary claims are not applicable here. In cases such as this in which monetary damages are not sought, the Court can still take guidance from the mechanics lien statutes (and applicable case law such as EFCO, supra) to determine the prevailing party and the attorneys' fees and costs that should be awarded.

Furthermore, from a policy and fairness standpoint, and unlike defendants in a mechanics lien foreclosure action, Respondents/Defendants in this case never had the option of simply paying some amount of money sought by the Plaintiffs in order to end the case if the amount sought would be less than the attorney's fees and costs that would be incurred by Respondents/Defendants in defending the case. In the instant case, the Thomases put Respondents in a position in which they had no choice but to either defend the action (at a substantial cost) or concede the Thomases' claims

[7] The Master properly noted in his Order that the Thomases did not contest the reasonableness of the amount of attorneys' fees and costs sought by Respondents.

that would have a substantial impact on their property rights if the Thomases were to prevail. Furthermore, the scale of the litigation in this case, and resulting attorneys' fees and costs, were largely a result of the extensive documents, witnesses, etc. that were presented by the Thomases.

Here, the Thomases sought to significantly impact the property rights of the Respondents through their attempts to enforce the Original Covenants and First Amendment, and Respondents incurred significant fees and costs in defense of the same. Because Respondents did not seek monetary relief, any reference to capping the attorneys' fees and costs by the lien amount is simply not applicable. The Thomases should not be able to rely on the *absence* of a specific prayer for monetary damages to somehow impose a cap on attorneys' fees and costs.

The Respondents prevailed at trial on all claims and are entitled to an award of attorneys' fees and costs. Accordingly, the Master's award of attorneys' fees and costs to Respondents should be affirmed.

V. This Court should affirm the lower court's Order for any other reasons which may appear in the record.

"An appellate court may affirm a lower court's decision for any reason or ground that exists in the record on appeal, even if that reason was not relied upon, presented to, or ruled on by the lower court. I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (citing Rule 220(c), SCACR).

Respondents request that this Court affirm the decision of the Master for any other reasons which may appear in the record.

CONCLUSION

For the reasons set forth herein, and for such other reasons which may appear in the record, the Order and Judgment of the Master should be AFFIRMED.

Respectfully submitted,

s/ Paul S. Landis

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