

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cynthia Graham Howe, Master-In-Equity

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S.C. Supreme Court

Unpublished Opinion No. 2014-UP-284 (S.C. Ct. App. Filed July 9, 2014)

John Musick, Respondent,

v.

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

PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Certificate of Counsel ii

Questions Presented 1

Statement of the Case / Statement of the Facts 1

Arguments

 I. IN HOLDING THE 1972 ORDER ALLOWED ONLY SOME SPECIFIC “GRANTOR” – AS OPPOSED TO THE DICKS – THE RIGHT TO REVISE THE LOT ARRANGEMENT WITHIN THE PROPERTY, THE COURT OF APPEALS FAILED TO PROPERLY APPLY AND INTERPRET THE PLAIN LANGUAGE OF THE 1972 ORDER 5

 II. THE COURT OF APPEALS 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 9

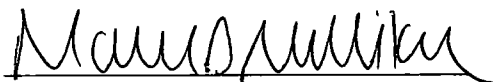
 III. THE COURT OF APPEALS ERRED IN FAILING TO FIND THE PROPERTY AS SHOWN ON THE 1955 PLAT CONSISTS OF SEVEN LOTS, AND IN HOLDING THAT EVEN IF THE PROPERTY HAD CONSISTED OF SEVEN LOTS, WARD HAD THE RIGHT TO COMBINE THOSE LOTS INTO ONE 11

 IV. THE COURT OF APPEALS ERRED IN FINDING THE DICKS ARE NOT ENTITLED TO PROTECTION UNDER THE SHELTER RULE WHEN THE 1972 ORDER WAS NOT PROPERLY RECORDED AND THE DICKS’ PREDECESSORS IN TITLE PURCHASED THE PROPERTY WITHOUT ANY NOTICE OF THE 1972 ORDER 16

Conclusion 24

CERTIFICATE OF COUNSEL

Counsel for the Petitioners hereby certifies that the Petition for Rehearing was made and finally ruled upon by the Court of Appeals on August 25, 2014.



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Columbia, South Carolina
September 23, 2014

QUESTIONS PRESENTED

- I. Did the Court of Appeals err in not holding the Dicks had the right to revise the lot arrangement within the Property pursuant to the 1972 Order, and instead holding that only some purported "Grantor" had the right to change the lot lines, when the plain language of the 1972 Order, which the Court of Appeals was bound to interpret and apply, does not limit this right of revision to any particular party?
- II. Did the Court of Appeals err in holding that Carmen Ward and Gene Lewis were the "Grantors" contemplated in the 1972 Order when that term is not defined in the 1972 Order or elsewhere and when the Court of Appeals instead appears to have considered the 1972 Order ambiguous, and relied upon extrinsic evidence, but thereafter failed to strictly construe the 1972 Order in favor of the free use of the Property as it was required to do under binding precedent?
- III. Did the Court of Appeals err in holding that the Property has always been sold as one lot when two prior recorded plats show the Property as seven lots, Respondent has admitted and the Court of Appeals has previously held the Property consists of seven lots, and under the applicable restrictions no party had the right to combine those seven lots into one?
- IV. Did the Court of Appeals err in failing to find that the Dicks are entitled to protection under the Shelter Rule when the 1972 Order was admittedly not properly recorded, the Dicks' predecessors in title both purchased the Property without knowledge of the 1972 Order, and a further investigation resulting from any "constructive notice" the Court Appeals asserts the Dicks' predecessors may have had would not have revealed the 1972 Order?

STATEMENT OF THE FACTS / STATEMENT OF THE CASE

In 2003, Thomas L. Dicks purchased seven lots within Blocks 28 and 29 of the Long Bay Estates subdivision in Myrtle Beach ("Property"). (R. pp. 79-80, 536-537, 538-541). In connection with this purchase, Thomas L. Dicks recorded a plat (the "2003 Plat") which, while still showing the Property as seven lots, revised the arrangement of the lots. (R. p. 542). On that same day, Thomas L. Dicks conveyed Lots 1, 2 and 3 to Robert E. Dicks, Jr. It is this 2003 Plat that Musick challenges. The real property records that are relevant to this issue are:

- In 1955, Robert L. Bellamy drew a plat of the subdivision (“1955 Plat”), which was recorded in 1958. (R. p. 530). The Property is shown on the 1955 Plat as comprising seven individual lots within Blocks 28 and 29. Id.
- Certain alleged restrictions were somehow attached to and recorded with the 1955 Plat although they were not signed, dated, or acknowledged (“1958 Restrictions”). Id. The 1958 Restrictions apply only to Blocks 1 through 27, and not to the Property which comprises Blocks 28 and 29. Id.
- On June 1, 1972, Gene F. Lewis and Carmen F. Ward, alleging ownership of Blocks 28-33 of Long Bay Estates, filed an action against numerous other owners of property in Long Bay Estates seeking to quiet title to certain portions of their property. (R. pp. 455-470). In connection with this action, an order was issued by the Honorable Winston Vaught (“1972 Order”) which concluded that the 1958 Restrictions, by their express terms, apply only to Blocks 1 through 27, and that the property owned by the plaintiffs in that action – including Blocks 28 and 29 (which is the Property) – is not subject to the 1958 Restrictions. (R. p. 460).
- However, in connection with this 1972 lawsuit, the parties agreed to place certain restrictions on Blocks 28 and 29, separate and apart from the 1958 Restrictions. (R. p. 461). The 1972 Order created these restrictions upon Blocks 28 and 29 by providing as follows:

In like manner the remaining portions of “old” Blocks 28 and 29, that is to say the area lying between the rear of Blocks 24 and 25 and the southeasternmost “paved street” are subject to such residential restrictions, **but with right of revision of the lot arrangement** or for combination with abutting portions of lots in Blocks 24 and 25. Id. (emphasis added).

In sum, the 1958 Restrictions do not affect the Property. The 1972 Order, which affects the Property, states the Property is subject to the residential restrictions imposed by the 1958 Restrictions, **but with right of revision of the lot arrangement**. The 1972 Order further explains that properties affected thereby have been indicated as “residential” and as “residential (with right of revision)” on the map attached thereto. Id. That map shows the Property as seven lots and is identified as “residential (with right of revision).” (R. p. 470). The Dicks’ 2003 Plat, which simply revises the arrangement of the seven lots comprising the Property, entirely follows the terms of the 1972 Order.

Even if the 1972 Order were somehow construed to prevent the Dicks' rearrangement of the lots (though specifically authorized by the 1972 Order), all parties admit the 1972 Order was not properly indexed and therefore could not be discovered in a title examination. (R. p. 167, ll. 12-18, p. 182, ll. 2-5, p. 360, ll. 20-24, p. 380, l. 16 – p. 381, l. 5, p. 404, ll. 11-22).¹ It therefore could not operate to provide constructive or inquiry notice to third parties. Id. In addition, the Dicks' predecessors in title – the Meeses – did not have actual notice of the 1972 Order at the time of their purchase of the Property. (R. p. 384, ll. 15-19, p. 385, ll. 14-25, p. 386, ll. 1-11, p. 386, l. 25 – p. 387, l. 8, p. 396, l. 21 – p. 397, l. 3). Therefore, the Dicks are entitled to protection from any effects of the 1972 Order on the Property by the Shelter Rule.

Musick owns Lot 4 of Block 24 in Long Bay Estates. (R. p. 78). Musick instituted this lawsuit in 2004 claiming the rearrangement of the lots as shown on the Dicks' 2003 Plat violates the 1972 Order. According to Musick's argument, the Dicks must own the Property as one lot (although, as explained below, it has always existed as seven lots and there is no evidence of those prior lot lines having been abandoned), and the Dicks do not actually have the right to change the lot arrangement within the Property. Interestingly, however, both Musick and Robert DeCiero, a neighbor who testified on Musick's behalf, testified the Property being used as seven lots is entirely consistent with the overall character of the neighborhood. (R. p. 273, l. 20 – p. 274, l. 2, p. 319, l. 23 – p. 320, l. 1,

¹ The 1972 Order was indexed in the Clerk of Court's office under the name of Leroy Adams, but was not indexed as a judgment against the names of the plaintiffs in that case - Gene Lewis and Carmen Ward - as required by Section 15-35-520 of the South Carolina Code. (R. p. 167, ll. 12-18, p. 182, ll. 2-5); S.C. CODE ANN. § 15-35-520 (2005). Because the plaintiffs in the case out of which the 1972 Order arose were the record owners of the property, the 1972 Order was not indexed in the chain of title to the property that was the subject of that action, a portion of said property now being owned by the Dicks. Thus, the 1972 Order was not discoverable during a title examination of the Property and did not operate to provide constructive or inquiry notice to third parties of its terms. (R. p. 360, l. 20-24, p. 380, l. 16 – p. 381, l. 5, p. 404, ll. 11-22). This fact is admitted by all parties to this litigation. (R. p. 167, ll. 12-18, p. 182, ll. 2-5).

p. 320, ll. 3-4, p. 334, ll. 3-4). Other than the common area and one large lot in Long Bay, this property remaining as one large lot would be abnormal for this subdivision. (R. pp. 530, 470).

The parties each filed Motions for Summary Judgment, and Musick's Motion was granted. (R. pp. 21-35). The Dicks appealed and the Court of Appeals reversed and remanded for trial. Musick v. Dicks, Opinion No. 2010-UP-351 (S.C. App. 2010). The trial resulted in an Order issued by Cynthia Graham Howe, Master-in-Equity for Horry County, dated July 29, 2011 and filed August 9, 2011 (the "Order") which found in favor of Musick. (R. pp. 10-17). The Dicks filed their Motion to Reconsider, which was denied, and thereafter appealed the Order (and subsequent denial of their Motion to Reconsider). (R. pp. 6-9, 100-143, 144-159).

The Court of Appeals affirmed the Order in Musick v. Dicks, Opinion No. 2014-UP-284 (S.C. App. 2014) (the "Opinion"). Petitioners filed their Petition for Rehearing on July 23, 2014, which the Court of Appeals denied by its Order filed on August 25, 2014. Petitioners seek a writ of certiorari to review the Opinion, which is in direct conflict with the plain and obvious meaning of the 1972 Order, and represents a complete departure from the interpretive standards the Court of Appeals was bound to apply in construing the 1972 Order and from the proper application of the Shelter Rule as it exists in South Carolina.

ARGUMENT

I. IN HOLDING THE 1972 ORDER ALLOWED ONLY SOME SPECIFIC “GRANTOR” – AS OPPOSED TO THE DICKS – THE RIGHT TO REVISE THE LOT ARRANGEMENT WITHIN THE PROPERTY, THE COURT OF APPEALS FAILED TO PROPERLY APPLY AND INTERPRET THE PLAIN LANGUAGE OF THE 1972 ORDER.

The 1972 Order states the residential restrictions in the 1958 Restrictions apply to the Property “**but with right of revision of the lot arrangement . . .**” (R. p. 461) (emphasis added). Since the filing of the 1955 Plat, the Property has consisted of seven lots.² (R. p. 530). According to the plain language of the 1972 Order, upon which the Dicks relied in filing their 2003 Plat, the Dicks had the right to revise the lot arrangement of the seven lots. The Dicks believed they had the right to revise the lot arrangement. The 1955 Plat shows the Property as seven lots. The 1972 Order states the Property is subject to certain residential restrictions set forth in the 1958 Restrictions **but with** right of revision of the lot arrangement. Any contrary conclusion would seem unfathomable. Nonetheless, the Court of Appeals held the right of revision of lot arrangement was limited to some particular party. The Court of Appeals held some “Grantor” was the only party to have the right of revision of lot arrangement within the Subject Property, and that the “Grantor” was Gene Lewis and Carmen Ward. In reaching this conclusion, the Court of Appeals does not mention, and it remains unclear, how the Dicks should have known that they did not have the right to revise the lot arrangement, as explicitly set forth in the 1972 Order. This decision calls into question the very purpose and function of our

² The Court of Appeals held the Subject Property had somehow been converted into one lot; however, this conclusion is completely unsupported by the record. No evidence has ever been presented during the ten years during which this case has been pending showing that the lot lines as established and existing on the 1955 Plat, and the map attached to the 1972 Order, were ever abandoned or removed. This issue is discussed in greater detail below.

recording system, if a party is now to be charged with notice of matters not contained in or discernable from the public records.

The right of revision of the lot arrangement as established in the 1972 Order is not restricted to any particular party, much less to some unidentified “Grantor.”³ The revision rights are not limited to the Plaintiffs in the 1972 Case, not limited to some “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 Court of Appeals read a provision into the 1972 Order that simply does not exist, of which the Dicks could not possibly have been aware or had notice based on the language of the 1972 Order.

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 parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written.”) 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). Because

³ 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.

restrictions on property are historically disfavored, restrictive covenants are to be “strictly construed” and all doubts on 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 of Appeals, 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 regarding 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 had the parties wanted to restrict the property at issue in a particular way, they would have done so by including such language in the restrictions themselves). That the parties did not so limit the right of revision of lot arrangement in the 1972 Order shows they 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 successors in title).

The “plain language” of the 1972 Order provides the Property is subject to residential restrictions “but with right of revision of the lot arrangement.” (R. p. 461). In finding the right of revision of the lot arrangement was only in favor of some unidentified “Grantor” or Lewis and Ward, the Court of Appeals 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 in the 1972 Order, which does not limit the right of revision to any person or party, the Court of Appeals looked to other documents such as the 1958 Restrictions (which by their terms do not 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 too much to require potential purchasers of property to go through such great lengths, like the Court of Appeals did, including examining documents that are inapplicable, to determine the meaning of restrictions potentially affecting property. For this reason the “plain and ordinary” meaning of restrictions is to be applied.

The Court failed to properly interpret and apply the plain language of the 1972 Order, as it had to do under the appropriate interpretive standards applicable to restrictive covenants. The 1972 Order is clear that any owner of the Property has the right to revise the lot arrangement. 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 authorized by the 1972 Order, and the Master and Court of Appeals should have so held. Any interpretation to the contrary is in direct contravention not only with the 1972 Order, but with the interpretive standards to which courts must adhere in interpreting contracts. To allow such a deviation from these required standards would set a precedent that could

lead to unpredictable results in contract disputes and heightened uncertainty in contract drafting and negotiations.

II. THE COURT OF APPEALS 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.

After determining that, although contrary to the plain language of the 1972 Order, the right of revision of lot arrangement granted under the 1972 Order was reserved to some particular “Grantor”, the Court of Appeals stated the 1972 Order was “ambiguous” as to who would be considered the purported “Grantor” with respect to these rights. That the 1972 Order would be “ambiguous” as to who the claimed “Grantor” was thereunder is certainly an understatement since the operative provision of the 1972 Order contains no actual mention of the word “Grantor” much less the identity of any such purported “Grantor.”

In the event of an ambiguity, which the Court of Appeals expressly found regarding the identity of the purported “Grantor”, the Court should have resolved all doubts in favor of the free use of the property, and held the right to revise the lot arrangement ran with the title to the Property. Hamilton v. CCM, Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 382 (1980). 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 failing to properly construe the 1972 Order in favor of the free use of the Property, the Court of Appeals relied upon the case of Hardy v. Aiken, 369 S.C. 160, 631 S.E.2d 539 (2006) which states this rule of construction should not be used to “defeat the plain and obvious purpose of the restrictive covenants.” Opinion ¶ 2. However, 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 by the 1972 Order must be determined by examining the language of the 1972 Order itself. Resorting 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.

The Court of Appeals found the 1972 Order is ambiguous as it relates to the identity of the purported “Grantor” thereunder, but the Court did not make it clear whether the 1972 Order’s operative provision relating to the revision of lot arrangement is ambiguous. The Court of Appeals 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, then the operative provision of the 1972 Order must have also been found ambiguous. The provision should have been construed in the light most favorable to the free use of property and the Dicks' interpretation of the 1972 Order's operative language should have been adopted. As stated at length above, the Court of Appeals was bound to apply the plain meaning of the 1972 Order which did not restrict the right of lot arrangement to any particular party. If the Court did not apply this plain and ordinary meaning, the Court necessarily must have found this provision ambiguous. In the event of ambiguity, the Court was bound to strictly construe the provision and to construe the provision in the light most favorable to the free use of the Property. Under either of these scenarios, the Court of Appeals has erred, and the interpretive standards required to be applied by the Court of Appeals, and by any other court in this State, have been violated.

III. THE COURT OF APPEALS 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 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 the Property consisted of seven lots, and the Court of Appeals previously found the Property to consist of seven lots.

The 1955 Plat clearly shows the Property as containing seven lots. (R. p. 530). In addition, the map attached to the 1972 Order shows the Property as containing seven lots. (R. p. 470). Musick admits the 1955 Plat shows the Property as containing seven lots. (R. p. 529). The Court of Appeals' prior Opinion also held that "[t]he 1955 Plat and a map attached to the 1972 Order show [the Subject Property] 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 of Appeals affirmed the Master's conclusion that the Property has always been one lot, as opposed to seven.

The only justification given by the Court for its holding that the Property has always been one lot, as opposed to seven, is that it had a single tax map number.⁴ However, that the Property may have been identified by the assessor's office by only one tax map number does not affect the issue at hand. No evidence is before this Court as to what information the assessor relied upon in creating its tax maps. The assessor 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.

No evidence was presented on this issue other than the fact that at one point in time the seven lots comprising the Property were identified by the 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). That the seven lots comprising the Property were at some point in time identified by the assessor under one tax map number is insufficient to support the Court of Appeals' conclusion that

⁴ The only other possible justification for this holding, which was not mentioned by the Court of Appeals but was relied upon by the Master below, is the argument that the lines showing the subdivision of the Property into seven lots on the prior plats indicated a mere "potential subdivision" of the 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.

the Property has always been one lot, and was not properly relied upon by the Court of Appeals in reaching this conclusion.

Both the 1955 Plat and the map attached to the 1972 Order show the Property as containing seven lots, Musick admitted the Property contained seven lots, and the Court of Appeals previously held the Property consisted of seven lots. Yet faced with this undisputed evidence, the Court of Appeals summarily, and almost inexplicably, found that the Property consisted of and had always been sold as one lot.

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

The Court of Appeals found Carmen Ward had the right to, and 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 reserved two rights 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 1972 Order created rights to revise the lot arrangement of those seven lots and to combine the lots with adjoining lots in Blocks 24 and 25. (R. p. 461). 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). No right was ever created in any documents submitted in evidence which authorizes anyone, including

any purported "Grantors", to take the seven lots and turn them into one.⁵ No evidence, facts, or law support the Court of Appeals' 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.⁶

Any construction of the 1958 Restrictions or the 1972 Order which provides that lots can be taken away or combined is contrary to the purpose and spirit of both the 1958 Restrictions and the 1972 Order. The 1958 Restrictions are "protective covenants" 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). The Court of Appeals' 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. (R. pp. 530, 470)

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

⁵ Revising the boundary lines, as allowed under the 1958 Restrictions, 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. Turning to the 1972 Order, "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.

⁶ 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 of Appeals 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.

In addition, the Court found Carmen Ward sold the Property to the Meeses as one lot. Although no specific evidence 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. (R. p. 13). However, there was no evidence submitted to show the Culler Survey was anything other than a boundary survey. (R. p. 517). 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, ll. 20-22, p. 423, ll. 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 existing seven lots were being eliminated, which is required by local ordinance. (R. p. 517, p. 308, ll. 8-11). 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.

In light of the general rule that lines on a senior survey control over lines on a junior survey if conflict occurs between the two, the lot lines on the 1955 Plat must control 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 shown, in solid lines, on the 1955 Plat must control. Id.

The Court of Appeals overlooked and misapprehended the record and the law in holding the Property was and had always been one lot.

IV. THE COURT OF APPEALS ERRED IN FINDING THE DICKS ARE NOT ENTITLED TO PROTECTION UNDER THE SHELTER RULE WHEN THE 1972 ORDER WAS NOT PROPERLY RECORDED AND THE DICKS' PREDECESSORS IN TITLE PURCHASED THE PROPERTY WITHOUT ANY NOTICE OF THE 1972 ORDER.

Even if the 1972 Order were construed to prevent the Dicks' revision of the lot arrangement of the seven lots, the Dicks are entitled to protection from the 1972 Order under the Shelter Rule because the Dicks' predecessors in title – the Meeses – took title to the Property with no notice of the 1972 Order. Under this well-established rule, a purchaser with notice of an unrecorded title or claim will be protected if his grantor was an innocent purchaser. See 1 PATTON AND PALOMAR ON LAND TITLES § 13, at 77-78 (3d. 2003); Liberty Loan Corp. of Darlington, S.C. v. Mumford, 283 S.C. 134, 322 S.E.2d 17 (Ct. App. 1984) (“whenever in a succession of purchasers you reach one who is innocent and purchases in ignorance, the title is thenceforth sanctified.”). With respect to the Shelter Rule and its application, this Court has stated as follows:

The governing law has been established by many decisions; among them are; Fretwell v. Neal, 11 Rich.Eq. 559, 572, “the well-recognized doctrine of equity being that wherever, in a succession of purchasers you reach one who is innocent and purchases in ignorance, the title is thenceforth sanctified”; Foster v. Bailey, 82 S.C. 378, 382, 64 S.E. 423, 424, “The case illustrates the danger of negligence in complying with the recording statute”; Southern Railway v. Carroll, 86 S.C. 56, 67 S.E. 4; and McCandless v. Klauber, 158 S.C. 32, 155 S.E. 141. The rule is well stated in 77 C.J.S. Sales § 296 d, p. 1110, as follows:

After property has passed into the hands of a bona fide purchaser, *every subsequent purchaser* stands in the shoes

of such bona fide purchaser and is entitled to the same protection as the bona fide purchaser, *irrespective of notice*, unless such purchaser was a former purchaser, with notice, of the same property prior to its sale to the bona fide purchaser.

Goodwin v. Harrison, 231 S.C. 243, 98 S.E.2d 255, 258 (1957) (emphasis added).

The Court of Appeals, however, found the Meeses had “constructive notice” of the restrictions in the 1972 Order and the Dicks are therefore not protected by the Shelter Rule. In reaching this conclusion, the Court of Appeals misconstrued the testimony of James Dusenbury, the Meeses’ closing attorney, and the testimony of the Meeses. The Court of Appeals’ holding represents a clear departure from this Court’s precedent established in Goodwin.

A. The Court of Appeals misconstrued 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 in the 1972 Order at the time of their purchase of the Property, the Court of Appeals 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. Mr. Dusenbury’s actual testimony was quite the opposite. 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, and he issued a title policy with no exception to the 1972 Order. (R. p. 361, ll. 7-9, p. 366, l. 25 – p. 367, l. 5). Mr. Dusenbury’s testimony on 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, ll. 8-13, p. 371, l. 23 – p. 372, l. 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 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, ll. 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. As previously stated and evidenced by the title commitment and policy Dusenbury issued, Dusenbury

himself had no knowledge that the restrictions in the 1972 Order affected the Property until *after* the Meeses' acquired the Property. The Court of Appeals misconstrued Dusenbury's testimony, which in reality supports the Dicks' Shelter Rule argument.

B. The Court of Appeals misapprehended the testimony of David Meese who unequivocally stated he had no knowledge of the 1972 Order 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, ll. 15-19, p. 385, ll. 14-25, p. 386, ll. 1-11, p. 386, l. 25 – p. 387, l. 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 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 misapprehended the testimony of David Meese and erred in finding that David Meese had constructive notice of the 1972 Order *at the time of his purchase of the Property*.

C. The Court of Appeals further misinterpreted Leigh Meese’s testimony.

Likewise, the Court of Appeals held Leigh Meese had sufficient notice of the restrictive covenants, at the time of her purchase of the Property, to put her on constructive notice of the 1972 Order. 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. The Court entirely disregards the testimony of Leigh Meese stating without hesitation that *at the time of her purchase of the Property* she had no 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, l. 21 – p. 397, l. 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, l. 21 – p. 397, l. 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 of Appeals misinterpreted Leigh Meeses' 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 Meeses could not have had "constructive notice" of the 1972 Order when any further investigation would have only led to a determination that the 1972 Order did not encumber the Property.

The Court of Appeals 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 finds (although not supported by the testimony) "[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, however, the court focused in part on what a further investigation would have revealed and specifically found that certain facts alleged would not "prompt a reasonable purchaser to conduct further inquiry after examining this public record."

Because the 1972 Order is not indexed correctly, it would not have been found in a title examination. The 1958 Restrictions do not appear in the chain of title as they expressly state they do not encumber the Property. Therefore, even if the Meeses had notice of restrictions possibly affecting the property (which, again, according to their

testimony they did not), any further inquiry on their part would only have led to the conclusion that no restrictive covenants applied at all to the Property. See 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.”).

The Meeses could not reasonably have been held to have “constructive notice” of the 1972 Order, and certainly not of the Court of Appeals’ strained construction thereof.

E. The bona fides of either Leigh or David Meese is sufficient for the purpose of the Shelter Rule.

In the event it remained unclear whether Leigh Meese knew of the 1972 Order at the time of her purchase of the Property, the Court of Appeals 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 knows of a prior judgment or monetary lien 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. Restrictions, however, cannot be

handled in the same manner since restrictions cannot attach only to an undivided interest in the property. Only one of the two cotenants must be bona fide 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 cotenants, as to receipt of notice of outstanding claims affecting title); Gray v. Caldwell, 904 So. 2d 212 (Miss. Ct. App. 2005) (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 other tenants without their unanimous consent.).

The 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). Under the scenario involving restrictions on property, all it takes is for one purchaser to not have notice to clear the property of that restriction. Otherwise, David Meese would have not been able to receive the benefit of his bargain.

If the Court of Appeals somehow construed the testimony to conclude Leigh Meese had notice of the 1972 Order at the time of the 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 afforded 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 misinterpreted the testimony and refused to follow binding South Carolina precedent in holding the Dicks are not entitled to the protection of our Shelter Rule.

CONCLUSION

For the reasons stated, Petitioners ask this Court to grant the petition for a writ of certiorari.

Respectfully submitted,


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ATTORNEYS FOR PETITIONERS

September 23, 2014

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cynthia Graham Howe, Master-In-Equity

Unpublished Opinion No. 2014-UP-284 (S.C. Ct. App. Filed July 9, 2014)

John Musick, Respondent,

v.

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

CERTIFICATE OF SERVICE

I, Kathleen S. Romero, an employee of Callison Tighe & Robinson LLC, Attorneys for the Petitioners, do hereby certify that, on this date, I caused to be served the foregoing **Petition for a Writ of Certiorari** 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:

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September 23, 2014

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