

THE SUPREME COURT OF SOUTH CAROLINA

Appeal from the Court of Common Pleas
The Honorable John M. Milling
Georgetown County
Trial Court Case No. 2006CP2200914
South Carolina Court of Appeals.
Opinion No. 4779

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AJG Holdings, LLC, Stalvey Holdings, LLC,
David Croyle, Linda Croyle, Jean C. Abbott,
Linda T. Courtney, Sumter L. Langston,
Diane Langston, Carl B. Singleton, Jr.,
Virginia M. Owens, and Stoney Harrelson,
Respondents,

S.C. Supreme Court

v.

Levon Dunn, Pamela S. Dunn, and Robin H. Sasser
and Charles E. Sasser as Personal Representatives
of the Estate of Helen Sasser,
Petitioners.

RESPONDENTS' BRIEF ON CERTIORARI

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I. STATEMENT OF ISSUES PRESENTED

- A. The Court of Appeals correctly held that Sasser did not have any power to amend the restrictive covenants because she did not retain any property interest in the Sasser Subdivision.
- B. The Court of Appeals correctly held that Sasser did not assign “developer rights” to the Dunns because she did not retain any property interest in the Sasser Subdivision.
- C. The Court of Appeals correctly held it could not review the denial of a motion for summary judgment.

II. STATEMENT OF THE CASE

The Respondents accept the Statement of the Case stated in the Petitioners’ Brief on Certiorari except for the statements made in footnote #2 regarding Judge Abbott. Judge Abbott is not a party to this case and references to him in this footnote are not relevant and are disputed.

III. STATEMENT OF FACTS

This is an action to enforce restrictive covenants. Respondents are owners of various lots within the Helen Sasser Subdivision located within Georgetown County, S.C. Sasser acquired the land she subdivided from D.W. Green and

others in 1978 from the partition of a plantation. The lots within the subdivision are subject to uniform restrictive covenants imposed by Helen Sasser when she conveyed the lots. Each conveyance contained the following language regarding the restrictions: "This conveyance is made subject to the following restrictive covenants which are deemed to run with the land and are bound on the purchasers, their heirs and assigns." (R. 274:10 – 75:20; 237 - 49)

The restrictions that are relevant to this action are as follows:

1. That the expression "Developer" as used herein shall be construed to mean Helen Sasser, her heirs and assigns.
2. No lot shall be used for commercial purposes without express written consent from the Developer.

In 1991, Mrs. Sasser executed a deed to M. T. Coleman, et al, (hereinafter the "Coleman deed") wherein she conveyed various lots, tracts, and parcels of land. The consideration was \$92,500.00. That deed contained the following paragraphs:

This conveyance is subject to those restrictions of record as contained herein as well as is contained in the deed of Helen Sasser to Joseph Holmes dated March 17, 1983, recorded March 18, 1983 in Deed Book 207 at Page 758, Office of the Clerk of Court for Georgetown County.

.....

It is the intent of the grantor herein to convey to the grantees all of her ownership interest of approximately 18.32 acres, being the remaining

portion of the tract heretofore conveyed to her by D.W. Green et al. by deed dated July 28, 1978 recorded July 31, 1978 In Deed Book 160 at Page 772, Office of Clerk of Court for Georgetown County.

.....

It is the intent of the grantor herein to convey all remaining property as contained in the deed to the grantor herein by deed of D.W. Green, et al dated July 28, 1978 and recorded July 31, 1978 in Deed Book 160 at Page 772, Office of the Clerk of Court for Georgetown County.

The granting clause of the deed contains the following additional language:

“Together with all and singular, the Rights, Members, Hereditaments, and Appurtenances to the said premises belonging or in anywise incident or appertaining.” (R. 243 - 45)

Appellants concede in their brief that Sasser conveyed all her interests in the subdivision: “Undisputedly, Mrs. Sasser previously sold all the property in the Woodland Plantation subdivision to third-parties.” (Appellants’ Brief, P. 12)

During 2006, the Dunns began operating a commercial bed and breakfast and wedding venue enterprise on their property. The Plaintiffs instituted this action to enforce the restrictive covenants, in particular the prohibition against commercial activities. (R. 64-65; 66-67; 60-62)

By a document entitled Assignment and Indemnification Agreement, dated September 5, 2006, and recorded in the Office of the Register of Deeds for Georgetown County in Deed Book 185 at Page 258, Sasser purported to assign to

Levon and Pamela S. Dunn her rights as Developer under various deeds to the parties or their predecessors in interest, conveying Lots Number 5-E, 5-W, 6, 7, 8, 9, and 10. In the Assignment and Indemnification Agreement, Sasser states that “[Sasser] has full power and authority to make this assignment and owns the Developer rights under the Deeds free and clear of the rights of any third party.” (R. 226-28) By a document entitled Consent to Covenants and Restrictions dated September 6, 2006, and recorded in the Office of the Register of Deeds of Georgetown County in Deed Book 185 at Page 264, Levon Dunn and Pamela S. Dunn purported to “consent” to the use of their own property, being Lots 7, 8, 9, and 10, for any and all commercial uses, and to the subdivision of their lots. (R. 232-36)

Circuit Judge John H. Milling granted partial summary judgment to Respondents in his order dated September 2, 2008, on various issues. He denied Petitioners’ motion for summary judgment. The Court of Appeals affirmed on all counts. Petitioners’ Petition for Rehearing was denied and the Supreme Court subsequently granted certiorari.

IV. ARGUMENT AND CITATION OF AUTHORITY

A. Petitioners have waived their appeals regarding their tort counterclaims.

Petitioners have abandoned their appeals regarding their counter-claims.

Baker v. Chavis, 306 S.C. 203, 410 S.E.2d 600 (1991): (Issues not argued in a brief are deemed abandoned.)

B. The Court of Appeals correctly held that since Sasser did not retain any interest in the Sasser Subdivision, she did not retain developer rights.

Respondents agree with Petitioners that “development rights” are valuable property interests. They are among the “bundle of rights” that comprise ownership in real property. As such, they may be conveyed, and are conveyed, when an owner sells “all her right, title and interest” in land without a specific reservation of rights. In this case, the last deed out of Mrs. Sasser not only contained such a granting clause but also contained the standard habendum which read “Together with all and singular, the Rights, Members, Hereditaments, and Appurtenances to the said premises belonging or in anywise incident or appertaining.” Development rights are certainly contained within this language. Finally, if there were any question remaining of the parties’ intent to divest Sasser of any further involvement in the subdivision, the deed contained two highly unusual paragraphs that read:

It is the intent of the grantor herein to convey to the grantees all of her ownership interest of approximately 18.32 acres, being the remaining portion of the tract heretofore conveyed to her by D.W. Green et al. by deed dated July 28, 1978 recorded July 31, 1978 In Deed Book 160 at Page 772, Office of Clerk of Court for Georgetown County.

....

It is the intent of the grantor herein to convey all remaining property as contained in the deed to the grantor herein by deed of D.W. Green, et al dated July 28, 1978 and recorded July 31, 1978 in Deed Book 160 at Page 772, Office of the Clerk of Court for Georgetown County.

The Petitioners' assertion that Sasser retained anything, rights or otherwise, is simply not supported by anything in this record.

As the Court of Appeals noted, the Dunn's argument is a circular one: Sasser has developer rights because she reserved developer rights. This is a classic Catch-22 situation.¹

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Yossarian: Is Orr crazy?

Dr. 'Doc' Daneeka: Of course he is. He has to be crazy to keep flying after all his close calls he's had.

Yossarian: Why can't you ground him?

Dr. 'Doc' Daneeka: I can, but first he has to ask me.

Yossarian: That's all he's gotta do to be grounded?

Dr. 'Doc' Daneeka: That's all.

Yossarian: Then you can ground him?

Dr. 'Doc' Daneeka: No. Then I cannot ground him.

Yossarian: Aah!

Petitioners repeatedly assert that Sasser “specifically retained” developer rights. However, the exact opposite is true: she specifically transferred everything whatsoever that she ever owned in the property to the grantees in the Coleman deed. Petitioners’ assertion that the Coleman deed contained a clear reservation of her developer rights (Brief on Certiorari, P.7) is absurd. The adoption by reference in the Coleman deed of the restrictions stated in the 1983 Holmes deed merely subjected the property conveyed to those restrictions. The adoption of restrictions contained in another instrument without more cannot operate as a reservation of rights.

The controlling case is *Queen’s Grant Horizontal Property Regime, v. Greenwood Development Corp.*, 368 S.C.342, 628 S.E. 2d 902 (Ct.App.2006). In that case the Court of Appeals stated that “a developer may generally reserve to

Dr. 'Doc' Daneeka: There's a catch.

Yossarian: A catch?

Dr. 'Doc' Daneeka: Sure. Catch-22. Anyone who wants to get out of combat isn't really crazy, so I can't ground him.

Yossarian: Ok, let me see if I've got this straight. In order to be grounded, I've got to be crazy. And I must be crazy to keep flying. But if I ask to be grounded, that means I'm not crazy anymore, and I have to keep flying.

Dr. 'Doc' Daneeka: You got it, that's Catch-22.

Yossarian: Whoo... That's some catch, that Catch-22.

Dr. 'Doc' Daneeka: It's the best there is.

himself the right to amend restrictive covenants in his sole discretion, and may do so without the consent of the grantee, so long as he exercises that right in a reasonable manner. However, when a subdivision developer is divested of all interest in the subdivision, a reserved right to amend restrictive covenants is extinguished.” (internal citations omitted) It should be noted that in *Queen’s Grant*, the reservation was clear, unambiguous, and specific.

The only rights that Sasser could conceivably have retained were the right to amend the restriction against commercial uses and the right to amend the restriction against the subdivision of lots. Neither of these is a property right as envisioned by the Court in *Queen’s Grant, supra*. In fact, this situation is identical to that presented in the Georgia case cited as authoritative in the *Queen’s Grant* case, *Armstrong v. Roberts*, 254 Ga. 15, 325 S.E.2d 769) (1985). In that case, the restriction in issue provided: “no building shall be located on any lot nearer than fifty (50) feet to the front lot line, unless approved in writing by Sturgis Development Company, Inc.” After selling all its interest in the subdivision, Sturgis signed a waiver of the set back restriction. The Georgia Supreme Court stated:

So long as the developer owns an interest in the subdivision being developed his own economic interest will tend to cause him to exercise a right to waive restrictions in a manner which takes into account harm done to other lots in the subdivision. There is some economic restraint against arbitrary waiver. After the developer has divested himself of all interest in the subdivision this economic

restraint is lacking. We adopt the New York and Illinois rule. A developer of a subdivision who reserved the authority to waive restrictions in covenants running with the land no longer possesses that authority after divesting himself of his interest in the subdivision.

A parallel concept to the right to amend restrictions is the right to enforce them. South Carolina has recognized that a party lacks standing to enforce restrictions once they no longer have an interest in the subdivision. The cases of *McLeod v. Baptiste*, 315 S.C. 246, 433 S.E.2d 834 (1993), and *Shaw v. Hardy*, 270 S.C. 298, 241 S.E.2d 906 (1978), establish the rule that a party who no longer owns real property in a subdivision lacks standing to enforce the restrictions. In *McLeod*, the court concluded a "grantor lacks standing to enforce a covenant against a remote grantee when the grantor no longer owns real property which would benefit from the enforcement of that restrictive covenant." *McLeod*, 315 S.C. at 247, 433 S.E.2d at 835.

In *Shaw*, a claim of title to property was brought by Shaw against Hardy. The *Shaw* court noted: "Hardy does not claim, nor is there any indication that he could claim, any interest in the property. Indeed, Hardy expressly gave up any interest he may have had in the property in question by conveying that interest to the Martin's Lake Club prior to the institution of this suit." *Id.* at 300, 241 S.E.2d at

907. The court concluded Hardy was not a proper party to the lawsuit. The court explained:

Having parted with any interest in, or claim to, this property and there being no showing of his having reacquired any interest in it, Hardy was neither a necessary nor proper party defendant and his motion for summary judgment should have been granted.

In the present case, under this rule Sasser would have had no standing to enforce a violation of the restrictions once she conveyed all her interest in the subdivision. It follows that she would also have no right to amend the restrictions either.

Since it is undisputed Mrs. Sasser had divested herself of all interest in the subdivision, her right to amend the covenants was extinguished and she had nothing to assign to the Dunns. The Trial Court had to grant Respondents summary judgment under these facts.

Rules of construction of deeds support the Trial Court and Court of Appeal on this issue. "In construing a deed, the intention of the grantor must be ascertained and effectuated unless that intention contravenes some well-settled rule of law or public policy. In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law. *The intention of the grantor must be found within the four corners of the deed.*"

Gardner v. Mozingo, 293 S.C. 23, 25, 358 S.E.2d 390, 391-92 (1987) (emphasis added). The terms of an unambiguous deed may not be varied or contradicted by evidence drawn from sources other than the deed itself.”) (citations omitted); *Scott v. Scott*, 216 S.C. 280, 293, 57 S.E.2d 470, 476 (1950) (“[O]ne of the most valuable safeguards thrown around a deed is that parol evidence is not admissible to vary or contradict the terms of a written contract, and this applies in all its strictness to actions involving deeds.”); *Walters v. Summey Bldg. Systems, Inc.*, 311 S.C. 507, 509, 429 S.E.2d 854, 856 (Ct.App.1993) (“The construction of an unambiguous deed is a question of law, not fact. The terms of such a deed may not be varied or contradicted by evidence drawn from sources other than the deed itself.”) There is nothing ambiguous about the Coleman deed. Mrs. Sasser’s deposition and affidavit testimony given years after the deed cannot be considered in determining her intent. The face of that deed shows she intended to convey every interest she still had in the tract to her assigns, the Coleman grantees.

C. The Court of Appeals correctly refused to address the denial of Petitioners’ motion for summary judgment.

Petitioners had moved for summary judgment that the restrictions against commercial use of the lots within the Sasser Subdivision were personal to Mrs. Sasser and were extinguished upon her conveyance of all interest in the property. The Trial Court denied that motion, stating that the issue had to be determined “at trial.” The Court of Appeals refused to address the issue because the denial of a

motion for summary judgment is not appealable. *Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 580 S.E. 2d 440 (2003). Petitioners present no authority to overturn this well established rule.

Even if this Court should determine to review the denial of summary judgment, it is clear the record presented ample disputed facts. Therefore, even if the denial of summary judgment were appealable, the Trial Court's decision would have to be affirmed. In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Medical Univ. of South Carolina v. Arnaud*, 360 S.C. 615, 602 S.E.2d 747 (2004); *Rife v. Hitachi Constr. Mach. Co., Ltd.*, 363 S.C. 209, 609 S.E.2d 565 (Ct.App.2005). If triable issues exist, those issues must go to the jury. *Mulherin-Howell v. Cobb*, 362 S.C. 588, 608 S.E.2d 587 (Ct.App.2005).

D. Petitioners raise an issue for the first time in this appeal when they ask this Court to declare what rights transferred from Sasser to Respondents.

Conceding that the denial of a motion for summary judgment is not appealable, Petitioners make the curious argument that the Court of should have taken "the logical next step and set forth what rights, if any, actually transferred from Mrs. Sasser to the Respondents." Petitioners then argue for the next four pages of their brief that the restrictions were personal covenants of Mrs. Sasser, an

issue the trial court and Court of Appeals specifically declined to address. Petitioners should not be allowed to bring this issue in through the backdoor, especially in light of the fact that Petitioners base their argument on this issue primarily on the deposition testimony of Mrs. Sasser and an affidavit of Professor Wilcox. It is likely none of this testimony will be admissible at trial because the deeds in question clearly show on their face that the covenants run with the land. “In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law.” *Gardner v. Mozingo*, 293 S.C. 23, 25, 358 S.E.2d 390, 391–92 (1987). “The intention of the grantor must be found within the four corners of the deed.” *Id.* at 25, 358 S.E.2d at 392; *K & A Acquisition Grp., LLC v. Island Pointe, LLC*, 383 S.C. 563, 682 S.E.2d 252, 262 (2009).

This issue is not properly before this Court at this time and, if it were, Respondents would be entitled to a holding that the covenants run with the land and they are enforceable by Respondents.

CONCLUSION

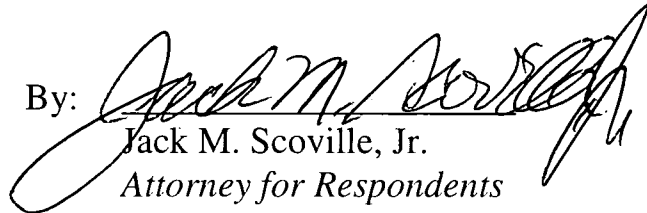
A ruling for Petitioners would throw the law of land titles and conveyance into chaos. A reversal of the Trial Court and Court of Appeals means one could no longer rely on the face of documents to mean what they plainly say. A developer

could come back years after apparently divesting all interest in a subdivision to make material changes in the covenants governing it. Such a ruling would encourage the same type of mischief as was practiced by the Dunns and Sasser in this case.

For these reasons, the Court of Appeals should be confirmed.

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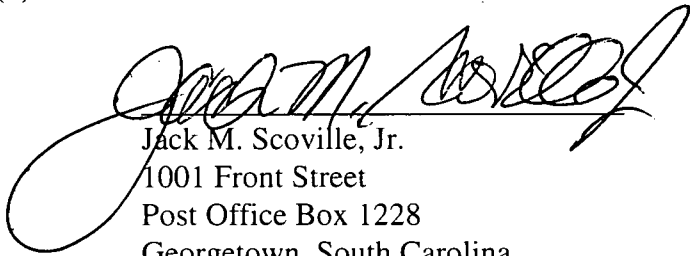
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Respondents' Brief of Certiorari in the above-captioned matter complies with Rule 211(b).



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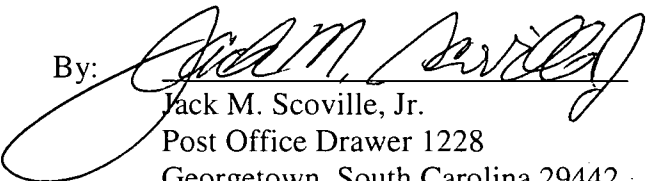
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I, Jack M. Scoville, Jr. hereby certify that on July 9, 2014, I served a copy of the *Respondents' Brief On Certiorari* on the attorney for Petitioners via the United States Mail, postage pre-paid, and addressed as follows:

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