

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM Horry COUNTY
Court of Common Pleas

Cynthia Graham Howe, Master-In-Equity

Case No. 2004-CP-26-2075
Appellate Case No. 2012-212773

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SC Court of Appeals

72973

John Musick, Respondent

v.

Thomas L. Dicks and Robert E. Dicks, Jr., Appellants.

PETITION FOR REHEARING

Appellants, Thomas L. Dicks and Robert E. Dicks, Jr. (the "Dicks"), by and through their undersigned counsel and pursuant to Rule 221(a), SCACR hereby move and petition the Court reconsider and rehear the within appeal and the Court's opinion entered July 9, 2014 as Opinion Number 2014-UP-284 (the "Opinion"). This Petition is based on the grounds that the Court overlooked or misapprehended certain matters set forth herein. Based on the reasons set forth below, the Dicks respectfully request the Court grant this Petition for Rehearing, vacate the Opinion, and reverse the Master's orders.

In its Opinion, the Court overlooked or misapprehended the following matters:

ARGUMENT

- I. **IN HOLDING ONLY THE “GRANTORS” OR WARD AND LEWIS HAD THE RIGHT TO CHANGE THE LOT LINES OR REVISE THE LOT ARRANGEMENT WITHIN THE PROPERTY, IN FAILING TO FIND THE DICKS PROPERLY OWN THE PROPERTY AS SEVEN LOTS, AND IN FAILING TO FIND THE DICKS HAD THE RIGHT TO REVISE THE LOT ARRANGMENT, THE COURT FAILED TO PROPERLY APPLY AND INTERPRET THE PLAIN LANGUAGE OF THE 1972 ORDER AS REQUIRED, AND ALSO, TO THE EXTENT THE COURT FOUND THE 1972 ORDER AMBIGUOUS, IT FAILED TO CONSTRUE THE 1972 ORDER IN FAVOR OF THE FREE USE OF PROPERTY.**

The 1972 Order states the 1958 Restrictions apply to the Property “but with right of revision of the lot arrangement or for combination with abutting portions of lots in Blocks 24 and 25.” (R. p. 461) (emphasis added). According to the plain language of the 1972 Order, the right of revision of the lot arrangement established in the 1972 Order is not restricted to any particular party, much less to some unidentified “Grantor.”¹ The revision rights are not limited to the Plaintiffs in the 1972 Case, not limited to the “Grantor,” and not limited to Ward or Lewis. If the parties and the court in the 1972 Case wanted to limit the revision rights to a particular party, they could have easily done so, but they did not. Instead, the Master in this case, and now this Court, have read a provision into the 1972 Order that simply does not exist.

The plain meaning of the language of the 1972 Order must be honored and adhered to. S.C. Dep’t. of Natural Res. v. Town of McClellanville, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001) (a restriction upon real property shall not “be enlarged or extended by construction or implication beyond the clear meaning of its terms *even to accomplish what it may be thought the*

¹ In a sentence following the grant of rights in question, Judge Vaught states, almost as an afterthought, the 1958 Restrictions as well as other restrictions used in the area provide “to grantor” the right to change certain boundary lines “in any event.” Id. This “in any event” language appears to have been added almost as an aside and to state that the parties should not be offended that the 1972 Order was providing rights of revision of the lot arrangement because the neighbors in this residential subdivision should have known that certain rights did exist to make alterations in this residential subdivision. Musick’s argument is grounded almost exclusively in this “in any event” sentence - a sentence unnecessary to Judge Vaught’s ruling which appears to be surplusage and dicta.

parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written.”) (emphasis added). Restrictive covenants, such as those contained in the 1972 Order, are contractual in nature, and therefore “the language used in the restrictive covenant is to be construed according to its plain and ordinary meaning.” Penny Creek Assoc. v. Fenwick Tarragon Apartments, 375 S.C. 267, 272, 651 S.E.2d 617, 620 (Ct. App. 2007). Furthermore, because restrictions on the use of property are historically disfavored, restrictive covenants are to be “strictly construed” and all doubts as to the proper construction of restrictive covenants must be resolved in favor of free use of the property. *Id.*; see also Hardy v. Aiken, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006). Although this principle was acknowledged by the Court in its Opinion, it was not properly applied.

Here, if the parties intended to restrict the right of revision of the lot arrangement to the so-called “Grantor,” or to any other particular party, the parties would have done so much as they did with respect to other matters in the 1958 Restrictions. See Taylor v. Lindsey, 332 S.C. 1, 498 S.E.2d 862 (1998) (analyzing a situation similar to the one at hand and holding that if the parties had wanted to restrict the property at issue in that case in a particular way, they would have done so by including such language in the restrictions themselves). The fact that the parties did not so limit the right of revision of lot arrangement in the 1972 Order simply shows the parties did not intend the right to be so limited. Instead, the right of revision of the lot arrangement, having not been reserved to any particular party, was intended to and should be construed to run with the title to the Property and held by the Dicks. See West v. Newberry Elec. Coop. Inc., 357 S.C. 537, 542-43, 593 S.E.2d 500, 503 (Ct. App. 2004) (holding that owner’s right to have utility company relocate power line was a real covenant that ran with the land and benefitted owners successor in title).

The “plain language” of the 1972 Order simply states the Property is subject to residential restrictions “*but with right of revision of the lot arrangement.*” (R. p. 461) (emphasis added). In finding the right of revision of the lot arrangement was only in favor of some unidentified “Grantor” or Lewis and Ward, this Court has failed to apply the rule of construction that “restriction[s] 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” and the Court failed to interpret the “plain language” of the 1972 Order which did not restrict the right of revision of the lot arrangement to any particular party. See Hamilton v. CCM, Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980).

Instead of applying the plain language of the restrictions contained in the 1972 Order (which do not limit the right of revision to any particular party), the Court looked to other documents such as the 1958 Restrictions (which by their terms do not even apply to the Property) to come to some conclusion (which is still not supported by the documentation of record) that the right of revision should be limited to some particular “Grantor” or Lewis and Ward. It is simply too much to require every potential purchaser of real property to go to the great lengths the Court has gone to (including examination of record documents which are by their terms inapplicable to the Property) in order to determine the meaning of restrictions potentially affecting the property. It is for this reason that the “plain and ordinary” meaning of restrictions on real property is to be applied, and the Court failed to adhere to and apply the plain and ordinary meaning of the 1972 Order.

Instead of reviewing the plain and ordinary meaning of the 1972 Order’s operative provision, this Court found the court in the 1972 Action “intended to expand the 1958 Restrictions to the Property, including the Grantor’s right to revise lot arrangement prior to the

sale of the Property.” The 1958 Restrictions, however, do not grant anyone the right to revise the lot arrangement. The 1958 Restrictions only provide a right to change the boundary lines and change the building lines of unsold lots. The Court has confused the rights created in the 1958 Restrictions, limited to a specific party, with the right to revise lot arrangement in the 1972 Order, which is not limited to any party and is not limited to unsold lots. This Court erred in this regard.

The Court failed to properly interpret and apply the plain language of the 1972 Order, as it was required to do under the appropriate interpretive standards applicable to restrictive covenants. The plain meaning of the 1972 Order is quite clear that any owner of the Property has the right to revise the lot arrangement and such right is not limited to unsold lots. The Dicks have arranged the lots consistent with the 1955 Plat and the map attached to the 1972 Order, keeping the Property as seven lots. This is clearly authorized by the 1972 Order, and the Master and this Court should have so held. The evidence submitted shows Musick is not entitled to any relief and in fact shows the Dicks are entitled to own the Property as seven lots. The Dicks respectfully submit the Court overlooked and misapprehended the record and the law in this regard.

II. THE COURT ERRED IN HOLDING CARMEN WARD AND GENE LEWIS WERE THE “GRANTORS” PURPORTEDLY REFERRED TO IN THE 1972 ORDER, AND IN FAILING TO CONSTRUE THE 1972 ORDER IN FAVOR OF THE FREE USE OF PROPERTY, AND AGAINST THE PARTY SEEKING ENFORCEMENT.

The Court apparently has held that the right of revision of lot arrangement granted under the 1972 Order was, in fact, reserved to some particular “Grantor” (despite the fact that no language to that effect was actually included in the operative provision of the 1972 Order). Presumably since the 1972 Order contains no actual mention of the word “Grantor” much less

the identity of any such purported “Grantor,” the Court found the 1972 Order ambiguous as to who the purported “Grantor” was thereunder.

In the event of ambiguity, which this Court expressly found, the Court should have resolved all doubts in favor of the free use of the property. Hamilton v. CCM, Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 382 (1980). Moreover, in construing restrictive covenants, ambiguities must be strictly construed against the party seeking to enforce them, here Musick. Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891, 893-94 (1987); Seabrook Island Prop. Owners Assn. v. Marshland Trust, Inc., 358 S.C. 655, 662, 596 S.E.2d 380, 383 (Ct. App. 2004). And, where a restriction on land is capable of two different constructions, the construction which least restricts the property is favored. Anderson v. Buonforte, 365 S.C. 482, 617 S.E.2d 750 (Ct. App. 2005).

As justification for the failure to properly construe the 1972 Order in favor of the free use of the Property, the Court relies upon the case of Hardy v. Aiken, 369 S.C. 160, 631 S.E.2d 539 (2006) which states that this rule of construction should not be used to “defeat the plain and obvious purpose of the restrictive covenants.” Opinion ¶ 2. However, as is set forth in greater detail above, the “plain and obvious” meaning and purpose of the 1972 Order is that the right of revision of lot arrangement is not reserved to any particular party. Again, no mention of the word “Grantor” is made in the operative provision of the 1972 Order which creates the restrictions applicable to the Property. The “plain and obvious” meaning of the restrictions imposed pursuant to the 1972 Order must necessarily be determined upon examination of the language of the 1972 Order itself; resort to interpretation of various other documents, such as the 1958 Restrictions, which are not in themselves applicable to the Property, by definition goes beyond the “plain and obvious” meaning of the 1972 Order itself. Hence, the only possible

“plain and obvious” meaning or construction of the restrictions established in the 1972 Order is that the right of revision of lot arrangement is not limited to any particular party.

This Court found the 1972 Order is ambiguous as it relates to the identity of the purported “Grantor” thereunder, but this Court did not make it clear whether the 1972 Order’s operative provision relating to the revision of lot arrangement is ambiguous. This Court never squarely addressed this issue. The Dicks assert it is plain and obvious they have the right to revise the lot arrangement, as the 1972 Order does not limit this right to any party, but to the extent the Court found the Dicks do not have this right, which it presumably did, the 1972 Order’s operative provision is ambiguous. To the extent the Court impliedly found the operative language is not ambiguous and only some specific, yet unidentified “Grantor” had that right, it was in error. To the extent this Court found the operative language is also ambiguous, which the Dicks maintain no such conclusion was reached, then the operative language should have been construed in the light most favorable to the free use of property and, as such, the Dicks’ interpretation of the 1972 Order’s operative language should have been adopted.

The Court should have strictly construed the ambiguity against Musick and construed the 1972 Order in favor of the free use of property, thus adopting the Dicks’ interpretation of the 1972 Order which does not limit the reservation of the right of revision of lot arrangement to any particular party and which allows the Dicks to own the Property as seven lots. The Dicks respectfully submit the Court overlooked and misapprehended the record and the law in this regard.

III. THE COURT ERRED IN FAILING TO FIND THE PROPERTY AS SHOWN ON THE 1955 PLAT CONSISTS OF SEVEN LOTS, AND IN HOLDING THAT EVEN IF THE PROPERTY HAD CONSISTED OF SEVEN LOTS, WARD HAD THE RIGHT TO ELIMINATE AND COMBINE THOSE LOTS INTO ONE.

- A. The 1955 Plat and the map attached to the 1972 Order both show the Property as containing seven lots, Musick admitted that the Property consisted of seven lots, and this Court previously found the Property to consist of seven lots.

The 1955 Plat clearly shows Blocks 28 and 29 as containing seven lots. (R. p. 530). In addition, the map attached to the 1972 Order shows the remaining portions of Blocks 28 and 29 as containing a total of seven lots. (R. p. 470). Musick admits the 1955 Plat shows Blocks 28 and 29 as containing seven lots. (R. p. 529). This Court's prior Opinion in this case also expressly held that "[t]he 1955 Plat and a map attached to the 1972 Order show Blocks 28 and 29 as divided into seven different lots." Musick v. Dicks, Op. No. 2010-UP-351 (S.C. Ct. App. 2010). Despite all of the foregoing, the Court seems to have held the Property has always been one lot, as opposed to seven.

The only justification given by the Court for this holding that the Property has always been one lot, as opposed to seven, is that it had a single tax map number.² However, the fact that the Property may have previously been identified by the Horry County Tax Assessor's office by only one tax map number simply has no bearing on the issue at hand. No evidence is before this

² The only other possible justification for this holding, which was not mentioned by the Court but was relied upon by the Master below, is the argument that the lines showing the subdivision of the Subject Property into seven lots on the prior plats indicated a mere "potential subdivision" of the Subject Property. (R. p. 8). This is simply not the case. The 1955 Plat shows the Property as being divided into seven lots, with the division being clearly shown by solid lines. (R. p. 530). Thereafter, the 1972 Order, which shows the seven lots as dotted lines, expressly and clearly establishes that the reason such dotted lines are used is only for the purpose of indicating that, as opposed to other lot lines shown on said map, the lot lines shown within the Property were taken directly from the 1955 Plat - which 1955 Plat in fact does show the subdivision in solid lines. (R. p. 470). In addition, the 1972 Order recognizes there existed lots within the Property by using the term "lot arrangement" and recognizing the Property is part of two blocks.

Court as to what information the Tax Assessor's office relied upon in creating its tax maps. The Tax Assessor's office may have erroneously relied upon the Culler Survey (which was only a boundary survey) without also looking to the 1955 Plat and therefore reflected the Property as one lot without showing the lot lines established by the 1955 Plat.

The reality is simply that no evidence was presented as to this issue other than the fact that at one point in time the seven lots comprising the Property were identified by the Horry County Tax Assessor under one tax map number. Courts have specifically recognized that "having separate tax parcel numbers and being separately taxed is not relevant in determining whether or not two properties have merged." In re Moyer, 978 A.2d 405 (Pa. Commw. Ct. 2009). The fact that the seven lots comprising the Property were at some point in time identified by the Horry County Tax Assessor under one single tax map number is insufficient to support the Court's conclusion that the property has always been one lot, and was not properly relied upon by the Court in reaching this conclusion.

The Dicks respectfully submit the Court overlooked and misapprehended the fact that both the 1955 Plat and the map attached to the 1972 Order clearly show the Property as containing seven lots, that Musick admitted the Property contained seven lots, and that this Court previously held the Property consisted of seven lots, and instead summarily finding the Property consisted of and had always been sold as one lot.

B. The Court erred in holding Carmen Ward had any right to change the lot arrangement so as to combine the seven lots comprising the Property into one lot, and that Carmen Ward effectively conveyed the Property to the Meeses as one lot.

This Court found Carmen Ward had the right to, and in fact did, "change[] boundary lines to combine the lots of Blocks 28 and 29 into one lot." Opinion ¶ 5. The Court states this right

was by virtue of the 1972 Order. Id. This finding, however, is in error, as no such right existed either pursuant to the 1972 Order or the 1958 Restrictions.

The 1958 Restrictions created two rights reserved to the Grantors thereunder: (1) change the boundary lines of the lots; and (2) change the building lines of the lots (set-backs). (R. p. 530). The 1958 Restrictions expressly prohibit the subdivision of lots. Id. The 1955 Plat shows the Property as containing seven lots and the map attached to the 1972 Order shows the Property as containing seven lots. (R. pp. 530, 455-470). The 1972 Order created rights to revise the lot arrangement of those seven lots and to combine the lots with adjoining lots within Blocks 24 and 25. (R. p. 461). No right was ever created in any documents submitted in evidence which authorizes anyone, including the Grantors and Lewis and Ward, to take the seven lots and turn them into one. The changing of the boundary lines³ of lots (as stated in the 1958 Restrictions) is simply not equivalent to revising the lot arrangement⁴ (as stated in the 1972 Order). No evidence, facts, or law support this Court's conclusion in that regard. Therefore, any finding that the Property is anything other than seven lots, or was ever combined into or conveyed as anything other than seven lots, is erroneous and authorizes a prohibited act.⁵

Any construction of the 1972 Order which provides that lots can be taken away or combined is contrary to both the 1972 Order and the 1958 Restrictions. The 1958 Restrictions

³ Revising the boundary lines simply means changing the boundary lines of existing lots, not taking them away and eliminating them. The act of revising boundary lines of lots simply does not include combining lots.

⁴ "Arrange" means "to put in proper order or into a correct or suitable sequence, relationship, or adjustment <~flowers in a vase> <~cards alphabetically>." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY (10th ed. 1993). Thus, according to the 1972 Order, the seven lots could be re-arranged, not eliminated.

⁵ The 1972 Order does mention the word "combination" in the operative provision, but that was with respect to the combination of the existing lots in Blocks 28 and 29 with lots in Blocks 24 and 25. The court in the 1972 case therefore understood the right of combination, and provided that right with respect to one limited instance. The 1972 Order failed to give the right to combine the lots in Blocks 28 and 29 into one lot, a right the Court found Ward had even though the court in the 1972 Case clearly understood the right of combination and explicitly chose not to provide an unrestricted right of combination.

are “protective covenants” in order to preserve the residential character of the neighborhood. (R. p. 530). Likewise, the 1972 Order is replete with language which implies the parties were concerned with preserving the residential character of the neighborhood. (R. pp. 455-470). Thus, this Court’s holding that the Property could be changed from seven lots to one large lot in the neighborhood is inconsistent, and does not make sense considering the scheme of the neighborhood, since most of the subdivision is divided into residential lots except for some well-defined common areas.

The Court in its Opinion has created in Ward and Lewis a right never granted to them, or anyone else for that matter, to remove and/or combine lots. There is no such right created by either the 1958 Restrictions or the 1972 Order, and the Court overlooked and misapprehended the record and the law and erred in this regard.

In addition, the Court found Carmen Ward sold the Subject Property to Leigh and David Meese as one lot. Although no specific evidence in the Record is cited for this conclusion, the Court’s conclusion is presumably based on the fact that the survey referenced in the deed from Carmen Ward to the Meeses (the “Culler Survey”) shows the Property as one lot.⁶ (R. p. 13). However, there was no evidence submitted to show the Culler Survey was anything other than a boundary survey. (R. p. 517). Mr. Mumford (the Dicks’ closing attorney) testified it is customary old lot lines would be indicated on a survey and the Culler Survey, which did not show these old lot lines, “didn’t appear to be anything but a boundary survey and [he] took it as such.” (R. p. 422, lines 20-22, p. 423, lines 12-15). The Culler Survey does not refer to (a) the 1972 Order; (b) the map attached to the 1972 Order which shows seven lots; or (c) the 1955 Plat which shows seven lots. (R. p. 517). There is no indication on the Culler Survey that the

⁶ The Court’s finding in this regard may also be based upon the claim that the Property had a single parcel number; however, as set forth more fully above, the Dicks respectfully submit that any reliance on a tax parcel identification number for the purposes set forth herein is misplaced.

existing seven lots were being eliminated, which is required by local ordinance. (R. p. 517, p. 308, lines 8-11). In fact, the Culler Survey is in the name of the Meeses, not Ms. Ward. (R. p. 517). Certainly the Meeses had no right to change seven lots into one lot.

Moreover, in light of the general rule that lines shown on a senior survey control over lines shown on a junior survey if conflict occurs between the two, the lot lines shown on the 1955 Plat must be controlling if any asserted discrepancy arises between the 1955 Plat and the Culler Survey, which is merely a boundary survey which says nothing about abandoning the lot lines established and shown on the prior plats. Kirkland v. Gross, 286 S.C. 193, 197, 332 S.E.2d 546, 548 (Ct. App. 1985) (overruled on other grounds by Boyd v. Hyatt, 294 S.C. 360, 364 S.E.2d 478 (Ct. App. 1988)). Therefore, even if the Court found the Culler survey was more than just a boundary survey, the lot lines as clearly shown, in solid lines, on the 1955 Plat would have to control. Id.

Based upon the foregoing, the Dicks submit that the Court overlooked and misapprehended the record and the law by failing to find that any purported change of the lots existing on the Property from seven lots to one lot is or was an unauthorized and illegal act, and that therefore the Property is and has always been seven lots.

IV. SHELTER RULE

The Court found the Meeses had constructive notice of the restrictions contained in the 1972 Order and the Dicks are therefore not protected by the Shelter Rule. In reaching this conclusion the Dicks respectfully submit the Court overlooked and misapprehended the testimony of James Dusenbury, the Meeses' closing attorney, as well as the testimony of the Meeses. The Court further erred in failing to find that, despite any purported notice of Leigh Meese (which the Dicks urge did not exist until after the Meeses' purchased the Property), the

clear status of David Meese as a bona fide purchaser for value without notice of the 1972 Order was sufficient to afford protection to both of the Meeses under the Shelter Rule.

- A. The Court overlooked and misapprehended the testimony of James Dusenbury, the Meeses' closing attorney, who unequivocally testified to having no knowledge or notice of any restrictions on the Property prior to or contemporaneously with the Meeses' purchase of the Property.

In holding the Meeses had constructive notice of the restrictions contained in the 1972 Order at the time of their purchase of the Property, the Court relied upon a purported admission by James H. Dusenbury, Jr., the Meeses' closing attorney, that he *would have* discussed restrictions affecting the Property with the Meeses at the time of their closing. The Dicks submit that Dusenbury's testimony has been misinterpreted by the Court.

In fact, Mr. Dusenbury testified he knew there was a strong possibility that restrictions applied, but that was *after* the Meeses purchased the Property. His title examination and review of title revealed no restrictions, including those within the 1972 Order, applicable to the Property. (R. p. 361, lines 7-9). He issued a title policy showing no restrictions applied and did not take exception to the 1972 Order. (R. p. 366, line 25 – p. 367, line 5). Mr. Dusenbury's testimony as to his knowledge of the 1972 Order at the time of the Meeses' purchase was actually as follows:

Q: Do you have any knowledge at the time David and Leigh Meese purchased the property that they would have knowledge of any restrictions on the property?

A: To the best of my recollection, no, I did not have such knowledge.

....

Q: And you knew there was a strong possibility that they applied to this tract but your knowledge was not acquired until after the Meeses purchased the property; is that correct?

A: To the best of my recollection, that is correct.

Q: You had not had that knowledge before; correct?

A: Correct.

(R. p. 364, lines 8-13, p. 371, line 23 – p. 372, line 4).

Despite the foregoing unequivocal testimony by Dusenbury that he did not have any knowledge of any restrictions on the Property, not even that there was a strong possibility any restrictions applied to the Property, the Court instead relied upon, and the Dicks submit overlooked and misapprehended, the following testimony by Dusenbury which was made on re-cross examination in response to a purely hypothetical scenario proposed by counsel for Musick:

Q: So when you're having conversations with them about possible problems, I know it wasn't in the chain of title, but doesn't it make sense that when you are having conversations with them about possible problems, hey, look, there are restrictions out there. I don't find them in the chain of title. It doesn't make sense that you would wait until after they buy it to tell them that there are strong possibilities that they would apply to the property.

It looks to me like that would be something you would be discussing contemporaneous when closing the purchase for them, wouldn't it?

A.: If I followed the question, yes, sir.

(R. p. 374, lines 9 – 23).

The above testimony simply addresses things Dusenbury typically *would have* discussed with his clients at the time of closing. This testimony does not indicate in any way or by any stretch that Dusenbury actually did discuss the 1972 Order or 1958 Restrictions with the Meeses at the time of their purchase of the Property. In fact, as previously stated and evident by the title commitment and policy issued by Dusenbury in connection with the transaction, Dusenbury himself did not have any knowledge that the restrictions in the 1972 Order affected the Property until *after* the Meeses' acquisition of the Property. The Dicks respectfully submit that the Court overlooked and misapprehended the record and erred in disregarding the clear and unequivocal testimony of Dusenbury above (that he had no knowledge of any restrictions on the Property at the time of the Meeses' purchase of the Property) and instead construing his testimony on re-cross (as to things he normally *would do*, with no particular application to or reference to this case or Property in particular) to surmise that Dusenbury and the Meeses somehow had

knowledge or notice of the restrictions contained in the 1972 Order at the time of their purchase of the Property. This is simply not the case.

B. The Court overlooked and misapprehended the testimony of David Meese who testified unequivocally that he had no knowledge of the 1972 Order or any restrictions relating thereto until after his purchase of the Property.

David Meese testified he had no knowledge about any restrictions on the Property, and in particular any judgments or restrictions that would prevent his owning the Property as seven lots, prior to his and his wife's purchase of the Property. (R. p. 384, lines 15-19, p. 385, lines 14-25, p. 386, lines 1-11, p. 386, line 25 – p. 387, line 8). Mr. Meese testified, verbatim, as follows:

Q: At the time you purchased the property, were you aware of any claims or assertions that the property was subject to any restrictions that would have prevented it from being subdivided?

A: No, I'm not.

.....

Q: At the time you and your wife purchased the property, did y'all have any notice that there were any restrictions or covenants of record that would have prevented you from using the property as more than one lot?

A: I did not believe there were any restrictions to our knowledge and belief.

Q: Did you or your wife have any notice of any judicial orders that would have been entered that would have affected the title to the real estate you were buying?

A: None that I recall.

.....

Q: To the best of your recollection, you would not have had knowledge of an Order issued in 1972 at the time you and your wife purchased the property?

A: I don't remember such a thing from the purchase, no.

.....

Q: You had no knowledge of any restrictions on the property; correct?

A: Restrictions in terms of subdivision?

Q: Yes.

A: I was not aware of any such restrictions for subdivision.

Id.

Despite the foregoing unequivocal testimony from David Meese that he purchased the Property without knowledge of the 1972 Order, the Court held "David Meese acknowledged that

at the time he purchased the property, he was aware there were restrictive covenants, but he did not remember the details.” Opinion ¶ 7. Respectfully, the Court overlooked and misapprehended the testimony of David Meese in this regard and in finding that David Meese had constructive notice of the 1972 Order *at the time of his purchase of the Property*.

C. The Court further overlooked and misapprehended Leigh Meese’s testimony.

Likewise, the Court held that Leigh Meese had sufficient notice of the existence of the restrictive covenants, at the time of her purchase of the Property, to put her on constructive notice of the 1972 Order and restrictions contained therein. In reaching this conclusion the Court relied solely on the following testimony of Leigh Meese: “I remember there were issues with the property. I can’t place my awareness of those issues with respect to our acquisition and sale of the property.” Opinion ¶ 7. At the same time, the Court entirely disregards the testimony of Leigh Meese stating without hesitation that *at the time of her purchase of the Property* she did not have any notice of the restrictions:

Q: At the time you purchased the property, can you tell me today whether you had any notice of any restrictions that would have encumbered the property?

A: **I did not.** At some point obviously I became aware of, you know, of a number of potential restrictions on the property. I don’t know at what time I became aware of those restrictions.

(R. p. 396, line 21 – p. 397, line 3) (emphasis added).

Leigh Meese expressly stated that, although she may have become aware of the restrictions *at some point*, she was *not* aware of the restrictions at the time of her purchase. (R. p. 396, line 21 – p. 397, line 3). Any knowledge of Leigh Meese at any time after her purchase of the Property is, again, absolutely irrelevant. Spence v. Spence, 368 S.C. 106, 117, 628 S.E.2d 869, 874-75 (2006). Respectfully, the Court overlooked and misapprehended Leigh Meese’s

testimony and erred in its holding that Leigh Meese had constructive notice of the 1972 Order *at the time of her purchase of the Property.*

- D. The Court overlooked and misapprehended the law and the record and erred in determining the Meeses had constructive and/or inquiry notice of the restrictions because the evidence the Court relies upon to reach that conclusion, to the extent it would have prompted an investigation or further inquiry, the investigation or further inquiry would have simply confirmed no restrictions apply to the Property.

The court cites Spence v. Spence, 368 S.C. 106, 120, 628 S.E.2d 869, 876 (2006) for the proposition that “[c]onstructive or inquiry notice in the context of a real estate transaction also may arise when a party becomes aware or should have become aware of certain facts which, if investigated, would reveal the claim of another. The party will be charged by operation of law with all knowledge that an investigation by a reasonably cautious and prudent purchaser would have revealed.” Opinion ¶ 7.

The Court then found “[t]he Meeses had notice of the existence of restrictive covenants that encumbered Long Bay Estates and there was a ‘strong possibility’ that the restrictions might apply to the Property. This awareness of the existence of restrictive covenants provided them with notice of all of the restrictions, including the restriction against subdivision.” Id.

In Spence, the court focused in part on what a further investigation would have revealed. It stated specifically that “[t]he question in this instance is whether the deeds and plats on record at the date of the conveyance from Owner 3 to Owner 4 imposed on Owner 4 a duty to inquire further about potential title defects or adverse claims. In other words, did the public record raise a ‘red flag’ requiring further inquiry by Owner 4?” The court in Spence specifically found that certain facts alleged would not “prompt a reasonable purchaser to conduct further inquiry after examining this public record.”

Since the 1972 Order is not indexed correctly, and would not have been found in any title examination, which facts are not disputed, the only matter that would be found on the public records is anything else appearing in the chain of title. Of course, the 1958 Restrictions do not appear in the chain of title as they state they do not expressly encumber the Property.

If in fact the Meeses wanted to check to see if there were any restrictions in the subdivision as they wondered why there were no restrictions that encumbered the Property, perhaps sending up a “red flag,” Dusenbury would have asked his abstractor to find restrictions in the subdivision. Had he done so, he would have found the 1958 Restrictions, which expressly do not encumber the Property. The so-called further inquiry and investigation as a result of a possible “red flag” would have not led to anything at all, except a conclusion that restrictions in the subdivision expressly did not encumber the property. Once having conclusive evidence on the public records that restrictive covenants do not in fact encumber the Property, there would be absolutely no need to engage in a further investigation or inquiry, regardless of whether the matters were on the public record or outside the public record.

In other words, the inquiry and investigation that would have resulted would have not led to the discovery of restrictive covenants. Instead, the inquiry would have led to the conclusion that no restrictive covenants applied at all to the Property. See City of Greenville v. Washington Am. League Baseball Club, 205 S.C. 495, 509, 32 S.E.2d 777, 782 (1945) (“[I]f there are circumstances sufficient to put the party upon inquiry, he is held to have notice of everything which that inquiry, properly conducted, would certainly disclose.”); 58 AM. JUR. 2D *Notice* § 15 (“Although one who has notice of facts sufficient to put him or her on inquiry is deemed to have notice of all facts that a reasonable inquiry would disclose, this rule does not impute notice of every conceivable fact, however remote, that could be learned from inquiry. It imputes notice of

only those facts that are naturally and reasonably connected with the fact known and to which the known fact can be said to furnish a clue.”); 66 C.J.S. *Notice* § 12 (“The omission of the person to make inquiry cannot be material where such inquiry would not have led to a knowledge of the fact with the notice of which it is sought to charge him or her. If such a person’s conduct would have been the same whether or not he or she had made inquiry, the person’s omission cannot be a reason for charging him or her with notice.”).

In that regard, the Court overlooked and misapprehended the record and the law in finding the Meeses had constructive notice of the restrictions and in finding the Dicks are not protected by the Shelter Rule.

- E. To the extent the Court determined only one of David or Leigh Meese had no knowledge of the 1972 Order or any restrictions on the Property, the Court erred in failing to find the bona fides of either of them is sufficient for the purpose of the Shelter Rule.

Despite the foregoing testimony of Leigh Meese at trial, in the event that the Court remained unclear as to whether Leigh Meese was aware of the 1972 Order at the time of her purchase of the Property, the Court erred in failing to find that the clear status of David Meese as a bona fide purchaser for value without notice of the 1972 Order was not sufficient for purposes of the Shelter Rule.

This is similar to a situation where one of two cotenants has knowledge of a prior judgment or monetary lien that was not recorded properly, in which case the judgment as a matter of equity should only attach to the undivided interest of one cotenant, but not the other who is a bona fide purchaser for value without notice. In this case, however, the restrictions cannot be handled in the same manner because restrictions cannot attach only to an undivided interest in the property. As a result, only one of the two cotenants need to be bona fide in order for the Shelter Rule to apply. See In re Safe Deposit & Trust Co. of Baltimore, 94 A. 93 (Md.

1915) (the relation between tenants in common does not imply any agency, on the part of the tenant in possession for his co-tenants, as to receipt of notice of outstanding claims affecting title.); Gray v. Caldwell, 904 So. 2d 212 (Miss. Ct. App. 2005) (a cotenant may not act or claim in any manner to lessen or diminish the value or effect of the other cotenant's right, title, interest or status in land); Beesley v. Hanish, 521 A.2d 1235 (Md. Ct. App. 1987) (A cotenant may not prejudice the rights of the other tenants without their unanimous consent.).

Again, it is well-settled law in this country that “[u]nder the general doctrine that a restrictive covenant will not be applied against one who purchases property from a bona fide purchaser who lacks notice of the covenant, a purchaser of land with notice of outstanding restrictions, from one who is without notice thereof, in turn acquires the status of a bona fide purchaser, and will be protected in his or her title on account of the bona fides of the vendor.” 20 AM. JUR. 2D *Covenants* § 257 (2008). The very purpose of the Shelter Rule is not only to protect bona fide purchasers for value without notice from matters affecting their property in connection with their purchase and use of the property, but also to protect these bona fide purchasers in connection with their subsequent sale of the property in order to ensure that bona fide purchasers are entitled to “receive the benefit of [their] bargain and permit [them] to market the property.” 1 PATTON AND PALOMAR ON LAND TITLES § 13, at 78 (3d. ed. 2003).

As a result, under the scenario involving restrictions on property, all it takes is for one purchaser to not have notice in order to clear the property of that restriction. Otherwise, David Meese would have not been able to receive the benefit of his bargain.

To the extent that the Court somehow construed the testimony in such a way that it believed Leigh Meese to have had notice of the 1972 Order at the time of the purchase of the Property by the Meeses, the Court erred in failing to find that the clear status of David Meese as

a bona fide purchaser for value without notice was sufficient to afford them both the protection of the Shelter Rule.

In sum, and in light of all of the foregoing testimony, the Dicks respectfully submit the Court overlooked and misapprehended the record and the law in finding the Meeses had constructive notice of the 1972 Order *at the time of their purchase of the Property* and in failing to find the Dicks are protected by the Shelter Rule, and therefore not subject to the 1972 Order.

CONCLUSION

The Dicks respectfully submit that the Court overlooked or misapprehended the above-described matters and, therefore, the Dicks respectfully request this Petition for Rehearing be granted, the Court's Opinion be vacated, and the Master's order be reversed.

Respectfully submitted,

CALLISON TIGHE & ROBINSON, LLC



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ATTORNEYS FOR APPELLANTS

July 23, 2014

1020.276\2012Appeal\Petition

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cynthia Graham Howe, Master-In-Equity

Case No. 2004-CP-26-2075
Appellate Case No. 2012-212773

RECEIVED

JUL 23 2014

SC Court of Appeals

John Musick, Respondent

v.

Thomas L. Dicks and Robert E. Dicks, Jr., Appellants.

CERTIFICATE OF SERVICE

I, Kathleen S. Romero, an employee of Callison Tighe & Robinson LLC, Attorneys for the Respondent, do hereby certify that, on this date, I caused to be served the foregoing **Petition for Rehearing** upon Respondent's counsel, by depositing a copy of the same in the United States mail, with proper first-class postage affixed thereon, addressed as follows:

Thomas C. Brittain, Esquire
The Brittain Law Firm, PA
4614 Oleander Drive
Myrtle Beach, SC 29577

Kathleen S. Romero
KATHLEEN S. ROMERO

July 23, 2014

1020.276\2012Appeal\COS-Petition

Demetri "Jim" K. Koutrakos

803.404.6900

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July 23, 2014

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1015 Sumter Street
Columbia, SC 29211

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JUL 23 2014

SC Court of Appeals

RE: John Musick vs. Thomas L. Dicks, *et al.*
Case No. 2004-CP-26-2075
Appellate Case No. 2012-212773

Dear Ms. Kitchings:

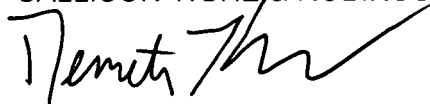
Enclosed herewith please find an original and seven (7) copies of a Petition for Rehearing in the above-referenced matter. Kindly file the same and return a clocked-in copy to the courier. This firm's check in the amount of \$25 is enclosed in payment of the required filing fee.

By copy of this letter, the Petition for Rehearing is being served upon Respondent's counsel.

With kind regards, I am

Sincerely yours,

CALLISON TIGHE & ROBINSON, LLC



Demetri "Jim" K. Koutrakos

DKK:ksr

Enclosures

cc (w/enc.): Thomas C. Brittain, Esquire
Mr. Thomas L. Dicks
Mr. Robert E. Dicks, Jr.

1020.276\2012Appeal\Clerk.010

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JUL 23 2014

SC Court of Appeals