THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2009-CP-23-7707

R.C. Frederick Hanold, III and Rose F. Hanold, and Carol R. Mitchell and George P.Mitchell,Jr., ...Respondents.
v.

Watson's Orchard Property Owners Association, Inc., a South Carolina Corporation, and Pelham Farm, LLC, a South Carolina Corporation, Legacy One, LLC, a South Carolina Corporation, SESP LLC, a South Carolina Corporation, an unknown Trustee of the Revocable Trust Agreement Dated March 19,1996 established by James B. Stephens as amended, and unknown Jay Stephens and Mike Stephens as Co-Personal Representative of the Estate of James B. Stephens, ...Defendants.

Of whom Pelham Farm, LLC, a South Carolina Corporation, Legacy One, LLC, a South Carolina Corporation, an unknown Trustee of the Revocable Trust Agreement Dated March 19, 1996 established by James B. Stephens as amended, and unknown Jay Stephens and Mike Stephens as co-Personal Representative of the Estate of James B. Stephens, ...Appellants.
v.

Property Owners in Watson's Orchard Subdivision: N. Carter Poe, III; McNally Reeves, as Trustee of the Residual Trust under item Five of the Last Will and Testament of Hattie L. Reeves dated February 9, 1998; Janet B. Yusi; Lucy S. Tiller; James G. Stephens; Rachel P. McKaughan; Ramon J. Ashy and Jana Ashy; Christopher D. Scalzo and Heather V. Scalzo; Erma R. Rash, as Trustee of the Erma R. Rash Revocable Trust dated February 12, 2010; James Edwin Conrad, as Trustee of the James Edwin Conrad Living Trust dated September 7, 2010; Sue Lane Conrad; Horst H. H. Eschenberg and Floride C. Eschenberg; Caryl L. Clover, as Trustee of the Caryl L. Clover Revocable Living Trust Agreement dated May 12, 1999; Mary F. Newell; Timothy M. Conroy and Elizabeth W. Conroy; Nathan Scolari; Joel Wells Norwood and Lynn Norwood; J. Lynn Shook; Juan Hernandez and Janice M. Pelletier; Scott P. Payne and Kathleen H. Payne; Joe G. Thomason and Dana L. Henry Thomason; Traci Segura; Cameron E. Smith and Joan B. Smith; Charles E. Howard and Sharon F. Howard; Penelope J. Galbraith; Meredith C. Vry; Delores B. Mitchell; Lisette M. Silva and Mary F. Colley; Ilona K. Alford and

William G. Alford; George T. McLeod and Martha T. McLeod; Ronald S. Wilson and Robin E. Wilson; The Merrill J. Gildersleeve and Anore L. Novak Revocable Living Trust dated November 1, 1996; Anna Marie T.Azores and Kim 0. Gococo; Ashley Westrope as Trustee of Martha Randolph Westrop Trust dated June 6, 1988; Cliff C. Jollie and Martha W. Jollie; David A. Saliny and Xiaoli Saliny; Lecia S. Franklin; Dean D. Varner and Deborah P. Varner; W. Frank Durham, Jr.; Christine M. Howard; Samuel P. Howard, Jr. and Jane H. Howard; Manfred E. Kramer and Jane J. Kramer; Mary J. Steele; James J. Barrett, III and Kimberly A. Barrett; Richard A. Herman and Patricia L. Herman,.....Third Party Defendants.

FINAL BRIEF OF RESPONDENTS

Randall S. Hiller
850 Wade Hampton Blvd.
Greenville, SC 29609
Attorney for Respondents

Other counsel of record:
William Herlong
P.O. Box 2003
Greenville, SC 29602
Attorney for Appellants

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2009-CP-23-7707

R.C. Frederick Hanold, III and Rose F. Hanold, and Carol R. Mitchell and George P. Mitchell, Jr., ...Respondents.
v.

Watson's Orchard Property Owners Association, Inc., a South Carolina Corporation, and Pelham Farm, LLC, a South Carolina Corporation, Legacy One, LLC, a South Carolina Corporation, SESP LLC, a South Carolina Corporation, an unknown Trustee of the Revocable Trust Agreement Dated March 19,1996 established by James B. Stephens as amended, and unknown Jay Stephens and Mike Stephens as Co-Personal Representative of the Estate of James B. Stephens, ...Defendants.

Of whom Pelham Farm, LLC, a South Carolina Corporation, Legacy One, LLC, a South Carolina Corporation, an unknown Trustee of the Revocable Trust Agreement Dated March 19, 1996 established by James B. Stephens as amended, and unknown Jay Stephens and Mike Stephens as co-Personal Representative of the Estate of James B. Stephens, ...Appellants.
v.

Property Owners in Watson's Orchard Subdivision: N. Carter Poe, III; McNally Reeves, as Trustee of the Residual Trust under item Five of the Last Will and Testament of Hattie L. Reeves dated February 9, 1998; Janet B. Yusi; Lucy S. Tiller; James G. Stephens; Rachel P. McKaughan; Ramon J. Ashy and Jana Ashy; Christopher D. Scalzo and Heather V. Scalzo; Erma R. Rash, as Trustee of the Erma R. Rash Revocable Trust dated February 12, 2010; James Edwin Conrad, as Trustee of the James Edwin Conrad Living Trust dated September 7, 2010; Sue Lane Conrad; Horst H. H. Eschenberg and Floride C. Eschenberg; Caryl L. Clover, as Trustee of the Caryl L. Clover Revocable Living Trust Agreement dated May 12, 1999; Mary F. Newell; Timothy M. Conroy and Elizabeth W. Conroy; Nathan Scolari; Joel Wells Norwood and Lynn Norwood; J. Lynn Shook; Juan Hernandez and Janice M. Pelletier; Scott P. Payne and Kathleen H. Payne; Joe G. Thomason and Dana L. Henry Thomason; Traci Segura; Cameron E. Smith and Joan B. Smith; Charles E. Howard and Sharon F. Howard; Penelope J. Galbraith; Meredith C. Vry; Delores B. Mitchell; Lisette M. Silva and Mary F. Colley; Ilona K. Alford and William G. Alford; George T. McLeod and Martha T. McLeod; Ronald S. Wilson and Robin E. Wilson; The Merrill J. Gildersleeve and Anore L. Novak Revocable Living Trust dated November 1, 1996; Anna Marie T.Azores and Kim 0. Gococo; Ashley Westrope as Trustee of Martha Randolph Westrop Trust dated June 6, 1988; Cliff C. Jollie and Martha W. Jollie; David A. Saliny and Xiaoli Saliny; Lecia S. Franklin; Dean D. Varner and Deborah P. Varner; W. Frank Durham, Jr.; Christine M. Howard; Samuel P. Howard, Jr. and Jane H. Howard; Manfred E. Kramer and Jane J. Kramer; Mary J. Steele; James J. Barrett, III and Kimberly A. Barrett; Richard A. Herman and Patricia L. Herman,.....Third Party Defendants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INITIAL BRIEF OF RESPONDENTS

STATEMENT OF CASE

This action was commenced on September 8, 2009, wherein Respondents sought a declaratory judgment that certain restrictive covenants prepared and filed by Appellants had not been validly adopted and were void and of no force and effect. An amended complaint was filed on September 10, 2009. The Defendant, Watson's Orchard Property Owners Association, Inc. (hereinafter WOPOA) answered on October 12, 2009. WOPOA and Appellants filed a joint answer and counterclaim on November 11, 2009. In the counterclaim they sought a declaratory judgment that the 2010 covenants had been validly adopted. On June 27, 2011 Appellants and WOPOA filed an amended answer, counterclaim and third party claim which brought in the property owners in Watson's Orchard Subdivision as third party defendants. None of the third party defendants answered and judgment by default was entered against them on February 22, 2012.

The matter was tried on September 4 and 5 of 2012 and post trial memoranda were submitted on September 14 by Appellant and Respondent. By Order dated October 19, 2012 the Court held, among other things, the amendment filed by the Appellants was not validly adopted and was of no force and effect. Appellants' subsequent motion for reconsideration was denied on January 28, 2013. This appeal timely followed.

STATEMENT OF FACTS

The issue in this case is whether the amended restrictions and covenants prepared, executed and recorded by the original Defendants were done in accordance with the requirements set forth in the original.

This saga began on January 20, 1962 when Richard F. Watson and Evelyn P. Watson recorded "Preliminary Restrictions and Protective Covenants applicable to certain property on both sides of Pelham Road". (R. Pg. 404) Ultimately, 47 lots were platted and approved by the Greenville County Planning Commission on Plat entitled "Watson Orchard" recorded

in Plat Book 000 Page 99. (R. Pg. 396) Additional "Restrictions and Protective Covenants applicable to certain property on the North side of Pelham Road" were recorded on September 22, 1964. (R. Pg. 412) These restrictions are still in effect for Watson's Orchard Subdivision.

In 1980, Lincoln of S.C., Inc. acquired all, or substantially all, of Watson's property on the south side of Pelham Road and endeavored to remove the restrictive covenants from that property to allow commercial development. (R. Pg. 378) In an effort to induce the lot owners in Watson's Orchard Subdivision to consent to the release of the restrictions Lincoln ultimately negotiated the payment of $50,000.00 in cash, conveyed a parcel of approximately 14.7 acres fronting on the southern side of Pelham Road as a Buffer zone and purchased an additional tract from a third party containing approximately 8 acres fronting on the eastern side of Haywood Road. (R. Pg. 379) The Haywood tract was acquired to provide a Buffer on both major roads. Restrictions were also imposed on the use of the Buffer zone and Haywood tract as well as some restrictions on the commercial use of the property being released. (R. Pg. 444-451) These negotiations were memorialized in an Agreement to Release of Restrictions prepared by Lincoln and executed by the then property owners. Subsequent to the execution of the Agreement to Release of Restrictions an action was brought in common pleas court and an Order entered accomplishing the provisions set forth in the agreement with the exception that a portion of the Buffer zone containing approximately 6.2 acres was agreed to be sold to J.B. Stephens after consummation of the transaction between Lincoln and the homeowners. (R. Pg. 391)

Immediately subsequent to the issuance of the Order of Judge McGowan, Lincoln imposed the restrictive covenants at issue on the Buffer zone and the Haywood property then conveyed the premises to Watson Orchard Property Owners Association, Inc. (hereinafter WOPOA). (R. Pg. 431) Stock was then issued from the corporation to all of the lot owners with the exception of J.B. Stephens. (R. Pg. 423-425) The restrictive covenants that were recorded affect only the Buffer zone and the Haywood Road property and do not affect or modify the existing covenants that were applicable, and are still applicable, to the Watson Orchard Subdivision. (R. Pg. 452)

Immediately after the conveyance by Lincoln to WOPOA, WOPOA sold a portion of the Buffer zone to J.B. Stephens for $105,000.00. (R. Pg. 565) The net effect to the then homeowners in Watson Orchard Subdivision was that they each received $3,000.00 in cash and vicariously owned property having a present value of at least $211,000.00 in 1981 dollars if sold as residential lots as the restrictions required. (R. Pg. 373)

Although apparently some effort initially was made by the corporation to abide by its stated purpose in the Articles of Incorporation (R. Pg. 729), between 1984 and 2005 it does not appear the corporation was in any way active as there is a dearth of corporate records for that time period. It wasn't until 2005 that J.B. Stephens made an offer in excess of two million dollars for the WOPOA property, as restricted, that kindled the greed and selfishness which led to the actions necessitating this litigation (R. Pg. 698-699). Although that transaction was never reduced to contract, or consummated, it was then that WOPOA obviously realized that the interest of the shareholders and the interest of the property owners were rapidly diverging. WOPOA acknowledged that they now comprised less than one third of the current owners of homes in the subdivision and with visions of a substantial windfall above and beyond that originally intended, it could only be obtained by removing the covenants and restrictions from the Buffer zone (R. Pg. 710-711). Although living next door to commercial offices was unacceptable when the shareholders of WOPOA owned the homes in1981, it apparently is perfectly acceptable now that they most do not.

Ralph Aiken, President of WOPOA undertook to appoint a committee, led by him, to explore all possible methods of removing the restrictions of single family use only from the Buffer zone (R. Pg. 700).

Throughout the subsequent process of attempting to remove the covenants the Defendants adopted whatever view they deemed expedient as to the number of votes entitled to participate (R. Pg. 778). When J.B. Stephens was not on their side he had one vote. Sometimes they believed 47 votes were appropriate, sometimes 56 votes and sometimes 64 votes (R. Pg. 707-708). Votes necessary were directly a function of how many favorable votes they had, or what they thought they could get away with, not what the document required.

They hired attorneys, including Mr. Grayson (R. Pg. 747) who filed an affidavit in this action, to give them an opinion as to how many votes were necessary. Despite Mr. Grayson's now affidavit, in 2008 he didn't seem to know how many votes were needed as he sent a packet of documents to a title insurance company for an opinion (R. Pg. 695-696). Ultimately, even the improperly recorded covenants still reflect the Defendants' lack of consensus on the proper method to tally the appropriate votes (R. Pg. 148).

SUMMARY OF ARGUMENT

Plaintiffs' position is simple and concise, the Defendants lacked a majority vote as required under the Covenants.

The Covenants are somewhat unique in that in order to amend or modify the Covenants the vote is required of the owners of the lots of an adjoining subdivision (which is not subject to the Covenants) in addition to the owner of the lots of the property which is subject to the Covenants. The language to that effect, and which is ultimately determinative of the issue presented, is found in the second paragraph:

> "....and shall inure to the benefit of each owner thereof and all owners of property in Watson Orchard Subdivision as shown on Plat recorded in the RMC Office for Greenville County in Plat Book 000, Page 99, and the lot in Plat Book 4-C Page 133, hereinafter referred to as "Watson's Orchard Subdivision", until January 1, 2010 at which time said covenants, conditions and restrictions shall be automatically extended for successive periods of ten (10) years each unless, by vote of a majority of the then owners of the lots into which the property described above shall have been developed and in Watson's Orchard Subdivision, (Emphasis added)

"The main guide in contract interpretation is to ascertain and give legal effect to the intentions of the parties as expressed in the language of the contract" Gilbert v. Miller, 586 S.C.2nd 861 (Ct. App. 2003). "If a contract's language is clear and capable of legal construction, this Court's function is to interpret its lawful meaning and the intent of the parties as found in the agreement" *id at* 30-31 586 S.C.2nd at 864. "A clear and explicit contract must be construed according to the terms the parties have used, with the terms to be taken and understood in their plain, ordinary and popular sense" *id*, 586 S.C.2nd at 864. "Under the parol evidence rule, extrinsic evidence is inadmissible to vary or contradict the terms of a contract" Penton v. J.F. Cleckley & Co., 486 S.C.2nd 742 (1997).

"Words of restrictive covenant will be given the common, ordinary meaning attributed to them at the time of their execution" Taylor v. Lindsey, 332 S.C.1, 498 S.C.2nd 862 (1998). "Restrictive covenants are contractual in nature, so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document" (emphasis added) Taylor v. Lindsey (infra).

When "the language imposing restrictions upon use of property is unambiguous, the restrictions will be enforced according to their obvious meaning", Shipyard Property Owners Association v. Mangiaracina, 307 S.C. 299, 414 S.C. 2nd 705 (Ct.App. 1992). It is the Plaintiffs' contention that the 1981 covenants and restrictions, interpreted from the four corners of the document, is unambiguous and when read in their plain, ordinary and popular meaning invalidate the votes cast by the defendants in this action.

The covenants themselves, other than the provision allowing enforcement and voting by property not subject to the covenants, were not atypical of residential covenants and restrictions utilized in that time frame. They restrict the property to single family residential use, prohibit certain nuisance and noxious activities, establish an architectural committee for control of the type and character of homes to be built thereon, regulate mailboxes and establish certain minimum lot sizes and building sizes that the property may be developed.

Subsequent to the imposition of the covenants by Lincoln of South Carolina, Inc., it conveyed the premises burdened by the restrictive covenants to Watson's Orchard Property Owner's Association, Inc., a corporation formed for the purpose stated in its articles of incorporation to "...engage in the business of selling and developing approximately 22.12 acres of residential real estate..." (emphasis added). Immediately after acquiring title, the property association conveyed a tract of land to the predecessor in title of the Appellants. At the time of the attempt to remove the covenants from the premises the evidence reflects that the property now consists of three tracts of land with three separate and distinct tax map identification numbers and that none of the tracts have ever applied for, been approved for or recorded a subdivision plat, nor have any homes been constructed thereon.

Within the "four corners" of the document at issue there is no definition of the term "lot" or the term "developed", nor is one necessary. Each has a plain ordinary meaning and

must be reviewed, taken and understood in their plain, ordinary and popular sense.

The inclusion of clear and unambiguous language in the paragraph establishing the criteria for amendment which states "...by vote of a majority of the then owners of the lots into which the property described above shall have been developed and in Watson's Orchard Subdivision..." means expressly that, "lots" that "have been developed" and is dispositive of this issue. To construe it in any other way would be to eliminate the language from the covenants entirely. If it meant the tracts were to have 15 votes then it would have said that. If it meant the tracts were to have the number of votes that it could be developed into, then it would have said that. If it was not mandatory that the lots have actually been developed it would have said "may" rather than shall. It did neither, instead it specifically inserted language that under any other interpretation would be superfluous, unnecessary and inapposite to what it does say. No machinations are needed to read it to -say in order to vote the "lot" shall have been "developed".

The plain, ordinary and popular sense use of these same words are contained within numerous cases, statutes and ordinances in effect at the time of its creation.

"Lot" is defined by the Greenville County Subdivision Ordinance that was in effect at the time of the creation of the covenants as "A portion of a subdivision or other parcel of land having a minimum of 20 feet frontage on, or approved access to, a public street and intended for transfer of ownership or for building purposes" (emphasis added). Although the word "developed" is not specifically defined in the Subdivision Ordinance, the plain and ordinary use of the term in relation to real property is expressed within the very definition giving rise to the ordinance itself. "Subdivision-means all divisions of a tract or parcel of land into two or more lots, building sites, or other divisions for the purpose, whether immediate or future, of sale, legacy, or building development." Black's Law Dictionary defines "lot" as "a share; one of several parcels into which property is divided" and it defines "develop" "to bring, or attempt to bring, to a state of fruition; continue the work in hand, as in operating under an oil and gas lease, in a manner that would discover oil, if it existed, and promote its production". The plain and ordinary use of the phrase "develop" is also contained in numerous statutes but perhaps most clearly used in it's ordinary sense by the following:

SECTION 12-43-224. Assessment of undeveloped acreage subdivided into lots. Notwithstanding the requirement that real property is required by law to be appraised at fair market value for ad valorem tax purposes, when undeveloped acreage is surveyed into subdivision lots and the conditional or final plat is recorded with the appropriate county official, the county assessor shall appraise each lot as an individual property and then discount his gross actual market value estimate of the developer's lot holdings under the following conditions...".

Of course, the plain ordinary meaning of develop in the context of real estate needs no definition by statute, ordinance or case law. That common knowledge is expressed exactly as 99.99% of everyday people understand it in the section set forth above.

The uncontradicted evidence was that nothing, not one thing, was done in the thirty years the Appellants have owned this property to change its character. No subdivision plat has been prepared, no subdivision plat has been presented to the Greenville County Planning Commission, no improvements of roads, sewers, water or electricity have been installed, no building permits have been issued, or buildings constructed. To the contrary the property has laid untouched the entire existence of these covenants and restrictions. The Appellants, who have reaped the benefit for thirty years of paying less real property taxes on undeveloped tracts of land, now wish this court to anoint their property as "developed lots" just long enough for them to be able to vote not to have to use them as lots. To accept that contention by the Appellants, the court would have to construe the intent of the covenants as being to exist for a period of thirty years and then simply expire. Such an interpretation would essentially ignore every single word contained within the covenants.

South Carolina law requires the recordation of a plat whenever property is subdivided for the purpose of sale or offering of sale, Section 30-5-240 South Carolina Code of Laws, and the Greenville County Subdivision Ordinance prohibits the subdividing or offering for sale of property unless a subdivision plat is approved by the Greenville County Planning Commission and recorded. The ordinance and statute were in existence at the time of the creation, of the covenants. In order for any "lot" to have been "developed" compliance with those laws was necessary, essential and obviously contemplated. No such compliance ever

occurred. There is not now, nor has there ever been, a subdivision plat submitted to or approved by the Greenville County Planning Commission or any subdivision plat ever recorded.

Further evidence of the intent of the parties is contained within the document itself. The paragraph immediately following the paragraph defining a majority for the purposes of amendment defines persons entitled to enforce the covenants and states, "if the undersigned, its successors or assigns, or any property owner of any lot into which the property described above shall subsequently be cut should violate or attempt to violate...". (emphasis added). Article I, subparagraph (11) states "nothing herein contained shall be construed to prohibit the use of more than one lot or portions of one and more lots as a single residential building site, provided that said lot would otherwise meet the requirements as to size, frontage, set back line and directional facing of said building as determined by the architectural committee". Article II, subparagraph (2) sets forth the frontage and lot size restrictions that the tracts may be minimally developed into.

The Declarant was not a party to this litigation. The only intent to be garnered in the construction of the agreement is that of the Declarant from the agreement itself absent an ambiguity. No action performed by the Defendants or the Plaintiffs, prior, or subsequent, to the recording of the declaration has any relevance to the interpretation of the document.

Appellant's entire case, in a nutshell, relies upon the phrase, "containing 5 lots" in a deed from the defendant, Watson's Orchard Property Owners Association, Inc. to the other defendants. This deed, if admissible at all, is relevant only to the issue as to whether the Stephen's property had been "developed" into "lots".

While the deed does state that it is conveying property "containing five lots" the legal description of the deed is a metes and bounds boundary description of a tract containing approximately 6.5 acres. It does not and could not "create" 5 lots, that would have required an approved and recorded subdivision plat. What it does mean, giving the word "containing" its plain ordinary meaning (to hold or contain within its volume or area), is that the tract conveyed contained a sufficient volume of land to allow it to be developed into 5 lots under the existing covenants and restrictions. The effect of the transfer was no greater than that

which occurred when the property association acquired title to its tract. There were now two tracts of land rather than one, each of which could be developed into lots but never were. (It was lawful in 1981 to subdivide a tract into parcels of at least 5 acres without approval of the Planning Commission).

Defendants' "expert" witnesses were anything but. To a person they avoided the word developed and rather than opine on the "plain, ordinary and popular meaning of the phrase, obfuscated, convoluted and unsupported "opinions" that somehow that was an acceptable subdivision under the terms of the Covenants. Having heard the testimony I am still unclear on what basis they arrived at their conclusions but am certain it was not by giving the terms their plain, ordinary and popular meaning. The probable reason our courts do not allow a grantor to testify to what he "meant" to say was demonstrated by the testimony of the drafter of the Covenants. To testify that the word used should be given the definition of a word that was not used is completely adverse to the criteria for construing a document. Testimony that good title could be conveyed based solely on reference to an unrecorded plat is even more ludicrous. See Section 30-5-250 (S.C. Code of Laws.) That would be especially true in the case at hand as it was uncontroverted that the plat referenced in the deed could never be recorded.

Likewise, reliance upon repetitions of an incorrect statement can't ever make the original statement correct. If I tell someone I have a cat when I actually have a dog, no matter how many people they repeat it to or how many times it gets written down, I still have a dog.

A final impediment to the Defendants' reliance upon the single phrase contained within the prefatory portion of the deed description is that allowing the deed to constitute a subdivision would constitute the enforcement of an illegal contract. "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", Jackson v. Bi-Lo Stores, Inc, 437 S.C.2nd 168 (Ct. App. 1993). "The general rule, well established in South Carolina, is that courts will not enforce a contract when the subject matter of the

contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decision", Beach Co. v. Twillman, Ltd., 566 S.C.2nd 863 (Ct. App. 2002). It is a well-settled principle of contract law that "a contract to do an act which is prohibited by statute, or which is contrary to public policy, is void, and cannot be enforced in a court of justice." McConnell v. Kitchens, 20 S.C. 430, 43738 (1884); *see also* Pendarvis v. Berry, 214 S.C. 363, 369, 52 S.E.2d 705, 707 (1949) *See also* Cent. States Health & Life Co. of Omaha v. Miracle Hills Ltd. P'ship., 456 N.W.2d 474 (Neb. 1990) (holding that when a lease restricts the use of a premises to a single purpose that is prohibited by zoning regulations, that lease is unenforceable and relieves the parties of all obligations thereunder). As such, the parties must be left as the court found them. *See* 17A C.J.S. *Contracts* § 362 (2011) ("As a general rule, both at law and in equity, a court will not aid either party to an illegal contract... but leaves the parties where it finds them."). Atlantic Coast Builders v Lewis, Opinion 27044 (2012). ("Men may enter into any agreements they please and, as between themselves, may either respect or disregard them. When, however, they are submitted to the courts for adjudication, they must be tested and governed by the law.'") Pendarvis v. Berry, 52 S.C.2nd 705 (1949).(quoting Gilliland v. Phillips, I S.C. 152 (1869).

Defendants' alleged "subdivision" of the tract into "lots" by virtue of a deed is undeniably violative of public policy and statutory law and therefore cannot be a basis, under any circumstances, for its claim of five votes.

The covenants clearly and unambiguously impose a condition precedent on the subject property which must be complied with before that property is entitled to a vote. The condition is that only those "lots which shall have been developed" are entitled to vote. No lots have been developed under any possible interpretation of the plain ordinary meaning of that phrase nor as required by both state and county law and Plaintiffs are entitled to a declaration that the votes cast by the owners of those properties are invalid as a matter of law.

ARGUMENT

I. The "settled rule" is that restrictive covenants will be given the common, ordinary meaning attributed to them at the time of their execution.

"Words of restrictive covenant will be given the common, ordinary meaning attributed to them at the time of their execution" Taylor v. Lindsey. "Restrictive covenants are contractual in nature, so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document" Taylor v. Lindsey.

When "the language imposing restrictions upon use of properties unambiguous, the restrictions would be enforced according to their obvious meaning" Shipyard Property Owners Association v. Mangiaracina.

II. The factual determinations made by the trial court are not subject to review.

Although Appellants seek to reargue all of the factual contentions raised at trial throughout the remaining body of their brief from Argument II through its conclusion, such argument is beyond the standard of review of this Court.

"Restrictive covenants are construed like contracts and may give rise to actions for breach of contract." Queen's Grant II Horizontal Property Regime v. Greenwood Dev. Corp., 368 S.C. 342, 361 628 S.E. 2nd 902, 913 (Ct.App.2006). "An action to construe a contract is an action at law reviewable under an 'any evidence' standard." Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n, 343 S.C. 335, 339, 540 S.E.2nd 843, 845 (2001. "On appeal of an action at law tried without a jury this court's review is limited to correction of errors at law." Epworth Children's Home v. Beasley, 365 S.C. 157, 164, 616 S.E.2nd 710, 714 (2005). "The trial court's findings are equivalent to a jury's findings in a law action." King v. PYA Monarch, Inc., 317 S.C. 385, 389, 453 S.E.2nd 885, 888 (1995). "Questions regarding credibility and the weight of the evidence are exclusively for the trial court." Sheek v. Crimestoppers Alarm Systems, 297 S.C. 375, 377, 377 S.E.2nd 132, 133 (Ct.App.1989). "We must look at the evidence in the light most favorable to the respondents and eliminate from consideration all evidence to the contrary." *Id.*

Even were that not the case Appellants' entire argument continues to revolve around whether the subject property was considered "lots". No where to be found in Appellants' argument is how that word relates to the four corners of the restrictive covenants. Most specifically, how that word relates to the phrase, which is essential to interpretation of the

document, "it shall have been developed".

The following "facts" are uncontroverted anywhere in the record.

1. The grantor of the deed to the Appellant was not the Declarant of the restrictive covenants. (R. App. Pg. 140 Lns. 3-18)

2. Nothing contained within that deed can vary, modify or otherwise provide any basis for interpreting the declaration of covenants and restrictions.

3. In the thirty years subsequent to the issuance of that deed, no subdivision plat has ever been recorded. (R. App. Pg. 28 Lns. 11-22)

4. It would be unlawful to convey more than one portion of the Appellants' property without the filing of an approved subdivision plat. (R. App. Pg. 29 Ln. 20 to Pg. 30 Ln. 14)

5. Only one building permit could be issued on the Appellants' property. (R. App. Pg. 56 Lns. 4-8)

6. Only one curb cut and one water meter could be obtained for the Appellants' property. (R. App. Pg. 6 Ln. 6 to Pg. 69 Ln. 11)

7. The property has been assessed and paid taxes for thirty years on the basis that it is a single piece of property.

8. The attorney who handled the transaction of the original acquisition of the property in 1981 testified, "No, um, Jim was acquiring a piece of property that was, uh, described by metes and bounds, uh, I understand that if un—at least by today's standards would have to have recorded the plat but it was not considered necessary by me at that time."...

Q. Okay, did you convey that to him that he would have to subdivide the property and record a plat if he wanted to sell any of these lots?

A. No, that really wasn't, uh, discussed. He had no interest in anything other than utilizing those five lots as a buffer for his property.

Q. Yeah, he was simply buying that property so no one could build across the street from him to block his view.

A. I think that is what he wanted to do. (R. App. Pg. 163 Lns. 11-21)

The Appellant ignores all of these "facts". It's sole argument is based upon the phrase "containing five lots" contained in a deed from one of the Defendants to the other Defendant and its subsequent replication in numerous self serving deeds thereafter occasionally supplemented by the "well it may be against the law but it is not one that anybody really enforces."

"Shall have been developed" has a very plain and ordinary meaning but it is most certainly not doing absolutely nothing for thirty years. Even absent county ordinances and state laws governing the development of real estate it is beyond comprehension that any rational person would construe doing nothing as satisfying that provision.

Appellants claim that the evidence was "overwhelming" is both baseless and not the standard of review, just as their evidence was, and completely ignores the restrictive covenants that the Court was asked to interpret. Although Appellants cite some seventeen reasons that the original purchaser may have considered the property capable of being developed into five lots, the simple fact remains that nor of it was ever accomplished. The attorney who handled the acquisition of the property, as set forth hereinabove, testified that he never intended to develop or subdivide it into five lots and certainly the covenants gave him that option.

III. The testimonial evidence is irrelevant and inadmissible.

As Appellants correctly point out in a footnote to their brief regarding the testimony of the purported "expert" witnesses, "[a] Trial Court's ruling to exclude or admit expert testimony will not be disturbed on appeal absent a clear abuse of discretion." Mizell v. Glover, 351 S.C. 392, 570 S.C.2nd 176, (2002). The trial court after hearing the testimony in its order determined that the expert opinions were not admissible. Thus the testimony of Mr. Grayson, Mr. Shouse and Mr. Estridge was properly discarded by the trial court as expert opinion and any "factual" testimony provided was irrelevant to the issue presented. Dawkins v. Fields, 354 S.C. 58, 580 S.C.2nd 433 (2003).

Particularly, Mr. Grayson's effort to testify as to the intent of the parties was clearly

inadmissible for numerous reasons. Firstly, no *parol* evidence is admissible at all unless the trial judge rules that the document is ambiguous. Here the trial court ruled that the covenants and restrictions were unambiguous. Even had the court ruled the covenants ambiguous then it must be determined whether the intention of the parties cannot be ascertained from the four corners of the document. If not, then and only then, would *parol* evidence be admissible. Necessarily, that *parol* evidence would have to come from the parties, not from a scrivener hired thirty years earlier to prepare a document and now hired by the Appellants to attempt to circumvent it.

IV. Appellants argument that the property is lots is without merit.

Appellants' entire argument under their paragraph III mistakes the law and argues that breaking the law just a little bit is okay. More importantly it continues to completely ignore what the covenants say. They do not say "could be developed", "may be developed" or "we meant to develop them". It says lots that "shall have been developed".

The issue is not whether lots may be conveyed pursuant to unrecorded plats nor is it whether you can get away with violating the county subdivision ordinance nor how easy it would have been to comply with the subdivision ordinance. The issue is whether the plain ordinary meaning of the words 'shall have been developed' into lots is to be defined by what has happened rather than what could have happened. Shall have been developed is to be defined from the four corners of the covenants and restrictions. The sole purpose of this property was that it be developed as a residential buffer to induce the existing Watson Orchard Property Owners to agree to commercial development, but not adjoining their residential subdivision. It is unimaginable that at the time these restrictions were placed upon this property that the Declarant or the owners of homes in the subdivision could have remotely contemplated that this property would lie fallow for thirty years and then be "subdivided" so that it could vote to avoid the originally intended purpose.

The simple fact remains that if this property had been subdivided into lots and a subdivision plat had been filed and recorded, thereby enabling these lots to be sold individually, building permits and curb cuts obtained for each, and then actually sold, this litigation and this appeal would never have been necessary. The exercise of "discovering" that these were really

intended to be five separate developed lots for which real estate taxes should have been paid for the past thirty years would not now be necessary. Indeed, had the Appellants actually recorded the subdivision plat and sold the lots they would not now be required to rely on what some employee wrote in the index at the Register of Mesne Conveyance office thirty years ago as "evidence" that this property is actually multiple "lots".

V. The text of the 1981 R and C clearly show the Appellants' property had not been developed.

Here the Appellants do in fact actually state that the case turns upon whether the property shall have been developed and then summarily say that it has.

Appellants also completely misrepresent the position taken by Respondent. The testimony and evidence related to the legality of the sale of the property as anything less than a single parcel is evidence that they were not developed. State and county law required recordation of plats in order to develop the property. State tax laws treat subdivided property different from unsubdivided property. Appellants were more than willing to pay less real property taxes on this lot for thirty years without pointing out to the tax assessor all of the "evidence" they had that their property should be assessed as five separate lots. The lack of doing what the law requires done is overwhelming evidence that the "lots' were not "developed" as required and intended by the covenants.

To claim that the portion of the covenants which state "into which the property described above shall subsequently be cut" is dispositive, ignores the remaining covenants and reality. However, even if you were to accept the Appellants' position, the property was cut, but only into two parts and thus the Appellants are still left with but one vote.

Perhaps the most perverse argument made by the Appellants is based upon the testimony they solicited from numerous witnesses as to the perfunctory process of preparing, gaining approval and recording a plat subdividing their property so that it could be taxed as five separate parcels and immediately sold as such. Appellants would have you suspend logic long enough to believe that not doing something so simple and easy is somehow evidence that it was done. To the contrary, a rational person would construe that testimony as evidence of the exact contrary intention. Not doing something that could easily be done is

just further proof that there was no intention to do it.

A singl tax bill for thirty years, no plat ever recorded, no right to build and the express testimony of the original purchasers personal attorney that there was never any intention to file a subdivision plat is much more than the "any evidence" standard required to affirm the tiral court's decision.

ADDITIONAL SUPPORTING GROUND TO AFFIRM

The appeal is moot as any relief that could be awarded by reversal to the Appellant would be superfluous. The original Defendant, Watson's Orchard Property Owners Association, Inc., has not appealed the order of the trial court. Accordingly, any findings in the order as to that Defendant are the law of the case.

The trial court specifically found, "that the property owned by the Defendant, Watson's Orchard Property Owners Association, Inc....has not been developed into lots for the purpose of being entitled to vote to amend or modify the restrictive covenants.

Pursuant to the amendment to exhibit "D" to Amended and Restated Declaration of Restrictions of Protective Covenants filed by the Appellants in the ROD Office for Greenville County the non-appealing Defendant cast, either, two votes or ten votes in the election resulting in vote totals of either twenty nine out of fifty four or thirty seven out of sixty two if the corporation was entitled to ten votes. Since the un-appealed law of the case as to the votes cast by WOPOA is that they were entitled to zero votes then, at best, there would have been twenty seven out of fifty four votes, an insufficient number to amend the original declaration.

CONCLUSION

Every year for thirty years the Appellant, upon opening his tax bill, was reminded that the public records for the County of Greenville reflected this property as consisting of one lot. Not one time during those thirty years did the Appellant takes his deeds, his grantor indexes and Mr. Grayson down to the assessor's office to correct that misconception. Never during that time did the Appellant take that "evidence" to the Planning Commission or the ROD Office to insure that the public records accurately reflected the subdivision of this property into five individual lots. The only person in the State of South Carolina who now

claims they knew and intended that this property be five lots, and could have done something about it, did nothing. Nothing, that is, until faced with the realization that a majority of the homeowners in Watson Orchard Subdivision were most decidedly not going to vote to remove the restrictions from this property. Then, and only then, when having five votes became essential, the Appellant, for the first time during his ownership, sought to claim otherwise.

The trial court heard the evidence and made findings of fact for which there is evidence to support within the record. Based upon those facts the trial court interpreted the covenants and restrictions as being unambiguous and gave the words therein their plain, ordinary meaning as the court was required to do. In doing so the court found that the phrase "shall have been developed" required doing something and at a minimum required placing the property into a condition whereby it could legally be built upon and sold. The failure of the Appellants to do anything was found to be fatal by the trial court and the decision should be affirmed.

RANDALL S. HILLER, P.A.

Randall S. Hiller
S.C. Bar No.: 2513
850-B Wade Hampton Blvd.
Post Office Box 1716
Greenville, South Carolina 29602
(864) 232-0026
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2009-CP-23-7707

R.C. Frederick Hanold, III and Rose F. Hanold, and Carol R. Mitchell and George P. Mitchell, Jr., ...Respondents.
v.

Watson's Orchard Property Owners Association, Inc., a South Carolina Corporation, and Pelham Farm, LLC, a South Carolina Corporation, Legacy One, LLC, a South Carolina Corporation, SESP LLC, a South Carolina Corporation, an unknown Trustee of the Revocable Trust Agreement Dated March 19,1996 established by James B. Stephens as amended, and unknown Jay Stephens and Mike Stephens as Co-Personal Representative of the Estate of James B. Stephens, ...Defendants.

Of whom Pelham Farm, LLC, a South Carolina Corporation, Legacy One, LLC, a South Carolina Corporation, an unknown Trustee of the Revocable Trust Agreement Dated March 19, 1996 established by James B. Stephens as amended, and unknown Jay Stephens and Mike Stephens as co-Personal Representative of the Estate of James B. Stephens, ...Appellants.
v.

Property Owners in Watson's Orchard Subdivision: N. Carter Poe, III; McNally Reeves, as Trustee of the Residual Trust under item Five of the Last Will and Testament of Hattie L. Reeves dated February 9, 1998; Janet B. Yusi; Lucy S. Tiller; James G. Stephens; Rachel P. McKaughan; Ramon J. Ashy and Jana Ashy; Christopher D. Scalzo and Heather V. Scalzo; Erma R. Rash, as Trustee of the Erma R. Rash Revocable Trust dated February 12, 2010; James Edwin Conrad, as Trustee of the James Edwin Conrad Living Trust dated September 7, 2010; Sue Lane Conrad; Horst H. H. Eschenberg and Floride C. Eschenberg; Caryl L. Clover, as Trustee of the Caryl L. Clover Revocable Living Trust Agreement dated May 12, 1999; Mary F. Newell; Timothy M. Conroy and Elizabeth W. Conroy; Nathan Scolari; Joel Wells Norwood and Lynn Norwood; J. Lynn Shook; Juan Hernandez and Janice M. Pelletier; Scott P. Payne and Kathleen H. Payne; Joe G. Thomason and Dana L. Henry Thomason; Traci Segura; Cameron E. Smith and Joan B. Smith; Charles E. Howard and Sharon F. Howard; Penelope J. Galbraith; Meredith C. Vry; Delores B. Mitchell; Lisette M. Silva and Mary F. Colley; Ilona K. Alford and William G. Alford; George T. McLeod and Martha T. McLeod; Ronald S. Wilson and Robin E. Wilson; The Merrill J. Gildersleeve and Anore L. Novak Revocable Living Trust dated November 1, 1996; Anna Marie T.Azores and Kim 0. Gococo; Ashley Westrope as Trustee of Martha Randolph Westrop Trust dated June 6, 1988; Cliff C. Jollie and Martha W. Jollie; David A. Saliny and Xiaoli Saliny; Lecia S. Franklin; Dean D. Varner and Deborah P. Varner; W. Frank Durham, Jr.; Christine M. Howard; Samuel P. Howard, Jr. and Jane H. Howard; Manfred E. Kramer and Jane J. Kramer; Mary J. Steele; James J. Barrett, III and Kimberly A. Barrett; Richard A. Herman and

Patricia L. Herman,.....Third Party Defendants.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

February 24, 2014

Randall S. Hiller
850 Wade Hampton Blvd.
Greenville, South Carolina 29609
(864) 232-0026
Attorney for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2009-CP23-7707

R.C. Frederick Hanold, III and Rose F. Hanold, and Carol R. Mitchell and George P. Mitchell, Jr., ...Respondents.

v.

Watson's Orchard Property Owners Association, Inc., a South Carolina Corporation, and Pelham Farm, LLC, a South Carolina Corporation, Legacy One, LLC, a South Carolina Corporation, SESP LLC, a South Carolina Corporation, an unknown Trustee of the Revocable Trust Agreement Dated March 19,1996 established by James B. Stephens as amended, and unknown Jay Stephens and Mike Stephens as Co-Personal Representative of the Estate of James B. Stephens, ...Defendants.

Of whom Pelham Farm, LLC, a South Carolina Corporation, Legacy One, LLC, a South Carolina Corporation, an unknown Trustee of the Revocable Trust Agreement Dated March 19, 1996 established by James B. Stephens as amended, and unknown Jay Stephens and Mike Stephens as co-Personal Representative of the Estate of James B. Stephens, ...Apellants.

v.

Property Owners in Watson's Orchard Subdivision: N. Carter Poe, III; McNally Reeves, as Trustee of the Residual Trust under item Five of the Last Will and Testament of Hattie L. Reeves dated February 9, 1998; Janet B. Yusi; Lucy S. Tiller; James G. Stephens; Rachel P. McKaughan; Ramon J. Ashy and Jana Ashy; Christopher D. Scalzo and Heather V. Scalzo; Erma R. Rash, as Trustee of the Erma R. Rash Revocable Trust dated February 12, 2010; James Edwin Conrad, as Trustee of the James Edwin Conrad Living Trust dated September 7, 2010; Sue Lane Conrad; Horst H. H. Eschenberg and Floride C. Eschenberg; Caryl L. Clover, as Trustee of the Caryl L. Clover Revocable Living Trust Agreement dated May 12, 1999; Mary F. Newell; Timothy M. Conroy and Elizabeth W. Conroy; Nathan Scolari; Joel Wells Norwood and Lynn Norwood; J. Lynn Shook; Juan Hernandez and Janice M. Pelletier; Scott P. Payne and Kathleen H. Payne; Joe G. Thomason and Dana L. Henry Thomason; Traci Segura; Cameron E. Smith and Joan B. Smith; Charles E. Howard and Sharon F. Howard; Penelope J. Galbraith; Meredith C. Vry; Delores B. Mitchell; Lisette M. Silva and Mary F. Colley; Ilona K. Alford and William G. Alford; George T. McLeod and Martha T. McLeod; Ronald S. Wilson and Robin E. Wilson; The Merrill J. Gildersleeve and Anore L. Novak Revocable Living Trust dated November 1, 1996; Anna Marie T.Azores and Kim 0. Gococo; Ashley Westrope as

Trustee of Martha Randolph Westrop Trust dated June 6, 1988; Cliff C. Jollie and Martha W. Jollie; David A. Saliny and Xiaoli Saliny; Lecia S. Franklin; Dean D. Varner and Deborah P. Varner; W. Frank Durham, Jr.; Christine M. Howard; Samuel P. Howard, Jr. and Jane H. Howard; Manfred E. Kramer and Jane J. Kramer; Mary J. Steele; James J. Barrett, III and Kimberly A. Barrett; Richard A. Herman and Patricia L. Herrman,.....Third Party Defendants.

PROOF OF SERVICE

I certify that I have served the Final Brief of Respondents by depositing a copy of it in the United States Mail, postage prepaid, on November 14, 2013, addressed to its attorney of record, William Herlong, Esq., Post Office Box 2003, Greenville, South Carolina 29602.

February 26, 2014

Randall S. Hiller
850 Wade Hampton Blvd.
Greenville, South Carolina 29609
(864) 232-0026
Attorney for Respondents