THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Thomas W. Cooper, Jr., Special Referee

Case No. 2006-CP-26-4440

COURT OF APPEALS
UNPUBLISHED OPINION NO. 2012-up—219 – FILED APRIL 4, 2012

APPELLATE CASE NO. 2012-212294

Dale Hill, Betty Hill, Carl Clemmons, Geraldine Clemmons, Individually, and on behalf of a Class of all others similarly situated . . . . . *Petitioners*,

v.

Deertrack Golf and Country Club, Inc., Deertrack Golf, Inc., Deertrack Plantation, Inc., the Estate of John Schaad, by and through Ann Schaad as Executrix, and Deertrack Investors, LLC . . . . . *Respondents*.

RESPONDENT DEERTRACK INVESTORS, LLC'S RETURN TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(I) Whether "special and important reasons" exist to justify granting certiorari?

(II) Whether South Carolina should apply case law from Arizona, Nebraska, and New Mexico to create an implied easement by the "method and manner of development, marketing, and sale"?

(III) Whether the Trial Court applied the proper standard of proof?

(IV) Whether the evidence supports the finding that the subject property is not burdened by an implied easement restricting the use to a golf course for perpetuity?

(V) Whether the Trial Court erred in directing the cancellation of the *lis pendens?*

Deertrack Investors, LLC[1] (hereinafter "Owner") respectfully requests that this Court deny the petition for a writ of certiorari of Dale Hill, Betty Hill, Carl Clemmons, Geraldine Clemmons, Individually and on behalf of a Class of all others similarly situated (collectively hereinafter "Petitioners").

STATEMENT OF THE CASE

Petitioners are owners of residential property in the Deerfield Plantation subdivision in Horry County. By Order dated November 2, 2009, Petitioners are members of a class defined as "the current owners of the single family residential lots numbered 1 through 458 as shown on the plat recorded in the Office of the Register of Deeds for Horry County, South Carolina, in Plat Book 54 at Page 124." **(R. pp. 49-54).**

Respondent Owner is the owner of nearby property that formerly operated as a golf course and clubhouse (this property is commonly referred to herein as the "Subject Property"). Petitioners seek to restrict Owner from freely using the Subject Property by virtue of an alleged implied easement restricting the use to a golf course in perpetuity.

[1] First Trident Financial, LLC has moved to be substituted as the Respondent Deertrack Investors, LLC as a result of Deertrack Investors, LLC's transfer of its' entire interest in the Subject Property pursuant to the Master's Deed recorded in the Horry County Register of Deeds in Deed Book 3593 at Page 2332, recorded on July 2, 2012. **(Consent Motion for the Substitution of Parties, filed on or about July 11, 2012).**

Petitioners commenced this lawsuit seeking, *inter alia*, a declaratory judgment:

> a) That Deerfield Plantation, Inc. established an equitable servitudes/implied easements/negative reciprocal easements on behalf of Plaintiffs in the [Subject Property] adjacent to the Plaintiffs' residences;
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> b) That the [Subject Property] were amenities to the respective home sites Plaintiffs purchased;
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> c) That the equitable servitudes/implied easements/negative reciprocal easements/amenities so established require the land which Defendant Deertrack Investors, LLC owns be restricted to use as a golf course; and
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> d) That the equitable servitudes/implied easements/negative reciprocal easements/amenities so established cannot be unilaterally extinguished by Defendants.

(R. p. 107).

Owner moved for summary judgment as to Petitioners' claims, which was granted on November 5, 2008 by the Honorable Larry B. Hyman, **(See R. pp. 553-581; 6-34)**, but subsequently reconsidered and denied, noting the preference that a full record be developed at trial rather than ruling upon a dispositive motion. **(See R. pp. 582-600; 35-44).** Thereafter, the declaratory judgment cause of action was referred to the Honorable Thomas W. Cooper, Jr., as special referee. **(R. pp. 45-48).**

Petitioners were provided the opportunity to develop a full record and a final hearing on the merits of Petitioners First Cause of Action for a Declaratory Judgment was held on November 9, 2009. **(R. pp. 131-173).** After hearing all the testimony and reviewing the exhibits and arguments of counsel, on February 10, 2010, the special referee denied Petitioners' First Cause of Action for a Declaratory Judgment. **(R. pp. 55-86).** Petitioners filed a Rule 59(e) Motion, which was denied on June 22, 2010. **(R. pp. 272-344; 87-89).**

Petitioners filed a Notice of Appeal to the South Carolina Court of Appeals. The Court of Appeals upheld the special referee's February 10, 2010 Final Order pursuant to an unpublished Rule 220, SCACR, Opinion, Hill v. Deertrack Golf, Op. No. 2012-UP-219 (S.C. Ct. App. filed April 4, 2012). Rehearing was denied on May 25, 2012.

Petitioners now seek a writ of certiorari, which Owner requests this Court deny.

STATEMENT OF FACTS

Petitioners have not challenged the special referee's findings of fact as set forth in the February 10, 2010 Final Order in their motion to alter or amend judgment under Rule 59(e), on appeal, in their petition for rehearing, or their petition for certiorari.[2]

As a result, below are the uncontested findings of fact from the special referee's February 17, 2010 Final Order:

1. Prior to 1972, V.F. Platt, Jr. owned approximately 1,883 acres in Surfside Beach, South Carolina.
2. Deerfield Plantation, Inc. was a South Carolina corporation in existence on October 13, 1972. V.F. Platt, Jr. was the President and Kate W. Platt was the Secretary (hereinafter referred to as the "Deerfield Plantation I").
3. Deerfield Plantation I, V.F. Platt, Jr., and Kate Platt are not parties to this lawsuit.
4. On October 13, 1972, V.F. Platt, Jr. deeded 547.76 acres to Deerfield Plantation I (hereinafter referred to as "Deerfield Plantation Property"). The Deed was recorded in Deed Book 478, Page 654. Not part of this conveyance and specifically excluded

[2] Petitioners appear to raise, for the first time in their Petition for Certiorari, an argument that the special referee erred in finding as fact that certain actions testified to by the Hills and Clemmons applied to the Class as a whole. **(See Petition for Certiorari, p. 12).** This argument was not raised to or ruled on by the special referee and/or on appeal. Notwithstanding, the special referee's findings are not erroneous because (1) Petitioners did not present any testimony of any other Class Members other than the Class Representatives, and (2) the Order Certifying Class finds that the issues of fact are common throughout the class and that the Class Representatives claims arise from the same event or practice or course of conduct that gives rise to the claims of other class members, **(R. pp. 49-54).**

in the Deed was approximately 182.92 acres, identified as Parcels A, B, C, D, and E comprising the real property later known as the Deer Track Golf Course and Clubhouse (this excluded property is hereinafter referred to as the "Subject Property").

5. Deerfield Plantation I developed the Deerfield Plantation Property into a residential subdivision known as Deerfield Plantation.

6. Deerfield Plantation I recorded a plat of the Deerfield Plantation Property on November 14, 1972 at Plat Book 54, Page 124 in the Horry County Register of Deeds. This Plat depicted lots 1-458 within the Deerfield Plantation Property. The plat shows golf course fairways, labeled 1 through 18, and a body of water labeled "Vivian Lake". The November 14, 1972 Plat did not depict any other bodies of water, nor any clubhouse, tennis courts, or pool.

7. The November 14, 1972 Plat provides:

> It is hereby expressly declared that Deerfield Plantation, Inc. does not intend to dedicate and does not dedicate to the general public or any member thereof any easement, right of travel, right to use or other right with regard to the streets, roads, alleys, entrances, or other passages or ways and with regard to the lakes and parks shown upon this map, and that Deerfield Plantation, Inc. reserves unto itself, its successors and assigns, all streets, roads, alleys, entrances, or other passages or ways and any and all lakes and parks shown upon this map and all easements, rights of travel, right to use and any other rights over, upon, under or connected with the same.

8. Plaintiffs, individually and as class representatives, had actual and constructive notice of the November 14, 1972 Plat before closing on their respective Deerfield lot.

9. Deerfield Plantation I filed, in the Horry County records, a Declaration and Establishment of Conditions, Reservations, Covenants and Restrictions for Deerfield Plantation Single Family Residential Subdivision Horry County, South Carolina on

November 29, 1972 at Book 481, Page 305, covering lots 1 through 458 as shown on the November 14, 1972 (hereinafter Declarations). Pertinent portions of the Declarations provide:

> 11. Easements to permit the doing of every act necessary and proper in the playing of golf on the golf course adjacent to the lots and the playing of tennis on the tennis courts adjacent to the lots which are subject to these restrictions are hereby granted and established. These acts shall include, but not limited to, the recovery of golf balls and tennis balls from such lots, the flight of golf balls and tennis balls over and upon such lots, the use of necessary and usual equipment upon such golf course and tennis courts, the usual and common noise level created by the paying of the game of golf or the game of tennis and with all the normal and usual activities associated with the operation of a country club or clubhouse. The Developer shall have the right to determine the manner and extent to which the rights under this easement shall be exercised, and in the event that some other person, corporation, or other entity shall hereafter operate said golf course, tennis courts, country club or clubhouse facility then the Developer shall have the right to prescribe in writing to such person, corporation or entity charged with the operation of the said golf course, tennis courts, country club or clubhouse facility the manner and extent to which the rights under this easement shall be exercised. *In addition the Developer may, in its sole discretion, limit or withdraw or prohibit certain of the acts authorized by this easement, and may limited the manner or place of doing all or certain of the acts authorized by this easement.*
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> 23. The Developer hereby expressly states its *intent not to dedicate or convey to the general public or any member thereof any easement, right of travel, right to use or other right with regard to the streets, roads, alleys, entrances, or other passages or ways and with regard to the lakes and parks shown upon the above referred to map of this subdivision* (except such private easement as is stated in the Deed to each property owner purchasing or acquiring title to one of the herein described lots) and the *Developer hereby reserves unto itself, its successors and assigns, all streets , roads, alleys, entrances, or other passages or ways, any and all lakes and parks, all easements* and rights in connection therewith for any purpose, matter or thing set forth in paragraph 14 herein, rights of travel, right to use and any other right over, upon, under or connected with the same, as shown upon the above referred to map (except such private easements as is stated in the Deed to each property owner purchasing or acquiring title to one of the herein described lots). (Emphasis provided.)

10. Plaintiffs, individually and as representatives of a class, received a copy of and had actual and constructive notice of the Declarations prior to closing on their respective lots.

11. A property owners association named Deerfield Plantation Property Owners Association, Inc. was organized and, according to the Declarations, each property owner in Deerfield Plantation is a member of the Association.

12. Simultaneous with the filing of the Declarations, Deerfield Plantation I entered into a Privilege and Obligation Agreement with Deerfield Plantation Property Owners Association, Inc. dated November 29, 1972, the terms of which were deemed to extend to and include the successors and assigns of the parties. The applicable portions of the Privilege and Obligation Agreement provide:

> 2. *The Developer has leased certain lands in, around, and near the property comprising the abovesaid Deerfield Plantation single family residential subdivision, said lease being for a period of ten (10) years, for the purpose of constructing thereupon an eighteen hole golf course.* The Developer agrees to construct an eighteen hole golf course upon the property leased for such purposes, substantially as shown upon that certain map made by Moorman & Little, Inc., dated November 14, 1972, and recorded in Plat Book 54, page 124, office of the Clerk of Court for Horry County, S.C., according to plans and specifications as determined by J. Porter Gibson, Golf Course Architect and Land Planner, Charlotte, North Carolina, within a reasonable time.
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> 3. The Developer further agrees to construct within the bounds of the property shown and described upon the above referred to map, three lighted tennis courts, within a reasonable time period.
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> 4. The Developer also agrees to construct within a reasonable time, a clubhouse for use in connection with the golf course and tennis courts abovesaid, including an area for a professional golf shop, a snack bar, meeting room, and such other incidental accommodations as the Developer shall deem expedient.
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> 5. The Developer also agrees to contract, within a reasonable time, a swimming pool, within the property boundaries of the Developer as shown upon the above referred to map.
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8. The Developer agrees to make the abovesaid golf course, tennis courts, club house, and swimming pool facilities available to the owners of the property in Deerfield Plantation single family residential subdivision (reserving the right to make said facilities available to any other persons whomsoever in addition), subject, however, to the other provisions hereof, upon the filing of application for membership by the said property owners and upon approval of said application for membership by Deerfield Plantation, Inc., until such time as maximum membership as set by the Developer from time to time is reached. It is agreed that Deerfield Plantation, Inc. may reject the application of any applicant, other than on grounds of race, color, or creed, without cause or reason and without being required to assign any cause or reason therefore, *it being understood and agreed that the aforesaid facilities consisting of the aforesaid golf course, tennis courts, club house, and swimming pool, and any other incidential [sic] operation in connection therewith, are separate and distinct business operations of Deerfield Plantation, Inc, apart from Deerfield Plantation single family residential subdivision as aforesaid.* It is further agreed that application for membership for the use of said facilities shall be made upon such form or forms and at such time or times as Deerfield Plantation Inc. may direct. *It is further understood and agreed that Deerfield Plantation, Inc. reserves the right to discontinue the maintenance and/or operation of said golf course, tennis courts, club house, and swimming pool, or any other incidential [sic] operations connected therewith, at such time as Deerfield Plantation, Inc, in its sole discretion of its Board of Directors, shall determine that the maintenance and operation of the aforesaid facilities, or any one of them is not economically feasible or is not advisable for any other reason and to use the property devoted thereto for other purposes.* (Emphasis provided.)

13. Plaintiffs, individually and as representatives of the Class, received a copy of and had actual notice of the Privilege and Obligation Agreement before closing on their respective lots.

14. Effective December 26, 1972, Deerfield Plantation I filed a Property Report with the U.S. Department of Housing and Urban Development. The significant portions of the Property Report provide:

9.b. IF FACILITIES ARE PROPOSED OR PARTLY COMPLETED, STATE PROMISED COMPLETION DATE, PROVISIONS TO ASSURE COMPLETION, AND ALL ESTIMATED COSTS OR ASSESSMENTS TO BUYER OR LESSEE. IF THERE ARE NO PROVISIOSN TO ASSURE COMPLETION, SO STATE.

CLUBHOUSE: Proposed, with 19th Hole Club Room, Meeting Rooms, Snack Bar, Pro Shop, Card Room, Patio Area.

SWIMMING POOL: Proposed, with patio and lounge furniture.

GOLF COURSE. 18 Hole Championship Course. COST TO BUYER FOR COMPLETION OR MAINTENANCE OF FACILITIES? NONE

DEVELOPER ESTIMATES ABOVE ITEMS TO BE COMPLETED BY September, 1973, and gives its assurance of completion, and additionally requiring all contractors to provide completion bonds.

Initiation dues, annual dues and fees, and other use or privilege charges shall be charged to buyers or lessees and adjusted from time to time, as determined by the developer from time to time.

The developer will have no obligation or commitment to maintain clubhouse, swimming pool, tennis courts or golf course for any period of time and no purchaser or lessee of property shall be automatically entitled to membership in or use of said facilities by virtue of acquiring an interest in real property in the development.

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22. DOES DEVELOPER OWN GOLF COURSE PROPERTY & FACILITIES REFERRED TO HEREIN?

No, Developer, [Deerfield Plantation I] does not own the golf course & facilities related thereto, but holds a leasehold from the owner, a major stock holder of Deerfield Plantation, Inc. for a period of ten (10) years. (Emphasis provided.)

15. Plaintiffs, individually and as class representatives, received a copy and had actual notice of the Privilege and Obligation Agreement before closing on their property.

16. Plaintiffs, individually and as class representatives, executed a form Purchase Agreement for their purchase of a Deerfield Lot. The form Purchase Agreement contains the following relevant provisions:

11. *The Purchaser(s) acknowledges receipt and retention of a copy of the conditions, Reservations, Covenants, and Restrictions applicable to the Property recorded in Deed Book 481, Page 305, office of the Clerk of Court for Horry County, S.C., and does hereby ratify and affirm them.* The Purchaser(s) agrees to abide by the terms of the said Conditions, Covenants, Reservations and Restrictions, and agrees to subject the Property sold hereby to the terms and provisions of the same and to any liens created by them, and agrees that he hereby immediately becomes and is a member of Deerfield Plantation Property Owners Association, Inc., a non- profit corporation. *Purchaser(s) also acknowledges receipt and*

retention of copies of the Articles of Incorporation or Charter and By-Laws of Deerfield Plantation Property Owners Association, Inc., and of the Privilege and Obligation Agreement between Seller and Deerfield Plantation Property Owners Association, Inc., and affirms and ratifies said Privilege and Obligation Agreement, said By-Laws and the acts of the officers and directors of Deerfield Plantation property Owners Association, Inc. upon the Property as therein described. *The foregoing provisions of the Paragraph may be omitted from the Warranty Deed to be delivered hereunder at the option of the Seller, but shall nevertheless survive delivery of said deed.* (Emphasis Added.)

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15. This agreement is declared and agreed to be a contract executed and delivered within the State of South Carolina and shall be construed according to the laws of the State of South Carolina. *It is agreed and declared that this agreement together with any exhibits attached thereto constitutes the entire agreement between the parties hereto and that no warranties, representations, promises, statements or inducements have been made by the Seller or any agent of the Seller other than is contained herein in writing or other than is set forth in writing the documents mentioned herein which the Purchaser has acknowledged receipt of or endorsed hereon in writing and signed by the Seller through an officer of the Seller.* (Emphasis Added.)

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21. Purchaser(s) *acknowledges that he has read and understands this agreement* and that he has received and retained a copy thereof. (Emphasis Added.)

22. Purchaser(s) *acknowledges that he has received a copy of the Property Report* prepared pursuant to the rules and regulations of the Department of Housing and Urban Development prior to the signing of this agreement. (Emphasis Added.)

17. The Plaintiffs Betty J. Hill, Geraldine Clemmons and Carl Clemmons were witnesses in this action. Each could read and write without any apparent difficulties. Ms. Hill testified that she read the Property Report, the Privilege and Obligation Agreement and the Declarations.

18. On February 2, 1973, Plaintiff Class Representatives Dale W. Hill and Betty J. Hill purchased a lot from Deerfield Plantation I "designated as Lot #358 on that certain map of Deerfield Plantation property of Deerfield Plantation, Inc made by Moorman

& Little, Inc., Engineers, dated November 14, 1972, and recorded in Plat Book 54, page 124, office of the Clerk of Court for Horry County, S.C. . .". The Hill's deed is recorded in the Horry County Register of Deeds, Deed Book 485, Page 361 .

19. On February 7, 1973, Plaintiff Class Representatives Geraldine and Carl Clemmons executed the form Purchase Agreement with Deerfield Plantation I for Lot 365 in Deerfield Plantation. On April 4, 1973, Plaintiffs Carl L. Clemmons and Geraldine O. Clemmons closed on a lot "designated as Lot #365 on that certain map of Deerfield Plantation property of Deerfield Plantation, Inc made by Moorman & Little, Inc., Engineers, dated November 14, 1972, and recorded in Plat Book 54, page 124, office of the Clerk of Court for Horry County, S.C...." The Clemmons' deed is recorded in deed Book 488, Page 824.
20. Plaintiffs, individually and as class representatives, paid a premium price for their lots because of their proximity to a golf course.
21. The Plaintiffs' deeds do not contain any express easement related to the Subject Property. In fact, no deed or other recorded document was presented which contained any express easement to the Subject Property.
22. Plaintiff Class Representative Geraldine Clemmons testified that she received a brochure entitled "In the Beginning...", kept it at her bedside for a long time and read it over and over. Ms. Clemmons testified she believed, but was not 100% sure, that she received the brochure prior to purchasing the Deerfield Lot. The "In the Beginning..." brochure talked of the golfing community and southern way of life. The brochure also contains a map of Deerfield Plantation, similar to the plat recorded on November 14, 1972 at Plat Book 54, Page 124, but depicted additional lakes,

multi-family residential units, and an area labeled Club House and Parking Area. Ms. Clemmons testified that she and her husband decided to purchase Lot 365 based upon their expectations established by the "In the Beginning..." brochure. However she also testified that her friendship with Mr. and Mrs. Hill was a factor in purchasing a lot.

23. The map in the "In the Beginning..." brochure contained the same language as on the plat recorded on November 14, 1972 at Plat Book 54, Page 124, stating:

> It is hereby expressly declared that *Deerfield Plantation, Inc. does not intend to dedicate and does not dedicate to the general public or any member thereof any easement, right of travel, right to use or other right with regard to the streets, roads, alleys, entrances, or other passages or ways and with regard to the lakes and parks shown upon this map, and that Deerfield Plantation, Inc. reserves unto itself, its successors and assigns, all streets, roads, alleys, entrances, or other passages or ways* and any and all lakes and parks shown upon this map and all easements, rights of travel, right to use and any other rights over, upon, under or connected with the same. *(Emphasis supplied.)*

24. Plaintiff Class Representative Betty Hill testified that she and her husband decided to purchase Lot 358 based upon a map that appeared on the wall of a pharmacy operated by V.F. Platt, Jr., which was similar to the plat recorded on November 14, 1972 at Plat Book 54, Page 124. There was no evidence presented that Ms. Hill received the "In the Beginning..." brochure. The Hills' purchase of Lot 358 meets all of their expectations - a home in a golfing community and a lake behind their home.

25. Although also touted in the "In the Beginning..." brochure, the Plaintiffs are not claiming any type of property interest in the pool or tennis courts, which were closed several years ago.

26. Plaintiffs seek to claim easement rights in the Subject Property as a golf course and clubhouse.

27. Plaintiffs, individually and as Class representatives, never received anything in writing that the Subject Property would be forever operated as a golf course and/or clubhouse. In addition, no one ever represented to the Plaintiffs, individually and as class representatives, that the Subject Property would be forever operated as a golf course and/or clubhouse.

28. On June 20, 1978, the remaining unsold lots in the Deerfield Plantation Property owned by Deerfield Plantation I were sold to Caro Pines Realty, Inc. This deed is recorded in Deed Book 614 Page 112. It does not contain any express easement to the Subject Property.

29. Caro Pines Realty, Inc. was a South Carolina corporation formed on May 5, 1978 by John H. Schaad, Louis E. Schaad, Sr. and James Schaad, and it subsequently changed its name to Deerfield Plantation, Inc. (hereinafter referred to as the "Deerfield Plantation II")

30. Despite similar names, the Deerfield Plantation I Corporation and the Deerfield Plantation II Corporation have always been separate and distinct entities, with separate and distinct shareholders, officers, and directors.

31. None of the deeds from Deerfield Plantation I and/or Deerfield Plantation II in Plaintiffs' chain of title, individually or as class representatives, contain any express easement related to the Subject Property.

32. The Subject Property was also transferred on several occasions. First, the Subject Property was conveyed on June 6, 1978 by V.F. Platt, Jr. to Deerfield Plantation II. This deed is recorded in Deed Book 612, Page 792. The Deed does not contain any express easement or restriction in use of the Subject Property to a golf course, open

space, or park. Second, the Subject Property was conveyed on June 5, 1980 from Deerfield Plantation II to Deerfield Golf & Country Club, Inc., recorded in Deed Book 701, page 751. The Deed does not contain any express easement or restriction in use of the Subject Property to a golf course, open space, or park. Deerfield Golf & Country Club, Inc. later merged with Deertrack Golf, Inc., which conveyed the Subject Property on March 24, 2006 to Deertrack Management, Inc., was recorded in Deed Book 3069, Page 425. This Deed does not contain any express easement or restriction in use of the Subject Property to a golf course, open space, or park.

33. Deertrack Management, Inc. conveyed the Subject Property on March 24, 2006 to the current owners Deertrack Investors, LLC, and this deed is recorded in Deed Book 3069, Page 431. This Deed does not contain any express easement or restriction in use of the Subject Property to a golf course, open space, or park.

34. Plaintiffs testified that as a result of the Deerfield Plantation general scheme of development, they have an implied easement, the scope of which would prevent the current owner, Deertrack Investors, LLC, from developing the Subject Property and restrict the use of the Subject Property to a golf course, park, or open space.

ANALYSIS

I. NO SPECIAL OR IMPORTANT REASONS EXIST TO JUSTIFY GRANTING CERTIORARI

This Court should deny Petitioners' request for a writ of certiorari because Petitioners failed to identify any "special and important reasons" to justify granting certiorari.

Rule 242 of the South Carolina Appellate Court Rules provides that a writ of certiorari "will be granted only where there are special and important reasons."

(emphasis added). Rule 242, SCACR, identifies five (5) factors as indicative of "the character of reasons which will be considered" by the Court in making its decision: (1) Where there are novel questions of law; (2) Where there is a dissent in the decision of the Court of Appeals; (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; (4) Where substantial constitutional issues are directly involved; (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

This case possesses none of the characteristics identified by Rule 242, SCACR, as special and important. Instead, this case involves a determination as to whether an implied easement in favor of the Class Members burdens the Subject Property.

The Petition is couched in terms of whether South Carolina should adopt a new type of implied easement based on the "method and manner of development, marketing, and sale," in an attempt to identify a novel question of law. However, Petitioners do not present any proposed elements of this type of easement that would differ or vary from implied easements generally or any other specific type of implied easement currently recognized in South Carolina. Importantly, one essential element courts must consider in determining the existence of any implied easement as the law currently exists in South Carolina is the "circumstances surrounding the conveyance." See Inlet Harbour v. S.C. Dept. of Parks, Rec. and Tourism, 377 S.C. 86, 93, 659 S.E.2d 151, 155 (2008) ("Our guidepost must be what the parties intended, and the best evidence of the parties' intentions are the facts and circumstances surrounding the conveyance."). As a result, the type of easement Petitioners suggest this Court adopt does not involve any novel question

of law, but rather amounts to nothing more than new nomenclature for the existing law on implied easements.

Further, although South Carolina courts have never specifically adopted by name the type of easement suggested by Petitioners, our courts have been presented with the argument that representations and promotional literature in connection with a real estate purchase create implied easements under existing easement theories, and have rejected this argument in favor of the free use of land. See Hamilton v. CCM, Inc., 274 S.C. 152, 263 S.E.2d 378 (1980) (finding where there is no plain and obvious easement shown on a plat, the plat alone cannot create an easement and reversing the trial court's finding of an implied easement based on the "general impression" created by the developer's sales representative that the disputed property would be "open space"); Butler v. Sea Pines Plantation Co., 282 S.C. 113, 120, 317 S.E.2d 464, 468 (Ct. App. 1984) (finding that "because neither the public documents presented in evidence or the circumstances surrounding the conveyance give rise to a 'plain and unmistakable' implication, there can be no easement restricting the use of the disputed tract").

Notwithstanding, Petitioners urge this court to follow case law from Arizona, Nebraska, and New Mexico and find an easement by "method and manner of development, marketing and sale." However, as set forth herein, even if this court were inclined to adopt new nomenclature for an implied easement created by the method and manner of development, marketing, and sale, the undisputed facts and the facts presented by Petitioners do not warrant such adoption.

As a result, Petitioners argument is not novel; rather, it is a re-statement of the general law in South Carolina regarding the creation of implied easements. Therefore,

Petitioners have not presented any special or important reasons sufficient for this Court to grant certiorari under Rule 242, SCACR, and the Petition should be denied.

II. SOUTH CAROLINA SHOULD NOT APPLY CASE LAW FROM ARIZONA, NEBRASKA, AND NEW MEXICO TO CREATE AN IMPLIED EASEMENT BY THE "METHOD AND MANNER OF DEVELOPMENT, MARKETING, AND SALE".

This Court should deny Petitioners' request for a writ of certiorari because the elements of an implied easement under Arizona, Nebraska, and New Mexico case law as propounded by Petitioners, and the elements as they exist in South Carolina case law are inapplicable to the facts of present case.

a) Shalimar Ass'n v. D.O.C. Enterprises, Ltd., 142 Ariz. 36, 46, 688 P.2d 682, 692 (Ariz. Ct. App. 1984)

The Arizona Court of Appeals decided the Shalimar case approximately twenty-eight years ago. Although Petitioners rely on the Shalimar case to support their position that an easement was created in this case by the method and manner of development, marketing and sale, Petitioners overlook the critical element of clear evidence of intent to create the implied restrictive covenant as applied in Shalimar and as required under existing South Carolina law. See Inlet Harbour, 377 S.C. at 92, 659 S.E.2d at 154 ("As a starting point, we note that the intentions of the parties to the transaction are the overriding focus when examining implied easements").

In Shalimar, the Arizona Court of Appeals found a golf course subject to an implied restrictive covenant limiting the use of the property as a golf course until the year 2025. Shalimar Ass'n v. D.O.C. Enterprises, Ltd., 142 Ariz. 36, 46, 688 P.2d 682, 692 (Ariz. Ct. App. 1984). The court specifically found the developers had made representations to adjacent lot purchasers that the golf course would be maintained until

the year 2000, with provision for an extension of 25 years. Id. at 38, 688 P.2d at 684. In addition, the court also found that the developer and all prior owners of the golf course believed that property was required to be used as a golf course and operated it as such. Id. at 39, 688 P.2d at 685. Based on these and other factual findings, the Shalimar court affirmed the trial court's finding that it was the clear intent of the developer and the lot purchasers that the golf course would exist as such until the year 2025. Id. at 46, 688 P.2d at 692.

Contrarily, in the present case, the special referee specifically held that "no one ever represented to the Plaintiffs, individually and as class representatives, that the Subject Property would be forever operated as a golf course and/or clubhouse." **(R. p. 65, ¶27).** Further, the special referee held that any indication that the developer had a "common scheme of development is clearly and unambiguously limited and disclaimed in the recorded documents in Plaintiffs' chain of title...." **(R. p. 76, ¶76).** In concluding, the special referee further held that "there is no expressed or implied intention of the Defendants or their predecessor in title which gives rise to an easement or dedication of the sort sought by the Plaintiffs. Moreover, the expressed disclaimers and reservations contained in all of the initial documents make it clear that the developers did not intend such dedication of the golf course property in perpetuity." **(R. p. 84, ¶101).** These findings of the special referee are supported by the evidence in the record. Slear v. Hanna, 329 S.C. 407, 410, 496 S.E.2d 633, 635 (1998) ("The determination of the existence of an easement is a question of fact in a law action and subject to an any evidence standard of review when tried by a judge without a jury.")

b) Skyline Woods Homeowners Ass'n, Inc., et al. v. Broekemeier, 276 Neb. 792, 758 N.W. 2d 376 (Neb. 2008)

Petitioners' reliance on the Skyline case for support is also misplaced as the element of clear evidence of the intent to create the implied restrictive covenant upheld in Skyline is absent from the record and the special referee's findings of facts.

In Skyline, the Nebraska Supreme Court found that six documents, including land sales contracts, purchase agreements, covenants, and memoranda of understanding, created a restrictive covenant, which burdened the golf course property and required the owner to use the property only as a golf course or maintain the property "in the appropriate fashion as a golf course or an attractive lawn." Id. at 802, 758 N.W.2d 305. The documents relied upon by the court, when read together with the conduct and expectations of the developer and buyer, were found to create a covenant running with the land. Id.

In Skyline, the developer acquired property from seller pursuant to a land contract with the intent to develop it as residential lots in combination with a then existing golf course. The land contract required the developer to maintain the golf course in its then "present condition". In addition, a purchase agreement to a subsequent property owner contained a covenant that the buyer "shall maintain the golf course in a manner and condition equal to or better than the standard of course maintenance which Seller has applied in its operation of the course." Id. In addition to these documents, each of the documents reflected the written intent of each owner of the property to restrict its use to a golf course. Further, Developer testified that when "he sold [the golf course] to a buyer...that he was sure [the buyer] would maintain the golf course." Id. at 809, 758 N.W.2d at 390. The implied restrictive covenant upheld in Skyline was supported by

substantial and clear evidence of the intent of the parties at each transfer of the property to restrict the property to a golf course use.

In contrast, in the present case, the special referee found that "the expressed disclaimers and reservations contained in all of the initial documents make it clear that the developers did not intend such a dedication of the golf course property in perpetuity." **(R. p. 84).** This finding of the special referee is supported by the evidence in the record. Slear, 329 S.C. at 410, 496 S.E.2d at 635.

c) Ute Park Summer House Ass'n v. Maxwell Land Grant, Co., 77 N.M. 730, 427 P.2d 249 (N.M. 1967).

The New Mexico Supreme Court decided Ute Park approximately forty-five years ago. While the Ute Park case appears to be the most cited case for Plaintiffs' proposition, the clear evidence of the intent to create the implied restrictive covenant upheld in Ute Park is similarly absent from the record and the special referee's findings of facts.

The developer in Ute Park sold cabin sites with reference to a plat with an area designated as a golf course. Id. at 732, 427 P.2d at 251. The sales representatives told the purchasers that a golf course, playground and/or a recreation area would be constructed in that area. Id. Shortly after the sales to the purchasers, however, the developer sold the golf course property. Id.

The Ute Park court found an implied easement could have been created in the golf course property stating:

> Wherein plats were prepared and used in making the sales, where the cabin sites were actually staked or marked upon the ground in accordance with the plats, and wherein representations were made to the purchasers that the 'golf course' area would be used as a golf course, a play ground, or a recreation area, an easement in favor of the individual purchasers may arise.

Id. at 737, 427 P.2d at 254. As a result, the Ute Park court reversed a grant of summary judgment in favor of the owners of the golf course property. Id. at 738, 427 P.2d at 254.

In the present case, the special referee made specific findings of fact that do not support any implied easements, including that the developer, or anyone else for that matter, never made any representations that the Subject Property would be used as a golf course in perpetuity and that the developer expressly disclaimed any easements or rights of Petitioners in the Subject Property in the initial sales documents and plats. **(R. p. 55-86).** These findings of the special referee were made after the Petitioners had a full opportunity to develop the records at a trial on the merits, and are supported by the evidence in the record. Slear, 329 S.C. at 410, 496 S.E.2d at 635.

As a result, while the Arizona, Nebraska, and New Mexico cases may be factually similar to the present case in the alleged restricted use of the burdened property as a golf course, the factual similarities end there. Contrary to the findings of a clear intent of the developers to create a restriction on the golf course property at the time of the conveyance to residential lot owners as held in the out-of-state cases, the special referee in the present case held that the facts and circumstances surrounding the initial conveyance of the property from Deerfield Plantation I to the Petitioners made it clear that the developers did not intend a dedication of the golf course property in perpetuity. **(R. p. 84).** The special referee's findings are supported by evidence in the record and should not be disturbed on appeal. Jones v. Daley, 363 S.C. 310, 314, 609 S.E.2d 597, 599 (Ct. App. 2005) ("Under the any evidence standard, the scope of review is limited to the correction of errors of law, and a reviewing court will not disturb the referee's factual findings that have some evidentiary support.").

III. THE TRIAL COURT APPLIED THE PROPER STANDARD OF PROOF.

This court should deny the petition for certiorari because the undisputed facts support the special referee's findings of an express disclaimer of any implied easements and the clear intent not to convey an implied easements

Petitioners ask the court to adopt what they call the "Blue Ridge rule", which they propound is a rule that purchasers of lots with reference to the plat of a subdivision acquire "every easement, privilege and advantage shown upon said plat". Petitioners argue this includes the right to forever restrict the use of all of the open space as laid down on the plat by which the lots were purchased. Blue Ridge Realty Co. v. Williamson, 247 S.C. 112, 119-120, 145 S.E.2d 922, 925 (1965) ("The purchasers of lots with reference to the plat of this subdivision acquired every easement, privilege and advantage shown upon said plat, including the right to the use of all of the streets, near or remote, as laid down on the plat by which the lots were purchased."). However, the court in Inlet Harbour defined the Blue Ridge rule, differently than that propounded by the Petitioners, as "the general rule that when an owner conveys subdivided lots and references the plat in the deed, the owner grants the lot owners an easement over the streets appearing in the plat." Inlet Harbour, 377 S.C. at 92, 659 S.E.2d at 154. Further, the Inlet Harbour court clarified that the rule applied in Blue Ridge as nothing more than a presumption that when a grantor conveys property with reference to a plat showing streets or other ways of passage, the grantor intends to allow the grantee the use of the delineated streets and ways of passage. Id.

In the present case, Petitioners are not claiming any easement to the streets or ways of passage referenced on the Plat, recorded at Plat Book 54, Page 124, and therefore

the Blue Ridge rule is inapplicable. Rather, Petitioners are claiming an easement in the open space reflected on the Plat. Importantly, Petitioners are not claiming that they have a right to utilize the open space reflected on the Plat, either as a golf course or open space, and acknowledge they have never had a right to use the Subject Property without paying a fee. **(R. pp. 190-191).** The only right Petitioners' claim to have in the Subject Property is their view – they want to see open space and not look at tract houses behind their residential homes. **(R. pp. 160, 225, 232-233).** South Carolina has long held that easements in a view, breezes, light, or air are not recognized in this state. See O'Shea v. Lesser, 308 S.C. 10, 18, 416 S.E.2d 629, 633 (1992), Hill v. The Beach Co., 279 S.C. 313, 306 S.E.2d 604 (1983); Schroeder v. O'Neill, 184 S.E. 679 (1936); Bailey v. Gray, 53 S.C. 503, 515-517, 31 S.E. 354 (1898).

Notwithstanding, Petitioners allege the Blue Ridge rule eliminates the standard of proof that the creation of an implied easement must be by "clear and unmistakable implication". See e.g., Santoro v. Schulthess 384 S.C. 250, 273-274, 681 S.E.2d 897, 909 (Ct. App. 2009). Petitioners over-read the Blue Ridge rule in suggesting that the case mandates that a presumption of an implied easement restricting the use of the Subject Property to a golf course in perpetuity arose when Deerfield Plantation I sold Petitioners subdivided lots with reference to the Plat. Petitioners err further in asserting that Blue Ridge stands for the proposition that Owner bears the burden to prove it was the intent of Deerfield Plantation I not to convey to Petitioners an easement in perpetuity burdening the Subject Property to the use of a golf course or open space. See Inlet Harbour, 377 S.C. at 92, 659 S.E.2d at 154.

Even if this court was willing to expand the Blue Ridge holding as Petitioners suggest, the special referee held that Owner met the burden suggested by Petitioners. In the Final Order, the special referee found that "the expressed disclaimers and reservations contained in all of the initial documents make it clear that the developers did not intend such a dedication of the golf course property in perpetuity." **(R. p. 84).** The undisputed findings of fact by the special referee and the record as a whole are replete with evidence of the intent NOT to convey any easement to Petitioners in perpetuity burdening the Subject Property to golf course use or open space. As a result, any alleged error by the special referee in applying the standard that an implied easement must be created by "clear and unmistakable implication", if erroneous, is not prejudicial and harmless. JKT Co. v. Hardwick, 274 S.C. 413, 419, 265 S.E.2d 510, 513 (1980) ("An error not shown to be prejudicial does not constitute grounds for reversal.").

IV. THE EVIDENCE SUPPORTS THE FINDING THAT THE SUBJECT PROPERTY IS NOT BURDENED BY AN IMPLIED EASEMENT RESTRICTING THE USE TO A GOLF COURSE FOR PERPETUITY.

"The determination of the existence of an easement is a question of fact in a law action and subject to an any evidence standard of review when tried by a judge without a jury." Slear, 329 S.C. at 410, 496 S.E.2d at 635. Under the any evidence standard, the scope of review is limited to the correction of errors of law, and a reviewing court will not disturb the referee's factual findings that have some evidentiary support. Jones, 363 S.C. at 314, 609 S.E.2d at 599.

The special referee's conclusions that the "expressed disclaimers and reservations contained in all of the initial documents make it clear that the developers did not intend such a dedication of the golf course property in perpetuity", and holding that the

"Plaintiffs have failed to meet the burden necessary to declare any preexisting rights in the Subject Property by plain unmistakable implication," are supported by undisputed evidence in the records and the special referee's findings of fact. **(R. p. 84).**

Moreover, as discussed above such conclusions are not controlled by any error of law. The special referee held both that (1) any interest in the Subject Property was clearly and expressly disclaimed and (2) that Petitioners did not prove an implied easement by plain and unmistakable implication. **(R. p. 84).** Thus, the special referee's findings of fact and the facts as reflected in the record, are not sufficient to create an implied easement even if the Court were to adopt Petitioners suggestion to shift the burden of proof with respect to implied easements by reference to a plat and require the Owner prove a clear intent not to create any implied easement.

V. THE TRIAL COURT DID NOT ERR IN DIRECTING THE CANCELLATION OF THE *LIS PENDENS.*

Petitioners assert that the special referee erred in directing the cancellation of the *lis pendens*. As an initial matter, this issue was neither raised by motion for reconsideration nor ruled upon in the order denying motion for reconsideration. As a result, this issue is not preserved for appeal.

Even if this issue were preserved for appeal, which Respondents do not concede, the special referee did not err in cancelling the *lis pendens* as his final order resolved that portion of the litigation involving real property. Further, according to Rule 241(a), SCACR, the filing of a notice of appeal automatically stays the matter decided in the order unless exceptions to the rule exist.

Specific exceptions applicable to the automatic stay requirement in this case include Section 18-9-150 of the South Carolina Code, which requires the Petitioners post

a bond to stay the order on appeal where the order directs delivery of a written instrument, and Section 18-9-160 of the South Carolina Code, which directs the execution and deposit of an instrument with the clerk of court.

Both exceptions to the automatic stay requirement set forth in sections 18-9-150 and 160 are applicable to the Order on Appellant's First Cause of Action for Declaratory Judgment, and as a result the cancellation of the *lis pendens* set forth in the order should not be stayed without a bond posted by Petitioners. Moreover, the equities favor a bond requirement in this instance because Petitioners have no right to restrict the use of the Subject Property, expressly or in equity, and have utilized the *lis pendens* in order to gain a tactical advantage and prevent the free use during the pendency of this litigation and appeal. See Pond Place Ptns. v. Poole, 351 S.C. 1, 17, 567 S.E.2d 881, 889 (Ct. App. 2002) ("The *lis pendens* mechanism is not designed to aid either side in a dispute between private parties.").

As a result, the Special Referee did not err in directing the cancellation of the *lis pendens* and Petitioners should be required to post a bond in order for the portion of the of the Order directing the cancellation of the *lis pendens* to be stayed pending the appeal.

CONCLUSION

As a result, this Court should deny the petition for writ of certiorari.

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Myrtle Beach, South Carolina
July 23, 2012

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Thomas W. Cooper, Jr., Special Referee

Case No. 2006-CP-26-4440

COURT OF APPEALS
UNPUBLISHED OPINION NO. 2012-up—219 – FILED APRIL 4, 2012

APPELLATE CASE NO. 2012-212294

Dale Hill, Betty Hill, Carl Clemmons, Geraldine Clemmons, Individually, and on behalf of a Class of all others similarly situated . . . . . *Petitioners*,

v.

Deertrack Golf and Country Club, Inc., Deertrack Golf, Inc., Deertrack Plantation, Inc., the Estate of John Schaad, by and through Ann Schaad as Executrix, and Deertrack Investors, LLC . . . . . *Respondents*.

PROOF OF SERVICE

I, Carole Koerner, an employee of McNair Law Firm, P.A., attorneys for Respondent, Deertrack Investors, LLC in the above-entitled action, certify that I have served Respondent Deertrack Investors, LLC's Return to Petitioners' Petition for Writ of Certiorari, and Proof of Service on all parties to this matter by depositing a copy in the United States Mail, first class postage prepaid on the 23rd day of July, 2012.

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July 23, 2012

The Honorable Daniel E. Shearouse, Clerk
South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

Re: Hill, Dale v. Deertrack Golf and Country Club
Appellate Case No. 2012-212294

Dear Mr. Shearouse:

With reference to the above matter, enclosed for filing with the Court, please find original and seven copies of a Respondent, Deertrack Investors, LLC,'s Return to Petitioners' Petition for Writ of Certiorari and Proof of Service.

By copy of this letter to parties of record and as shown on the Proof of Service, I hereby serve a copy of the Respondent, Deertrack Investors, LLC's Return to Petitioners' Petition for Writ of Certiorari and Proof of Service.

Please return to me one clocked copy of the enclosed documents in the enclosed self-addressed envelope.

With kindest regards, I am

Very truly yours,

McNAIR LAW FIRM, P.A.

Amanda A. Bailey

AB:ck

cc: David B. Miller, Esquire
Robert S. Shelton, Esquire
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