

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS

THE STATE OF SOUTH CAROLINA
IN The Court of Appeals

RECEIVED

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

JUL 28 2011

Carmen Tevis Mullen, Circuit Court Judge

S C Supreme Court

Opinion No 4750 (S C Court of Appeals, withdrawn,
substituted and refilled July 1, 2011)

Robert L Cullen, Andrew A Corriveau,
and Andrea Hucks

Petitioners,

v

J Bennett McNeal, B McNeal Partnership, L P ,
Anthony R Porter, and Wright's Point Home
Owners Association,

Respondents

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

John E North, Jr
North & Black, PC
916 Bay Street, Suite 100
Beaufort, SC 29902
(843) 379-0800 (tel)
(843) 379-0900 (fax)
Attorneys for Petitioner

Other Counsel of Record

Joel D Bailey
PO Box 1437
Beaufort, SC 29901
(843) 525-6090
Attorney for Petitioners

INDEX

Opinion of Court of Appeals, Filed October 6, 2010	1
Petition for Rehearing	18
Order Denying Petition for Rehearing, and Substituted Opinion, Filed July 1, 2011	51
Briefs of the Parties	Submitted Separately
Record on Appeal, Volumes I, II, and III and Appendix	Submitted Separately

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Robert L Cullen, Andrew A
Corriveau, John Caldwell,
Andrea Hucks, Jamie Bellamy,
Michael Pearson, and David
Mandrell, Plaintiffs,

v

J Bennett McNeal, B McNeal
Partnership, L P , Anthony R
Porter, and Wright's Point
Home Owners Association,
Inc , Respondents-Appellants,

of whom Robert L Cullen,
Andrew A Corriveau and
Andrea Hucks are Appellants-Respondents

Appeal From Beaufort County
Carmen T Mullen, Circuit Court Judge

Opinion No 4750
Heard February 10, 2010 – Filed October 6, 2010

AFFIRMED

John E North and Pamela K Black, both of
Beaufort, for Appellants-Respondents

Joel D Bailey, of Beaufort, for Respondents-
Appellants

LOCKEMY, J In this cross-appeal, the Appellants-Respondents (the Homeowners) argue the circuit court erred in (1) considering extrinsic evidence in interpreting the Declarations for Wright's Point, (2) construing the term "Developer", (3) finding undeveloped land was a part of Wright's Point, (4) finding B McNeal Partnership, L P was a "successor developer", (5) finding the Developers were entitled to continue to control the Association, (6) finding the Developers were entitled to continue to control the Committee, and (7) failing to find the Homeowners were entitled to pursue the claims of the Association derivatively and seek attorney's fees. The Respondents-Appellants (the Developers) argue the circuit court erred in finding they were not entitled to attorney's fees. We affirm.

FACTS/PROCEDURAL BACKGROUND

Robert L Cullen, Andrew A Corriveau, and Andrea Hucks (the Homeowners) are property owners in Phase I of Wright's Point Plantation, a planned waterfront community in Beaufort County.¹ J Bennett McNeal, B McNeal Partnership, L P, and Anthony R Porter (the Developers) are real estate developers involved with the development of Wright's Point.

In 1997, Anthony Porter acquired a 1.7 acre tract, a 19.74 acre tract (Parcel B), and a 10.45 acre tract (Parcel C) of land in Beaufort County from Mary P Logan, Lewis H Wright, and John D Wright. Anthony Porter's father, Jimmy Porter, acquired an 8.41 acre tract (Parcel D) from Lewis

¹ The Homeowners are part of an original group of seven property owners in Wright's Point who initiated this litigation against the Developers. Cullen, Corriveau, and Hucks are the only Homeowners who have appealed the circuit court's order.

Wright and John Wright Pursuant to a recorded plat entitled "Wright's Point Phase I," portions of the 17 acre tract and Parcels B, C, and D were subdivided into 44 lots, roads, and community spaces A majority of the land within Parcels B and D was labeled "Future Development" and not subdivided into lots

In June 1998, the Declarations of Covenants, Conditions, Restrictions, and Easements (the Declarations) for Wright's Point, which subjected all four parcels owned by Anthony Porter and Jimmy Porter to the Declarations, were recorded Pursuant to the Declarations, the Wright's Point Homeowner's Association (the Association) was incorporated to administer Wright's Point and enforce the Declarations Porter and his father conveyed the open spaces, ponds, streets, and certain other areas in Wright's Point to the Association Also, pursuant to the Declarations, all construction and improvements made within Wright's Point were subject to review and approval by the Wright's Point Architectural Committee (the Committee), which consisted of Anthony Porter, Jimmy Porter, and subsequently included their appointees, including McNeal In April 1999, Anthony Porter conveyed undeveloped Parcel B and four lots in Phase I of Wright's Point to McNeal, d/b/a McNeal Land Company In July 2002, Jimmy Porter conveyed undeveloped Parcel D to B McNeal Partnership, L P

In May 2003, Homeowner Cullen convened a meeting of a group of property owners in Phase I and formed a separate entity called the Wright's Point Property Owners Association According to the minutes of the meeting, those present wanted "a total revamping of the [Committee]" so as to permit the use of hard-plank siding They also expressed their concern over the use of amenities in Phase I by new property owners in subsequent phases The newly-formed association elected Cullen as president and McNeal was elected as a board member, although he was not present at the meeting In an October 2003 letter to property owners in Wright's Point, Cullen explained that McNeal informed him Phase I was only part of the total Wright's Point development, and plans to develop the remaining properties were moving forward Cullen also explained that McNeal informed him Wright's Point was a "walking community" and owners in new phases should have access to the Wright's Point common areas and docks In November 2003, Cullen presented McNeal with a document which purported to

"represent a consensus of the existing homeowners and residents " The document asserted that Phase I should be a "separate and independent area" from the remaining phases of Wright's Point, and residents in any additional phases should not have access to the common areas and docks

In December 2003, Anthony Porter sent a letter to Cullen objecting to the existence of the Wright's Point Property Owner's Association and asserting that he was the Developer of Wright's Point, and thus, he was entitled to appoint and remove the Association's board members and officers. In January 2004, the Homeowners, together with other property owners, held an annual meeting of the Wright's Point Property Owners Association. Anthony Porter attended the meeting with his attorney and presented the Homeowners with a memorandum which stated (1) he was the Developer of Wright's Point and still owned lots there, so he retained "the sole authority under the [Declarations] to appoint and remove the directors of the [Association]", (2) the meeting being held was "not an official meeting" and several property owners, including himself, had not been given notice of the meeting, and (3) any meetings convened by the Homeowners had been done without his knowledge and were "not legal " In March 2004, at a supplemental annual meeting of the Wright's Point Property Owner's Association, the property owners in attendance ratified the filing of this declaratory judgment action

The Homeowners filed suit against the Developers in March 2004. In their first cause of action for a declaratory judgment, the Homeowners asked the circuit court to find (1) Anthony Porter's right to control the appointment of directors and officers of the Association had terminated, and this right belonged to the owners of the lots within Wright's Point, (2) the Homeowners were validly-elected directors of the Association, (3) McNeal did not have the right to act as the Developer or the Developer's representative in connection with the business and affairs of the Association, (4) McNeal and B McNeal Partnership, L P did not have the right to annex real estate owned by either of them to Wright's Point, or to permit owners of any part of that real estate access to or use of the common areas and amenities owned by the Association and located within Wright's Point, (5) only those owners of lots depicted on the plat of the development and recorded in Plat Book 64 at page 150 (Phase I) had the right to access or use the common areas of Wright's

issue Burton v York County Sheriff's Dept., 358 S C 339, 345-46, 594 S E 2d 888, 891-92 (Ct App 2004) "To determine whether an action is legal or equitable, this [c]ourt must look to the action's main purpose as reflected by the nature of the pleadings, evidence, and character of the relief sought " Fesmire v Digh, 385 S C 296, 303, 683 S E 2d 803, 807 (Ct App 2009) Here, the Homeowners' primary purpose in bringing this action was to enjoin the Developers from controlling the Association and allowing Wright's Point property owners outside of Phase I to access the common areas of the subdivision Therefore, we find this suit is an action in equity and this court may review the circuit court's factual findings in accordance with its own view of the preponderance of the evidence See Cedar Cove Homeowners Ass'n, Inc v Di Pietro, 368 S C 254, 264, 628 S E 2d 284, 288 (Ct App 2006) (holding "an action to enforce restrictive covenants by injunction is in equity")

LAW/ANALYSIS

I Homeowners' Appeal

A Extrinsic Evidence

The Homeowners argue the circuit court improperly relied upon extrinsic evidence in interpreting the Declarations without finding they were ambiguous We disagree

"The main guide in contract interpretation is to ascertain and give legal effect to the intentions of the parties as expressed in the language of the [contract] " Gilbert v Miller, 356 S C 25, 30, 586 S E 2d 861, 864 (Ct App 2003) "If a contract's language is clear and capable of legal construction, this [c]ourt's function is to interpret its lawful meaning and the intent of the parties as found in the agreement " Id at 30-31, 586 S E 2d at 864 "A clear and explicit contract must be construed according to the terms the parties have used, with the terms to be taken and understood in their plain, ordinary, and popular sense " Id at 31, 586 S E 2d at 864 Under the parol evidence rule, extrinsic evidence is inadmissible to vary or contradict the terms of a contract Penton v J F Cleckley & Co., 326 S C 275, 280, 486 S E 2d 742,

745 (1997) "However, where a contract is ambiguous, parol evidence is admissible to ascertain the true meaning and intent of the parties " Id

While the Homeowners argue the circuit court erred in relying upon extrinsic evidence, the Developers contend the circuit court determined the Declarations were unambiguous, and relied upon the Declarations' express language and clear meaning in making its findings. The Developers note the circuit court referenced cases in its order where the language of the contracts was clear and unambiguous. Furthermore, the Developers argue the circuit court's review of the evidence was done either to determine the resulting effect upon the rights or duties of the parties after it had interpreted the applicable provisions of the Declarations, or by way of support or confirmation of its interpretation.

We find the circuit court properly interpreted the Declarations in accordance with the rules of construction. A review of the circuit court's order reveals the court relied upon the express language of the Declarations and treated the specific covenants at issue as unambiguous. While the circuit court relied upon evidence presented at trial in its order, the evidence relied upon was used to determine the rights of both parties pursuant to the Declarations. The circuit court did not use extrinsic evidence to ascertain the intention of the parties.

B Definition of "Developer"

The Homeowners argue the circuit court erred in finding Jimmy Porter was a Developer of Wright's Point. They contend the term "Developer" should be limited to the definition contained in § 1.12 of the Declarations. We disagree.

The Homeowners contend the circuit court erred in considering Anthony Porter's testimony that the omission of Jimmy's name from § 1.12 was a clerical error, and in considering the Supplemental Declaration which states that Jimmy Porter was a Developer although his name was not set forth in § 1.12. "In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties." Ecclesiastes Prod Ministries v Outparcel Assocs, LLC, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App.

2007) "Contracts should be liberally construed so as to give them effect and carry out the intention of the parties " Id "The parties' intention must, in the first instance, be derived from the language of the contract " Id "To discover the intention of a contract, the court must first look to its language - if the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect " Id at 498, 649 S E 2d at 501 "The parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof " Id at 498, 649 S E 2d at 502

The circuit court determined the omission of Jimmy Porter's name from § 1 12 was a clerical error The circuit court noted that while Jimmy Porter's name was not included in the definition of the term "Developer" in § 1 12, an examination of the Declarations in their entirety supported its determination that Jimmy Porter was an official Developer of Wright's Point The circuit court noted Jimmy Porter's name was included as "Developer" in the language on the first page of the Declarations, on the signature page, and in § 1 01 Furthermore, the circuit court noted the Declarations state that a "[d]eveloper is the owner of certain real property described in Exhibit A " Exhibit A of the Declarations contains a description of all four parcels of land, including Parcel D which was owned by Jimmy Porter The circuit court also noted the deed conveying the common areas in Phase I to the Association lists Anthony Porter and Jimmy Porter as grantors

We find the Declarations, read in their entirety, support a finding that Jimmy Porter was a Developer of Wright's Point The first sentence of the Declarations states "This Declaration made this 24th day of April, 1998, by Anthony R Porter and Jimmy W Porter (hereinafter referred to as 'Developer') " Furthermore, the first "[w]hereas" clause on page one of the Declarations states that the "Developer" is the owner of certain real property described in Exhibit A " Exhibit A includes Parcel D owned by Jimmy Porter Moreover, Anthony Porter and Jimmy Porter signed the Declarations under the "Developer" heading Accordingly, we find the circuit court did not err in determining that Jimmy Porter was a Developer of Wright's Point

C Undeveloped Land

The Homeowners argue the circuit court erred in finding Wright's Point included the areas identified as "Phase II" and "Future Development" on the recorded plat. The Homeowners contend Wright's Point is limited to the 44 lots, amenities, and common areas shown on the plat, and does not include the additional areas shown as "Phase II" and "Future Development." We disagree.

The circuit court held Wright's Point was not confined to the properties in Phase I. The circuit court found the recorded plat of Wright's Point included a Phase II and an area designated for Future Development. The circuit court noted the marketing materials used to sell properties in Wright's Point clearly stated the development would include multiple phases. Furthermore, the circuit court determined Wright's Point consisted of the four parcels described in "Exhibit A" attached to the Declarations.

The Homeowners argue phases subsequent to Phase I must be developed and submitted by the Developer pursuant to § 2.03 of the Declarations. § 2.03 states:

Subdivision Plat. Developer reserves the right to modify, amend, revise and add to the Plat, at any time and from time to time, setting forth such information as Developer may deem necessary with regard to the Subdivision, including, without limitation, the locations and dimensions of the Lots, the private roads, utility systems, drainage systems, utility easements, drainage easements, access easements and building and set-back line restrictions.

Developer reserves unto himself, his heirs and assigns, the right to develop and submit additional phases to this Declaration of Covenants, Conditions, Restrictions and Easements, Wright's Point Homeowner's Association, Inc. and related documents. Such additional phases shall be limited

to the property which Developer has acquired from Lewis H Wright, et al and/or Mary P Logan, or any properties contiguous thereto Such additional phases will be subject to all of the Covenants, Conditions, Restrictions and Easements and the By-Laws upon Developer, his heirs and assigns, filing a copy of the plat signed by the Developer showing such additional phases or in the alternative filing with the Clerk of Court for Beaufort County, South Carolina his intention to add additional phases to the development

The Homeowners argue land in "Phase II" and "Future Development" must be developed and submitted as additional phases and are not "already" a part of Wright's Point, as determined by the circuit court The Homeowners also contend that when the Developer sold the undeveloped land to McNeal, his personal right to develop and submit additional phases was extinguished

While the Homeowners contend Wright's Point consists only of Phase I, we find an examination of the Declarations in their entirety reveals Wright's Point includes the undeveloped land labeled "Phase II" and "Future Development" on the recorded plat The Declarations define Wright's Point as the property described in Exhibit A, which includes Phase II and Future Development The Declarations also refer to a "Community-Wide Standard" and define that term as the standard "generally prevailing throughout the Property " "Property" is defined in § 1 19 as all of the land described in Exhibit A Furthermore, all of the property in Exhibit A was obtained by the Developers from Lewis H Wright, et al and Mary P Logan as required by § 2 03 To the extent the Homeowners argue the development of additional phases would constitute an impermissible annexation of land into Wright's Point, we note § 2 03 provides for additional phases of development of existing property already subject to the Declarations and not an annexation of property not described in Exhibit A Furthermore, although the undeveloped property was sold to McNeal, the Declarations provide that all of the property in Exhibit A "shall be held, transferred, sold, mortgaged, conveyed, leased, occupied and used subject to the covenants " Accordingly, we find the circuit

court did not err in determining that Wright's Point is not confined to the properties within Phase I

D McNeal as "Successor Developer"

The Homeowners argue the circuit court erred in approving the assignment of development rights to McNeal Partnership, L P We disagree

§ 1 12 of the Declarations provides for a successor-in-title or successor-in-interest to the Developer of Wright's Point § 1 12 states

"Developer" shall mean and refer to (a) Anthony R Porter, or (ii) [sic] any successor-in-title or any successor in interest to Anthony R Porter, to all of the Property then subject to this Declaration and provided in the instrument of conveyance to any such successor-in-title or interest is expressly designated as "Developer" hereunder by the grantor of such conveyance, which grantor shall be the "Developer" hereunder at the time of such conveyance

In June 2007, Anthony Porter and Jimmy Porter assigned their development rights in Wright's Point to McNeal Partnership, L P The Homeowners requested the circuit court "reopen the trial" and "include in its ruling a declaration as to the right of McNeal to act as the Developer " In its order, the circuit court held the assignment of Developer rights to McNeal was "done properly" and "was executed in accordance with the applicable language of the covenants " The circuit court noted the conveyance met the requirements of § 1 12 by expressly identifying Anthony Porter and Jimmy Porter "collectively as 'Developer '"

First, the Homeowners argue the Developers' rights were extinguished and could not be conveyed They contend Anthony Porter and Jimmy Porter conveyed their interests in the undeveloped land more than five years before the assignment in June 2007 Second, the Homeowners argue (1) it was a legal impossibility for McNeal to succeed to all of the property subject to the

Declarations, (2) none of the deeds which conveyed Parcels B and D contained any designation that the grantee was deemed the successor developer, and (3) McNeal did not take title to all of the property from the Developer. Third, the Homeowners argue the circuit court erred when it determined McNeal was a successor developer when the Assignment of Developer's Rights stated McNeal was not liable for the Developers' actions which occurred prior to the assignment.

The Developers note that according to § 1 12, a successor developer becomes Developer "to all of the Property then subject to this Declaration." The Homeowners argue Parcel C was subdivided and the lots sold thus making it impossible for McNeal to succeed as Developer of "all the property." The Developers contend § 1 12 does not state that lots are no longer subject to the Declarations once they have been conveyed to subsequent owners. The Developers also contend § 1 12 provides that a successor developer may either be a successor-in-title or a successor-in-interest. They note that while a successor-in-title would derive authority through a deed, a successor-in-interest may derive authority through another instrument of conveyance. Here, McNeal did not become a successor developer through a deed, but rather through the Assignment of Developer's Rights. The Developers also note McNeal was specifically identified as the successor developer by the grantor.

We find a preponderance of the evidence demonstrates that McNeal is a successor developer. The Assignment of Developer's Rights was properly executed and specifically identified McNeal as the successor developer. As a successor-in-interest and not a successor-in-title, there was no requirement that the deeds to Parcels B and D designate McNeal as a successor developer. Furthermore, § 12 04 provides that the provisions of the Declarations "shall run with and bind title to the Property" and are binding upon "all Owners and their respective heirs, successors and assigns." Thus, the Declarations do not indicate that lots are no longer subject to the Declarations once they have been conveyed to subsequent owners. Additionally, the Homeowners have failed to prove that a successor developer cannot assume the rights of Developer and also disclaim liability for actions of the Developer prior to the assignment of rights. Accordingly, we affirm the circuit court's finding that McNeal is a successor developer of Wright's Point.

E Control of the Association

The Homeowners argue the circuit court erred in finding the Developer was entitled to continue to appoint and remove officers and directors of the Association. We disagree.

§ 7 01 of the Declarations states, in part

Developer shall have the right to appoint and remove all members of the Board and any officer or officers of the Association until such time as the first of the following events shall occur: (i) the date as of which the last Lot in the Subdivision shall have been conveyed to a Person other than Developer or Builder, or (ii) the surrender by Developer of the authority to appoint and remove directors and officers of the Association by an express amendment to this Declaration executed and recorded by Developer.

The circuit court determined the language of §§ 7 01 and 12 01 was "clear and unambiguous" and that neither of the conditions set forth in § 7 01 and reiterated in § 12 01 had occurred. The circuit court found neither Anthony Porter nor Jimmy Porter had surrendered their authority to control the Association. In addition, the circuit court found Anthony Porter's transfer of title to his lots in Wright's Point to himself as Trustee of a Personal Residence Trust did not divest him of his property for purposes of control under § 7 01. The circuit court noted Anthony Porter testified the transfer of title in his lots was for tax purposes only, and that he continued to pay his Association dues. Furthermore, the circuit court determined the last lot in Wright's Point had not been conveyed to a person other than "Builder." The circuit court noted the Declarations define "Builder" as "any Person or legal entity engaged principally in the business of construction of structures to whom the Developer sells or has sold one or more Lots." The circuit court also noted that Ratchiff and Lloyd Denny, both licensed general contractors, testified as to their ownership of lots in Phase I.

First, the Homeowners argue Anthony Porter's conveyance of his lots in Phase I to his Personal Residence Trust constituted a conveyance "to a Person other than Developer" under § 7 01 They argue Porter's Trust is a different legal entity from "Developer " According to § 1 17 of the Declarations, "Person shall mean and refer to a natural person, corporation, partnership, association, trust or other legal entity or any combination thereof " Second, the Homeowners contend none of the owners of lots in Phase I meet the definition of a "Builder" under the Declarations They argue Ratchiff and Denny are not "Builders" simply because they hold contractor's licenses in their own names, as required by law Third, the Homeowners argue Porter was no longer entitled to control the Association because he no longer had a financial interest in Wright's Point

Based upon our finding that McNeal is a successor developer of Wright's Point, we affirm the circuit court's finding that the Developer was entitled to continue to appoint and remove officers and directors of the Association Pursuant to § 7 01, the Developer has the right to control the Association "until the date as of which the last Lot in the Subdivision shall have been conveyed to a Person other than Developer or Builder," or he surrenders the authority by express amendment to the Declarations Here, McNeal has not sold his lots in Phase I or the undeveloped property in Wright's Point, and he has not surrendered his right to control the Association Accordingly, we affirm the circuit court's finding that the Developer was entitled to continue to appoint and remove officers and directors of the Association

F Control of the Committee

The Homeowners argue the circuit court erred in finding the Developer had the right to continue to control the Committee after Phase I was developed We disagree

§ 1 01 of the Declarations states, in part

"Wright's Point Architectural Committee" shall mean and refer to Anthony R Porter and Jimmy W Porter or such other individual(s) as Developer may appoint,

or such entity to which the Wright's Point Architectural Committee may assign its duties, until all improvements constructed thereon and sold to permanent residents. At such time as all of the Lots in the Subdivision have been fully developed, the Developer shall notify the Board and all Owners of Lots in the Subdivision to that effect, at which time the Developer's rights and obligations as the Wright's Point Architectural Committee shall forthwith terminate. Notice to the Board and all the owners by Developer under this provision shall be in writing.

The circuit court found that because there were not improvements on all of the lots in Phase I, and because not all of the lots were owned by permanent residents, the Developer was entitled to remain in control of the Committee. The circuit court also found the Developer had not given notice to the Board and Owners as required by § 1 01.

The Homeowners argue it is impossible to determine whether all of the lots were owned by permanent residents, or whether all improvements had been constructed. They contend the Developer was no longer entitled to control the Committee because he sold all of the lots and had no financial interest in the development of the undeveloped land. The Developers maintain the evidence produced at trial demonstrates that not all of the lots were owned by permanent residents, and that not all of the lots had improvements.

We find a preponderance of the evidence demonstrates there were lots in Phase I not owned by permanent residents, and vacant lots in Phase I with no improvements. Homeowner Caldwell testified there were vacant lots in Phase I and lots that had not been sold to permanent residents. Richard Ratcliff and Homeowner Hucks both testified they owned lots in Phase I that had not been improved. Moreover, § 1 10 provides that the Developer retains control over the Committee until all of the lots are fully developed and the Developer notifies the Board and all Owners to that effect. Anthony Porter testified lots in Wright's Point would not be fully developed until all improvements within the entire development were complete to his

satisfaction. He also testified that "fully developed" does not mean "the completion and sale of all lots." Furthermore, there was no evidence produced at trial showing Anthony Porter ever notified the Board or the Owners that all of the lots had been fully developed as required by § 1 01. Accordingly, we affirm the circuit court's finding that the Developer had not relinquished the right to control the Committee.

G Derivative Claims and Attorney's Fees

The Homeowners contend the circuit court erred in failing to find their claims were derivative and that they were entitled to attorney's fees. We disagree.

A party cannot recover attorney's fees unless authorized by contract or statute. Jackson v Speed, 326 S C 289, 307, 486 S E 2d 750, 759 (1997), see also Hegler v Gulf Ins Co, 270 S C 548, 549, 243 S E 2d 443, 444 (1978) ("As a general rule, attorney's fees are not recoverable unless authorized by contract or statute.") The Homeowners argue they are entitled to attorney's fees pursuant to section 33-7-400 of the South Carolina Code (2006), which provides that "[d]erivative suits may be maintained on behalf of South Carolina corporations in federal and state court in accordance with the applicable rules of civil procedure." The Homeowners contend that while the statute does not specifically authorize attorney's fees, the statute's Official Comment provides for recovery. The Official Comment to section 33-7-400 of the South Carolina Code states in part "[t]he right of successful plaintiffs in derivative suits to this recovery is so universally recognized, both by statute and on the theory of a recovery of a fund or benefit for the corporation, that specific reference was thought to be unnecessary." Assuming without deciding that this suit is a derivative action, the Homeowners are not entitled to attorney's fees under section 33-7-400. This section does not specifically authorize the recovery of attorney's fees, and the Official Comment is specifically limited to "successful plaintiffs." Accordingly, we affirm the circuit court's denial of the Homeowner's request for attorney's fees.

II Developers' Appeal

The Developers argue the circuit court erred in denying their request for attorney's fees. This issue is not preserved for our review.

The Developers contend the language of § 11-01 of the Declarations provides a contractual basis that mandates an award of attorney's fees to the Developers and the Association. § 11-01 states, in part:

Each Owner shall comply strictly with the covenants, conditions and restrictions set forth in this Declaration. Failure to comply with any of the same shall be grounds for instituting an action for damages and/or for injunctive relief, such actions to be maintainable by Developer, the Board on behalf of the Association, or in a proper case, by an aggrieved Owner. Should Developer or the Association employ legal counsel to enforce any of the foregoing, all costs incurred in such enforcement, including court costs and reasonable attorneys' fees, shall be paid by the violating Owner.

The Developers argue the Homeowners' attempts to gain control of the Association, dictate and limit the use of common amenities, and prevent future phases of development, as well as their movement of Association funds to an unauthorized account, constitute non-compliance with the Declarations. The Developers also argue they are entitled to attorney's fees pursuant to the Uniform Declaratory Judgments Act. Section 15-53-100 of the South Carolina Code (2005) provides that "[i]n any proceeding under this chapter the court may make such award of costs as may seem equitable and just."

In order for an issue to be preserved for appellate review it must have been raised to and ruled upon by the trial court. Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000). A party must "present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments." On,

LLC v Town of Mt Pleasant, 338 S C 406, 422, 526 S E 2d 716, 724 (2000) Here, the Developers failed to present their arguments on appeal to the circuit court In their Answer and Counterclaim, the Developers asserted they were entitled to recover attorney's fees due to the frivolous nature of the Homeowners' claims However, the Developers did not assert they were entitled to attorney's fees pursuant to § 11 01 of the Declarations or section 15-53-100 of the South Carolina Code Therefore, because the circuit court did not rule on these arguments and the Developers failed to file a Rule 59(e) motion requesting a ruling from the circuit court, these arguments are not preserved for our review

CONCLUSION

For the foregoing reasons, the order of the circuit court is

AFFIRMED

SHORT and WILLIAMS, JJ , concur

COPY

RECEIVED

OCT 19 2010

SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Carmen Tevis Mullen, Circuit Court Judge

Case No 04-CP-07-633

Robert L. Cullen, Andrew A. Corriveau,
John Caldwell, Andrea Hucks, Jamie Bellamy,
Michael Pearson, and David Mandell,

Plaintiffs,

v

J. Bennet McNeal, B. McNeal Partnership, L.P.,
Anthony R. Porter, and Wright's Point Home
Owners Association, Inc.

Respondents/Appellants,

Of whom Robert L. Cullen, Andrew A. Corriveau
and Andrea Hucks are

Appellants/Respondents

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN
BANC, AND MEMORANDUM IN SUPPORT THEREOF

Pursuant to Rule 221, SCACR, Appellants/Respondents (the
Homeowners) hereby Petition the South Carolina Court of Appeals for a
rehearing of this matter and for a rehearing en banc

SUMMARY OF THE ARGUMENTS

When this Court found that McNeal, as successor, could exercise the original Developer's personal rights granted by the Declaration after the Developer had sold the land to which those rights applied, it failed to apply both South Carolina precedent and failed to enforce the unambiguous language of the Declaration as written

South Carolina law characterizes rights such as those at issue in this litigation as personal rights of the developer, which are extinguished when the developer conveys his interest in the land over which the rights were granted. In finding that McNeal acquired such rights by an assignment from the original developer years after the developer had conveyed the land to which the rights applied and years after those rights were extinguished, this Court clearly misapprehended or overlooked the effect of the applicable South Carolina law. Further, in finding McNeal as the "Successor Developer" based on the assignment of rights, the Court failed to apply the unambiguous language of the Declaration which requires that a successor developer succeed to the original developer's interest *in the property*, and not merely obtain a purported assignment of rights.

Finally, in resolving the issues presented, this Court both finds the Declaration unambiguous and rewrites the definition of Developer while considering and relying upon extrinsic evidence, which violates the established rules of construction. Unambiguous covenants are to be interpreted based on

the document itself and not on testimony of "intent" or other evidence outside the Declaration itself

The Homeowners request a rehearing of this matter on the following specific grounds

- I The Court overlooked, misapprehended, and did not address the Homeowners' argument that the Developers' rights at issue in this litigation were personal to the Developer and were extinguished when the Developer conveyed all of the undeveloped land in the Subdivision to a third party. The Court's ruling violates the rule of law established in the *Queen's Grant* case and other precedent binding on this Court.
- II The Court overlooked or misapprehended the Homeowners' argument and erroneously construed the Declaration when it found that a mere assignment of Developer's rights entitled McNeal to be the "Successor Developer" when the clear and unambiguous language of the Declaration requires that a Successor Developer be one who succeeds to the Developer's interest in the "Property" "then subject to the Declaration." In adjudicating this issue, the Court further overlooked or misapprehended that, at the time of the assignment, the Developer's rights had already been extinguished.
- III The Court overlooked, misapprehended, and did not address the Homeowners' argument and the rule of law that, after the time reasonably necessary to protect its financial interest in a development, a developer has a duty to transfer control of the affairs of the Subdivision to the Homeowners whose financial interests are at stake.
- IV The Court failed to apply the basic principles of contract construction when it simultaneously found the Declaration to be unambiguous but affirmed the circuit court's reliance on extrinsic evidence to construe and interpret it. The finding of this Court that the circuit court was correct when it "relied on evidence presented at trial to determine the rights of both parties pursuant to the Declarations" is directly contrary to the legal principle that unambiguous restrictive covenants are to be interpreted reasonably and in accordance with the language employed and without reliance upon extrinsic evidence.
- V The Court overlooked, misapprehended, or disregarded the rules of contract construction when it found that the Declaration was unambiguous and simultaneously rewrote the definition of Developer contained in the Declaration to include Jimmy Porter on the basis of the testimony of

Anthony Porter as to his "intent" and on the basis of documents extrinsic to the Declaration

- VI The Court overlooked, misconstrued, or disregarded the unambiguous definition of "Subdivision" in the Declaration by finding that it included portions of the "Property" that had not yet been subdivided into "Lots"
- VII The Court overlooked or misapprehended the clear evidence in the Record when it found that McNeal owned Lots in Phase I, which was not the case, and which undercuts this Court's stated basis to find that McNeal is entitled to control of the Association
- VIII The Court overlooked or misapprehended the rules of contract construction and other applicable legal principles when it used extrinsic evidence to construe the Declaration with respect to the right to control the Committee and after such right had been extinguished by the sale of the land
- IX The Court overlooked or misapprehended both the Official Comment to S.C. Code §33-7-400 and applicable precedent when it found that the statute does not authorize the recovery of attorney fees in a derivative action
- X The Court overlooked or misapprehended the fact that no separate entity called the Wright's Point Property Owner's Association was created

ARGUMENT

I

In affirming the circuit court, this Court failed to apply the rule established in the *Queen's Grant* case that rights reserved to a developer in restrictive covenants are personal rights which are extinguished when the Developer conveys the land to which the rights apply

The centerpiece of the Homeowners' argument, based on *Queen's Grant*, decisions from other jurisdictions, and the language of the Declaration, itself, was that the right to expand the Subdivision, as that term is defined in the Declaration, was a personal right of the Developer¹ and was extinguished when

¹ For purposes of this argument, it does not matter whether "Developer" is Anthony Porter or Jimmy Porter, or both of them together.

the Porters conveyed the undeveloped land to which those rights attached. This Court simply failed to address that argument and the applicable law in any meaningful way.

South Carolina, like other jurisdictions, considers the rights of a developer reserved in the applicable covenants to be personal to the developer, enforceable only by him, and extinguished upon disposition of the developer's interest in the land. See *Peoples Federal Savings and Loan Association of South Carolina v Resources Planning Corporation*, 358 S. C. 460, 479, 596 S.E.2d 51, 61 (2004), *reh denied*, citing *Board of Managers of Medinah on the Lake Homeowners Association v Bank of Ravenswood*, 295 Ill. App. 3d 131, 692 N.E.2d 402 (1998). In recognition of that principle, in *Queen's Grant II Horizontal Property Regime v Greenwood Development Corp.*, 368 S.C. 342, 362-363, 628 S.E.2d 902, 914 (Ct. App. 2006), the Court held that when a subdivision developer is divested of his interest in the subdivision, a reserved right to amend restrictive covenants is extinguished.²

The Declaration, itself, at ¶ 2.03 (R. p. 41) provides that the "Developer" reserves unto himself "the right to develop and submit" additional phases to the Subdivision and "to modify, amend, revise and add to the Plat."³ Thus, by the specific and unambiguous language of the Declaration, the ability to develop additional phases of the Subdivision is a "right" reserved to the Developer.

² In *Queens Grant*, the Court allowed the amendment because it found a continuing financial interest. The testimony of Ratcliff that neither Anthony Porter nor Jimmy Porter had any interest in the land or the development of Phase II by Ratcliff is un rebutted.

³ As set forth in more detail in a separate argument, the Plat was a specific document referenced in the Declaration which included 44 lots, roads, and other common areas. (R. p. 602)

It was undisputed that in April, 1999, Anthony Porter divested himself any ownership in the undeveloped land subject to the Declaration when he conveyed parcel B to McNeal and that all of the Lots depicted on the Plat were owned by people or entities other than the Developer. It is further undisputed that in July, 2002, Jimmy Porter divested himself of any ownership in the undeveloped land in the subdivision when he conveyed parcel D to McNeal and that he never owned any of the Lots.⁴ Neither Anthony Porter nor Jimmy Porter owned, personally, any land subject to the Declaration after 2003.

It was not until February 2007, eight years and five years, respectively, after Anthony Porter and Jimmy Porter had conveyed all of their interest in the land subject to the Declaration did they execute a 'Supplemental Declaration' purportedly adding lots to the official Plat. The lots purportedly added to the Subdivision were created from land owned by Ratcliff, who had purchased it from McNeal, who had purchased it from Jimmy Porter and Anthony Porter years before. (R p 699)

At no point in its Opinion does this Court address the Homeowners' argument, supported by applicable law, that the Porters could not exercise personal rights granted to them under the Declaration after they had conveyed the land to which those rights applied.

The precise situation presented here was decided against the developer in *Fairways of Country Lakes Townhouse Association v Shenandoah Development*

⁴ The land now purportedly intended to be Phase II was conveyed by McNeal to a corporation owned by Richard Ratcliff (Ratcliff) in February 2007 and includes land that McNeal acquired from Jimmy (Deed Exhibit 49 R p 748 Plat Exhibit 50 R p 752 Ratcliff 49 16 50 9)

Corporation 113 Ill App 3d 932, 447 N E 2d 1367 (Ill App 1983) In that case, the original developer conveyed undeveloped property to an unrelated entity, which in turn conveyed it to the party to the litigation Similar to the Declaration here, the restrictive covenants at issue allowed the developer to annex additional property into the development by filing a "Supplemental Declaration"

The *Fairways* court determined that the power to annex additional property into the development was personal to the original developer and that the right was extinguished when the subject property was sold

This Court has considered analogous provisions which provided for the unilateral modification or revocation of restrictive covenants already imposed upon land by a developer In those situations, we held that such reserved powers to modify or revoke restrictive covenants contained in a deed are personal covenants which can be exercised only by the one who imposed the restrictions, particularly where the power can be exercised without the consent of the property owners (internal citations omitted) *In these cases it was determined that once the title to the property passed from the hands of the one holding such a reservation of rights, the power can no longer be exercised by him or any other person notwithstanding that the declaration provided that all covenants were to run with the land* (internal citations omitted) (emphasis supplied)

We see no basis for interpreting the provisions of the Fairway Declarations differently and consider that the disputed provisions established a personal right to be exercised only by the original developer

* * * * *

Defendants' argument, taken to its logical conclusion would permit any number of persons who may have acquired portions of the Greens property, instead of the one corporation here, to separately choose to exercise the rights of the developer and annex his property on a piecemeal basis (emphasis supplied) Such an intention cannot be found with the Fairway Declarations and we may not supply it

Fairways at 936, 937, 1370, 1371 See, also *Orange Beach Marina, Inc v Warner* 500 So 2d 1068 (Ala 1986) [purported amendment to covenants by developer ineffective where developer had no continuing interest in the land]

In this case, McNeal and Ratcliff both own portions of the land formerly owned by the Developer and both purport to be able to exercise the Developer's personal rights reserved in the Declaration by having their land subdivided into Lots and submitted as a phase of the development The *Fairways* scenario is precisely what has occurred in this case and, like the covenants in *Fairways*, the Declaration does not contemplate successors, much less multiple successors, exercising the rights of the original Developer

By failing to reconcile its Opinion with the rule of law established by the South Carolina precedent cited by the Homeowners and the *Fairways* decision, and by failing to consider the specific language of the Declaration itself, this Court erred

II

The Court misapprehended or overlooked the Homeowners' argument that, pursuant to the unambiguous language of the Declaration, a "Successor Developer" is one who succeeds to the Developer's interest in the Property, not one who merely takes an assignment of the Developer's rights

In its Opinion, this Court bases its conclusion that McNeal is the successor developer' on the June, 2007, assignment by Anthony Porter and Jimmy Porter of "developer's rights" to McNeal (R p 162) Based upon that document this Court concludes that McNeal became the "successor in interest to the Porters As set forth above, the development rights purportedly assigned to

McNeal by the Porters had been extinguished years before when the Porters conveyed the land to which those rights attached. As a matter of law, in 2007, the Porters no longer had any 'developer's rights' to convey to anyone.

Additionally, the Declaration unambiguously provides the mechanism for qualifying as a Successor Developer and that mechanism does not contemplate an "assignment" of rights.

The unambiguous language of ¶ 12, of the Declaration provides that in order to act as a successor Developer, the successor must succeed to the Developer's interest in the **property**, not just the acquisition of the Developer's rights. The specific language employed in the Declaration imposes the following conditions on who can become a Successor Developer:

- a. the successor Developer must succeed to "all of the Property then subject to this Declaration,"
- b. the instrument conveying the interest in all of the Property must designate any such successor as the "Developer", and
- c. the grantor of such conveyance must be the "Developer" at the time of the conveyance is made.

"Property" is defined in ¶ 19 of the Declaration by reference to Exhibit A, on which parcels B, C, and D are described.⁵

It is undisputed that the deeds conveying Parcels B and D to McNeal did not designate him as "Developer" as required by the Declaration and that McNeal

⁵ At no point was any Property released from the Declaration. This Court's suggestion in its Opinion that the Homeowners argued that the Lots were not subject to the Declaration is factually incorrect.

could not exercise the rights of a 'Successor Developer' based upon those conveyances⁶

In its Opinion, this Court focuses on the Assignment as the source of McNeal's ability to act as Successor Developer. However, that document is not a conveyance of the 'Property' as required by the Declaration. It is merely an assignment of purported 'rights'. In order to be a Successor Developer under the Declaration, ¶1 12 requires that the successor succeed to 'all of the *Property then subject to the Declaration*'. The conveyance required by the Declaration to create a Successor Developer is the conveyance of title or interest "to all of the Property', and not as this Court found simply a conveyance of the purported development rights.

Under the specific language of the Declaration, which this Court finds unambiguous, McNeal cannot be considered a successor Developer because the deeds by which McNeal acquired the "Property' did not designate him as Successor Developer" and the Assignment was merely an assignment of purported rights and not a conveyance of an interest in the "Property' subject to the Declaration.

Equally significant, even if the Assignment was the kind of conveyance contemplated by the Declaration, on the date of the assignment, McNeal had already further conveyed a portion of the Property to Ratcliff, who was acting as

⁶ The finding of this Court that 'there was no requirement that the deeds to Parcels B and D designate McNeal as a successor developer' (Opinion p. 8) ignores the specific requirement of ¶1 12 of the Declaration.

the developer' with respect to this portion of the Property (R p 748)⁷ Under any construction of the facts, McNeal did not succeed to the Developer's interest in "all of the Property' subject to the Declaration and could not be a Successor Developer⁸

In construing the covenants in the Declaration, this Court is to give them a reasonable interpretation. The Declaration unambiguously allows for a successor developer, but only if the successor takes "all" of the "Property' subject to the Declaration and only if the conveyance clearly designates that person as the 'successor", implying the acceptance of both the rights and the burdens of the Developer.

The rationale for this interpretation of the provision is obvious. Covenants are a contract. The Homeowners became parties to that contract when they bought their Lots. The Declaration identified the Developer and the Homeowners knew who was to be responsible for the Developer's obligations and with whom they would deal. A unilateral change in that relationship by the Developer's Assignment, years after the Developer no longer had any financial interest in the land, essentially rewrites the contract represented by the Declaration.

⁷ As set forth hereinafter, the Supplemental Declaration purported to add lots to the Subdivision which were created by Ratcliff from a part of the Property conveyed to him by McNeal. It is undisputed that Ratcliff had no business relationship with Porter, personally, nor any business arrangements to share profits with McNeal, the purported successor developer' (Ratcliff R p 373 line 6 – p 375 line 17). Neither Porter nor McNeal had any interest in the company owned by Ratcliff (Ratcliff R p 375 line 15 – p 376 line 12). The expense of subdividing and developing the undeveloped land into lots for sale was paid by Ratcliff's company (Ratcliff R p 397 lines 5 -11). All of the profits or losses that relate to the subdivision of the 20 new lots in Phase II inured solely to Ratcliff, his wife, and his bank (Ratcliff R p 397 line 24 – p 398 line 7).

⁸ The Homeowners further correctly pointed out that, after the Lots were all sold, no successor could succeed to all of the Property' subject to the Declaration.

As set forth in the Declaration, a successor could act as Developer if 'all of the Property' was taken by the successor and there were no intervening interests. However, after the Homeowners purchased land burdened by the Declaration in which the identity, rights, and responsibilities of the Developer were established, it is unreasonable to allow that relationship to be unilaterally modified at will, for the Homeowners to be subjected to some unknown or unapproved new Developer, or, worse, for the Homeowner to have to contend with multiple Developers, none of whom assume the obligations of the original Developer.

This Court finds that the Homeowners have not "proved" that a successor developer can take the rights of a developer and disclaim its responsibilities. With all due respect, that is an issue of law, not of fact. Successor developers have, in fact, been held liable for their predecessor's obligations. See *Concerned Dunes W Residents v Georgia-Pacific Corp*, 349 S C 251 (S C 2002).

This Court's finding that McNeal was the 'Successor Developer' by virtue not of his acquisition of all of the Property subject to the Declaration, but on the basis of an assignment of developers' rights long after those rights had been extinguished, is not consistent with either the unambiguous language of the Declaration or the applicable law.

III

The Court failed to apply the rule of law and consider the Homeowners' argument that, after the time reasonably necessary to protect its financial interest in a development, the developer has a duty to transfer control to the Homeowners

In its Opinion, the Court fails to address the Homeowners' argument that, when the Developer no longer had any financial interest in the subdivision, his right to control the affairs of the subdivision terminates in favor of the homeowners

The covenants in the Declaration are to be interpreted reasonably and consistently with the 'customs, practices, usages and terminology as generally understood in the particular trade of business' They must also be interpreted in accordance with applicable rules of law

When a developer is no longer at risk, financially, he must surrender control to the owners, who then have the financial risk associated with the ownership of property

(2) After the time reasonably necessary to protect its interests in completing and marketing the project, the developer has a duty to transfer the common property to the association, or the members, and to turn over control of the association to the members other than the developer

Restatement (Third) of Property Servitudes, § 6.19 (2005)

The principle that a developer's rights terminate when he no longer has a financial interest in the development has been recognized in South Carolina and other jurisdictions in a variety of contexts See *Queen's Grant II Horizontal Property Regime v Greenwood Development Corp*, 368 SC 342, 362-363, 628 SE 2d 902 914 (Ct App 2006) [when a subdivision developer is divested of all

interest in the subdivision, a reserved right to amend restrictive covenants is extinguished] *Orange Beach Manna, Inc v Warner*, 500 So 2d 1068 (Ala 1986) [purported amendment to covenants by developer ineffective where developer had no continuing interest in the land] *Armstrong v Roberts*, 254 Ga 15, 16, 325 S E 2d 769, 770 (1985) [after developer divests himself of financial interest no economic restraint on arbitrariness] *Smith v First Savings of Louisiana FSA*, 575 So 2d 1033 (Ala 1991) [when developer divested himself of any remaining proprietary or pecuniary interest in the development, homeowners allowed to amend covenants and remove him as the sole member of the architectural control committee], *Beaver Lake Ass'n v Beaver Lake Corp* , 264 N W 2d 871 (Neb 1978) [by-law provision allowing the developer to assert control of association board of directors nullified after developer divested itself of unsold lots and used its power to further its own interests rather than the interests of the homeowners]

By affirming the circuit court's interpretation of the Declaration to allow continuing control of the Association and the Committee by the Developer when the Developer had sold and conveyed all of the Lots in the Subdivision to persons other than the Developer, personally, and had conveyed Developer's interest in the remaining undeveloped land to third parties, this Court has failed to apply clear principles of applicable law

The rights of the Developer under the Declaration to control the Association and the Committee were rights personal to the Developer and were extinguished when the 44 lots in the Subdivision were sold and the undeveloped

land conveyed to third parties. To fail to address and to disregard the Homeowners' argument as to that issue was improper.

IV

The Court overlooked or misapprehended one of the most basic principles of contract construction when it found the Declaration to be unambiguous and simultaneously used extrinsic evidence to interpret it.

In its Opinion, this Court found that the circuit court "properly interpreted the Declarations in accordance with the rules of construction" and determined that the Declaration was unambiguous⁹. This Court then found that "While the circuit court relied upon evidence presented at trial in its order, the evidence relied upon was used to determine the rights of both parties pursuant to the Declarations. The circuit court did not use extrinsic evidence to ascertain the intention of the parties" (Opinion, p. 5).

With all due respect to this Court, that aspect of its Opinion is nonsensical. The rights of the parties stem from the Declaration. Those rights, in an unambiguous document, are determined from the document itself, and not from extrinsic evidence. The consideration of extrinsic evidence was error and this Court should have so found.

The statement of this Court that the circuit court did not use extrinsic evidence "to ascertain the intention of the parties" is plainly wrong. On the issue of who was the 'Developer', the circuit court relied upon the testimony of

⁹ Although at no point in its Order did the circuit court actually make any finding with respect to the threshold inquiry of whether the Declaration or any aspect of it was or was not ambiguous. This Court supplies that omission and finds, based on the lower court's citations of some unspecified case law where the language of the contracts was clear and unambiguous, that the circuit court must have considered the Declaration unambiguous. The position of the Respondents/Appellants (McNeal) also was that the Declaration was unambiguous (Respondents/Appellants Final Brief p. 17).

V

The Court overlooked, misapprehended, or disregarded the rules of contract construction when it found that the Declaration was unambiguous and, simultaneously, rewrote ¶ 1 12 of the Declaration to include Jimmy Porter within the definition of the Developer

Even though this Court found that the circuit court had construed the Declaration as unambiguous, it then affirmed the conclusion of the circuit court with respect to the definition of "Developer" on the basis of evidence wholly extrinsic to the Declaration. As recited by this Court, the circuit court relied upon both the testimony of Anthony Porter that it was his "intention" that Jimmy Porter be included within the definition of "Developer" and upon a deed conveying property within the development to the Association which was signed by both Anthony Porter and Jimmy Porter.¹⁰ It is clear that the lower court also relied upon the language of the Supplemental Declaration, a document dated nine years after the Declaration was drafted, after the litigation was filed and the issue arose and after both Anthony Porter and Jimmy Porter no longer owned the land to which the Supplemental Declaration purportedly applied. (R p 22)

None of this evidence, clearly extrinsic to the Declaration, could not be relied upon to determine whether Anthony Porter or both Anthony Porter and Jimmy Porter were the 'Developer' if, as this Court has concluded, the Declaration is unambiguous. The circuit court and this Court must interpret the Declaration with respect to who is the 'Developer' based only on the language of the Declaration, itself, and the applicable rules of construction.

¹⁰ As an owner of the land Jimmy Porter had to sign the document subjecting it to restrictions. That does not automatically transform him into a Developer under the Declaration.

are not considered operative parts of a contract and cannot overcome a specifically defined term in that contract

In *Kingman v Nationwide Mutual Insurance Company*, 243 S C 405, 412,134 S E 2d 217, 221 (1964) the Supreme Court held, in an insurance context, that a recital or caption can only be used to explain an ambiguity¹¹ in the operative part of the contract, but where, as here, the operative provision is clear, it controls See, also *Winburn v McGuire Investment Group*, # 17 (220 Ga App 384, 386, 469 S E 2d 477, 479 (Ga App 1996) [definition of tenants as individuals in body of lease not overcome by signature lines¹² indicating representative capacity] *Stetch v The Pane Mart, Inc* , 434 N E 2d 97, 100 (Ind App 1982) [preliminary recitals not contractual and cannot be permitted to control express, contractual provisions of the contract], Am Jur 2nd, *Contracts*, §383

In its Opinion, this Court erroneously finds that Jimmy is also identified as 'Developer' in ¶ 1 01 of the Declaration In fact, that paragraph only nominates Jimmy Porter, individually, to the architectural committee for the development and *does not* refer to him as the 'Developer' (R p 37)

The circuit court and this Court found significance in the fact that Jimmy Porter owned one of the parcels to be subjected to the Declaration That fact, in and of itself, does not transform him into a 'Developer' for purposes of the

¹¹ It is axiomatic of course that if the Court found the Declaration ambiguous on this point the Homeowners were entitled to have it construed in their favor

¹² Even the signature line is not as portrayed by the Court The identifying term 'Developer' appears immediately above the signature of Anthony Porter and is singular and not plural There is no similar identifier above Jimmy Porter's signature (R p 63)

covenants within the Declaration. Because he was an owner of one of the parcels, his consent to burden that land with the restrictions represented by the Declaration was necessary. In fact, within the recitals themselves, which this Court finds significant, both the term Developer and the term Declarant are used to refer to Jimmy Porter and Anthony Porter. (R. p. 37)¹³

The non-operative parts of the Declaration relied upon by this Court and the circuit court to find that Jimmy Porter was a "Developer" are simply insufficient to overcome the specific definitional provision in the operative part of the Declaration in which the term "Developer" is unambiguously defined as Anthony R. Porter.

Finally, the recital upon which the lower court relied refers to 'Anthony R. Porter and Jimmy W. Porter' in the conjunctive and not in the disjunctive. The lower court found that 'Jimmy W. Porter, together with the Defendant Anthony R. Porter, was the official Developer' (emphasis supplied) (Order, R. p. 22). To give meaning to the lower court's ruling, the evidence would have to show that each right and responsibility accorded to the Developer under the Declaration was exercised by and performed by Jimmy and Porter together, not individually. However, there was not one shred of evidence that Jimmy and Porter, jointly,

¹³ The lower court also noted that Jimmy executed the Declaration and was described in the signature area as 'Developer'. However, the description of 'Developer' appears immediately above the signature of Porter and is singular and not plural. (Covenants Exhibit 20 R. p. 629) As owners of separate parcels being subjected to the Covenants, the signatures of both were required without regard to whether or not they jointly or only one of them would function as the "Developer". It is certainly reasonable to interpret the singular description of "Developer" in the signature area as referring only to Porter with Jimmy's signature as an owner to subject his land held as collateral to the Covenants.

took any action, assumed any responsibility, or exercised any rights accorded to the Developer in developing the Subdivision

The definitional sections of the operative provisions of the Declaration provides that Developer shall mean and refer to (a) Anthony R Porter No extrinsic evidence could be considered to vary or contradict this clear definition and nothing within the non-operative sections of the Declaration can change that definition The Court erred when it found otherwise

VI

The Court overlooked or misconstrued the definition of the “Subdivision” by finding that it included portions of the “Property” that had not yet been subdivided into “Lots”

Without performing a careful analysis of the provisions of the Declaration, this Court merely cursorily affirmed the circuit court’s conclusion that the property’ was ‘already’ a part of the “subdivision” That conclusion not only begs the question presented, but relies upon extrinsic evidence with respect to the meaning of purportedly unambiguous covenants and is wholly inconsistent with the specific provisions of the Declaration which provide a specific mechanism for adding to the existing Subdivision

The critical issue here is not whether the undeveloped land was subject to the Declaration, which it was, but whether the undeveloped land that had not yet been subdivided into Lots was a part of the ‘Subdivision’ as that term was defined in the Declaration The consequence of this analysis is whether owners of newly created lots are entitled to become Members of the Association and thereby entitled to use (and required to pay for) the amenities, particularly the

waterfront amenities, that the Association owned. The resolution of this issue requires a careful analysis of the Declaration,¹⁴ and, because the Court has found them to be unambiguous, the analysis is confined to the Declaration, itself, without resort to extrinsic evidence.

The circuit court's Order, affirmed by this Court, summarily concluded

"Wright's Point development is not confined to the properties within Phase I. I find that the development consists of the four parcels [B, C, D, and 1.7 acres] described in Exhibit "A" attached to the [Covenants] previously described herein."

(R p 19)

The circuit court apparently reasoned that, if the undeveloped land was subject to the Declaration, described on the official Plat as "Future Development", and depicted on the "Master Plan", then no further analysis was required to conclude that it was part of the Subdivision. In support of its conclusion, but without any reference to the applicable provisions of the Declaration, or identifying any ambiguity in it, the circuit court relied upon the testimony of Porter and McNeal, that "Wright's Point was conceived, designed and developed as a "walking community" whereby property owners have access to all amenities and designated common areas, regardless of which phase of the development their properties may be located." (R p 23)

However, the Declarations are clear that only "Members" of the Association were permitted to have access to and enjoyment of the property and amenities owned by the Association. (R p 42) Membership in the Association

¹⁴ It is axiomatic that provisions of restrictive covenants must be strictly construed. *Arcadian Shores Single Family Homeowners Association Inc v Cromer* 373 S. C. 292, 299, 644 S. E. 2d 778, 782 (Ct. App. 2007) *reh. denied*.

is conferred only upon an Owner" (R p 43) The Declaration defines 'Owner' as one with fee simple title to a Lot' (R p 39) A 'Lot' is defined as one of the lots shown on the official Plat (R p 39) The "Subdivision" is **not** all the property subject to the Declaration but **only** that part which had been subdivided into "Lots" on the official 'Plat

It is undisputed that, until one month before trial, the Subdivision, as defined in the Declaration, consisted of the 44 Lots as shown on the official Plat, as defined in the Declaration (R p 607, R p 286, lines 8-24) However, pursuant to the Declaration, the Developer had the right "to develop and submit additional phases " to the Subdivision by taking certain specified steps outlined in the Declaration (R p 41)

Consistent with these provisions of the Declaration, Porter testified that, until a month before trial when the official Plat was purportedly amended, 'the only owners within the development were the owners of the forty-four lots depicted on this official plat" (R p 294, lines 18-21) Porter agreed that the owners of the remainder of the real estate subjected to the Declaration, undeveloped parcels B and D, depicted on the official Plat as 'Phase II and Future Development", were not Members of the Association (R p 291, line 16 – 292, line 4)

Accordingly, Porter, as 'Developer", agreed both (1) that the Subdivision was limited at any given point in time to the land that had been subdivided into Lots as shown on the official Plat and (2) that the only persons who were

Members of the Association and entitled to use the amenities of the Association were the Owners of the Lots depicted on the official Plat

The only way to entitle persons, other than the owners of the 44 Lots in the Subdivision, to use of Association amenities is for them to become Owners of Lots. Lots are those shown on the official Plat, which could be amended by the Developer. The Declaration gives only the "Developer" the "right" to amend the official Plat and to "develop and submit additional phases" (R p 41). The Declaration was imposed on the land on April 24, 1998, after the 44 Lots had actually been created, along with the common areas and roads serving those Lots.

As previously set forth, the position of the Homeowners is that when the Porters divested themselves of the undeveloped land, all of the Developers' personal rights granted by the Declaration, including the right to "develop and submit" additional phases to the Subdivision, were extinguished thus terminating both Porter's rights to expand the Subdivision and the right of any future owner of the undeveloped land to create Lots that could be added to the official "Plat" and to the Subdivision. Even if that were not the case, there has been no compliance with the explicit provisions of the Declaration for adding Lots to the Subdivision by anyone.

The record reflects that, at the time that the restrictive covenants were imposed on the land, Porter had already created the 44 Lots and that he and Jimmy Porter owned other adjacent but undeveloped land.

The specific terms of the Declaration provide that the undeveloped land could only be subdivided into Lots and the Owners of those Lots brought into the Subdivision and become Members of the Association through compliance with the 'develop and submit' language of the Declaration. This land was not, as the lower court found, "already" within the Subdivision.¹⁵

Anthony Porter agreed that the undeveloped land was not part of the Subdivision. Consistent with these provisions of the Declaration, Porter testified that, until a month before trial when the official Plat was purportedly amended, "the only owners within the development were the owners of the forty-four lots depicted on this official plat" (Porter, R p 294, lines 18-21, R p 291, line 16 – p 192, line 20). Porter also agreed that as of the time of trial, after he and Richard Ratcliff had purported to add 20 lots to the Subdivision, there were then 64 lots and that the Members of the Association were the Owners of those 64 lots (Porter R p 291, line 16 - p 295, line 20). Porter agreed that the owners of the remainder of the real estate subjected to the Declaration, undeveloped parcels B and D, depicted on the official Plat as 'Phase II' and "Future Development', were not Members of the Association (Porter, R p 291, line 16 – p 292, line 4). This Court's findings to the contrary conflict not only with the Declaration, but with the testimony of the original Developer.

In ¶2 03 of the Declaration the Developer reserved the right to 'develop and submit additional phases' from "the property which Developer has acquired from Lewis H Wright et al and/or Mary P Logan." If undeveloped parcels B

¹⁵ Development contemplates the platting of lots and installation of the infrastructure necessary to support a residential or commercial community not merely ownership of raw land.

and D were *already* a part of the Subdivision, there would have been no reason for the inclusion of this 'develop and submit" language in ¶2 03 of the Declaration

The language used in the Declaration clearly contemplates that if phases in addition to the 44 Lots are to be 'submitted", they must first be "developed and then the inclusion documented by

filing a copy of the plat signed by the Developer showing such additional phases or in the alternative filing with the Clerk of Court for Beaufort County, South Carolina his intention to add additional phases to the development

(R p 41)

There was no evidence that any 'plat signed by the Developer", other than the original one showing the 44 Lots, had ever been filed other than an amended plat concerning the undeveloped land that signed by its owner, Richard Ratcliff, who purchased the land from McNeal and who was not and has never contended to be the 'Developer" as defined in the Declaration (R p 289, line 1-17)¹⁶

The unambiguous provisions of the Declaration allowed the 'Developer", and not some third party, to develop and submit additional Lots to the Subdivision and provided the mechanism by which it could be accomplished It is undisputed that none of these steps were ever taken by the Developer

¹⁶ Neither Porter the original Developer nor McNeal the purported successor developer, had any interest in the 20 lots in Phase II that the Defendants purported to develop and submit Ratcliff was not the Developer or a successor developer and thus had no right under the Covenants to develop and submit additional lots to the development or to make the owners of such lots Members of the Association Porter testified that he had no responsibility for any of the expenses of Phase II and no legal right to the income or profits of Phase II (Porter R p 323 lines 17 21 Porter R p 324 lines 7 13)

Having found the Declaration unambiguous, this Court is obligated to enforce its provisions as written. The Subdivision consists only of Lots on the Plat. The Plat can only be amended by the Developer in compliance with the provisions of the Declaration. None of that occurred in this case and this Court's finding to the contrary is error.

VII

The Court overlooked or misapprehended the fact that McNeal is not legally or factually entitled to control of the Association

As this Court finds, control of the Association is given to the "Developer" until such time as the last "Lot in the Subdivision" shall have been conveyed to a Person other than Developer or Builder (emphasis supplied) (R p 47)

Although the evidence at trial dealt with Porter as the "Developer", this Court concluded that, since McNeal is the "Successor Developer" and has not sold his lots in Phase 1 or the undeveloped property" he is entitled to control. This conclusion is wrong legally and factually.

As previously set forth, McNeal cannot be the Successor Developer under the Declaration and, because he is not the Developer, he is not entitled to control the Association.

Even if McNeal can be considered the "Developer", he is not entitled to control under the clear provisions of the Declaration. The Declaration bases the right of control on the ownership by the Developer of "Lots", not undeveloped property. Lot, as defined in the Declaration, is a Lot shown on the official Plat

While McNeal did, in fact, receive four Lots in Phase 1 from Porter as compensation for his services in finding the property later developed, the record is crystal clear that, at the time of trial, McNeal no longer owned those Lots (R p 433, lines 16 - 25)

Further, even if he were the Developer, McNeal is not entitled to control of the Association based upon ownership of undeveloped land. By so holding, this Court is completely rewriting the clear and unambiguous language of the Declaration which bases the right of control on ownership of "Lots", not on the ownership of undeveloped property.

Although purportedly basing its ruling on McNeal's status as Successor Developer, this Court tacitly affirmed the circuit court's finding that the ownership of a Lot by Porter's trust and upon which his personal residence was built was tantamount to the Developer's ownership of a Lot for purposes of determining rights of control under the Declaration. That finding is not consistent with the law or the language of the Declaration.

A financial interest in a residence is not the same as a financial interest in a real estate development. A trust is a legal entity separate and apart from the Porter, personally, or Porter acting in his capacity as Developer. It is not a reasonable construction of the Declaration to construe the Trust as the Developer.

Similarly, this Court failed to correct the circuit court's erroneous finding that the Developer can continue to exert control over a development based on the ownership of Lots by corporations, the principals of which happen to be licensed

'Builders", when the Developer has no financial or business interest in the business of either of the Builders' Granting such continued control over the Association after the time that the Developer has conveyed to third parties all of his interest in the land violates established principles of law that preclude such continued control after the point in time that the Developer has conveyed his interest in the development This Court's ruling allowing such control is error

VIII

The Court overlooked or misapprehended the rules of contract construction and the language of the Declaration when it relied on extrinsic evidence to determine that the Developer had the right to control the Committee after the Developer had conveyed to third parties his interest in the development

In its Opinion, this Court affirms the circuit court's holding that the Developer continues to control the architectural review Committee, not on the basis of the language of the Declaration, as read as a whole, but upon the testimony of Porter with respect to what the phrase "fully developed" meant As previously set forth, it is improper to rely upon extrinsic evidence when interpreting unambiguous covenants Since neither this Court nor the circuit court considered the Declaration ambiguous, this Court must limit its analysis to the Declaration, itself

The first phrase of ¶1 01 states 'Wright's Point Architectural Committee shall mean and refer to Anthony R Porter, and Jimmy W Porter or such other individuals until all improvements constructed thereon and sold to permanent residents' This phrase does not define the time during which the Developer has control It defines the time during which the Committee exists The second

sentence of that section defines when the Developer's control of the Committee terminates which is when "all of the Lots in the Subdivision have been fully developed (R p 38)

The Declaration is clear that the Developer's control ends when the Lots are fully developed However, the Declaration further provides that

"the Developer may, in its sole discretion, relinquish control over the Wright's Point Architectural Committee at any time prior to completion and sale of all Lots in the Subdivision "

(R p 38)

Reading these sentences together, it is clear that the duty to relinquish control is when the Developer has completed and sold all of the Lots in the Subdivision In finding otherwise, this Court confused the time that the Committee exists with the time that the Developer must relinquish control of the Committee In doing so, this Court erred both in its interpretation of the Declaration and in failing to honor the legal principle which terminates a Developer's right of control when the Developer no longer has a financial interest in the development

Further, in interpreting this section of the Declaration, the circuit court and this Court improperly relied upon the testimony of Porter that "fully developed" meant when "all improvements within the entire development were complete to his satisfaction" ¹⁷ Applying that definition is not consistent with the Declaration, common sense, or the law

¹⁷ Even Porter testified that the process of development includes the acquisition of property improving the property with roads and amenities subdividing it and then selling lots or building structures on the lots and selling them (R p 268 line 7 – 269 line 12)

In reliance only upon the first phrase of ¶ 1 01, the circuit court and this Court have concluded that the Developer maintained control of the Committee until a "permanent resident" purchased every Lot and improvements were built on each such Lot. This interpretation is wholly unreasonable and unworkable. The residence of a person is a factual question, typically determined on the basis of intent and is evaluated on a case by case basis. See *Widdicombe v Tucker-Cales*, 366 S. C. 75, 89, 620 S. E. 2d 333, 341, (Ct. App. 2005), *reh denied, cert granted, reversed on other grounds*.

Neither this Court, nor the circuit court, explained its view of what would constitute a "permanent resident", whether that should be evaluated by the intentions of the purchaser of a Lot, or the reality of how long the purchaser actually resided in the Subdivision. However, no matter which means of evaluating the "permanence" of a "resident" was used, it would be impossible, as a practical matter, to ever objectively demonstrate that the Lots were owned by "permanent residents".

Similarly, if "improvements" are construed as those the owner of a Lot would make, rather than those made by the Developer in connection with marketing the project, whether those improvements are completed could never be objectively determined and, if the construction of "improvements" is as applied by this Court, there would be absolutely no need for a "successor" Committee since there would be no necessity for any architectural review since all

improvements were completed¹⁸ By stopping its analysis after consideration of only the first phrase of ¶1 01, the lower court imposed a wholly unreasonable construction on the language of the Declaration as a whole

The evidence was clear at trial that the infrastructure and amenities related to the 44 Lots had long been completed and the 44 Lots had all been transferred from Developer to Owners Other provisions of the Declarations terminate the Developer's rights when he no longer has a financial interest in the Subdivision As noted previously, the common law mandates such a termination

The Homeowners construction of the Declaration is consistent with authority which holds that a Developer's right to architectural control is personal to the Developer and ceases when he conveys his interest in the subdivision *Smith v First Savings of Louisiana, FAS, 575 So 2d 1033 (Ala, 1991)* [after developer has no pecuniary interest in subdivision, covenant provision granting him sole control of ARB for twenty five years invalid]

Reading the Declaration as a whole, and construing them reasonably and in accordance with law, this Court should have reversed the circuit court and found that ¶1 01 allows the Developer to remain in control of the Committee only so long as the Developer has a financial stake in the Subdivision and not, as this Court's Opinion holds, potentially in perpetuity

¹⁸ It is certainly conceivable that one of the 44 Lots could remain unbuilt upon for many years long after the Developer had moved on to different projects and with only the residents of the Subdivision having any interest in what was built in the neighborhood

IX

This Court's ruling that SC Code §33-7-400 does not authorize the recovery of attorney fees is contrary to both the Official Comment to that statute and applicable precedent

Despite its assumption that the Homeowners' claims were derivative, this Court completely ignores the clear right under SC Code § 33-7-400 and the Official Comment thereto for a plaintiff in a derivative action to recover attorney fees. The Official Comment to § 33-7-400 provides: "The right of successful plaintiffs in derivative suits to this recovery [attorney fees] is so universally recognized, both by statute and on the theory of a recovery of a fund or benefit for the corporation, that specific reference was thought to be unnecessary."

South Carolina case law reflects the propriety of awarding attorney fees to the successful plaintiff in a derivative action. In *Historic Charleston Holdings, LLC v Mallon*, 365 SC 524, 617 SE 2d 388 (Ct App 2005) *rehearing denied*, this Court affirmed the award of attorney fees against one of the members of an LLC in a derivative action in which the other LLC member had obtained dissolution of the LLC, an accounting, and injunctive and declaratory relief.

Authority from other jurisdictions allows for such recovery. In *LeVanger v Highland Estates Properties Owners Ass'n, Inc* (80 P 3d 569 (Ut App 2003)), a case factually similar to this one, members of a home owners association sued the board members for improperly amending the association's covenants conditions and restrictions. Attorney fees were awarded for successfully obtaining a 'substantial non-pecuniary right' – the enforcement of the provisions of the covenants - for the association. See, *Neese v Richer*, 428 N E 2d 36

6
(Ct App Ind 1981) [listing decisions awarding attorney fees in derivative actions in which non-pecuniary benefits were realized as the result of the litigation for the corporation]

In rehearing this case on the merits of the Homeowners claims, the Homeowners respectfully urge that this Court also reconsider its determination that, under these facts and the claims presented, there is no right to recover attorney fees pursuant to S C Code § 33-7-400. The failure to find in favor of the Homeowners, to find that they properly represented the Association, and to award them their fees and expenses is error.

X

The Court overlooked or misapprehended the fact that no separate entity called the Wright's Point Property Owner's Association was created

In its Opinion, this Court erroneously finds that "a separate entity called the Wright s Point Property Owner's Association" was formed by the Homeowners. There is absolutely no evidence in the record that any separate legal entity, other than that created by the Developer under the Declarations, was created or existed.

In fact, the record is clear that the Homeowners and other property owners organized themselves pursuant to the direction of McNeal that the owners begin assuming responsibility for the Association. (R p 174, line 16 – p 175, line 6)

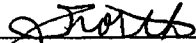
CONCLUSION

Despite the finding of this Court that the Declaration was unambiguous, this Court approved the reliance of the circuit court on clearly extrinsic evidence in deciding the issues presented to it. The circuit court and this Court further

failed to address or consider the Homeowners argument that, after the Developer conveyed his interest in the property to which the Declaration applied, the personal rights reserved to the Developer in the Declaration were extinguished and could no longer be exercised. Finally, this Court overlooked or misapprehended the Homeowners argument that McNeal could not be a Successor Developer because he did not succeed to the Developer's interest in the 'Property' as required by the Declaration but only received an assignment of the Developer's purported rights.

For all of the reasons set forth herein, the Appellants/Respondents respectfully request that this Court grant a rehearing and reconsideration of the issues presented in this case, that a rehearing en banc be granted, and that this Court reverse the findings of the circuit court as to the issues presented by the Appellants/Respondents.

Robert L. Cullen, Andrew A. Corriveau, and
Andrea Hucks, Appellants/Respondents



John E. North, Jr.
Pamela K. Black
North & Black, PC
916 Bay Street, Suite 100
Beaufort, SC 29902
(843) 379-0800 (tel)
(843) 379-0900 (fax)
Attorneys for Appellants/Respondents

Paul G. Shortz, Jr.

H. B. Wood

James E. Cook

Columbia South Carolina

cc John E. North Esquire
Pamela K. Black Esquire
Joel D. Butler Esquire

FILED
 JUL 01 2011

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Robert L Cullen, Andrew A
Corriveau, John Caldwell,
Andrea Hucks, Jamie Bellamy,
Michael Pearson, and David
Mandrell, Plaintiffs,

v

J Bennett McNeal, B McNeal
Partnership, L P , Anthony R
Porter, and Wright's Point
Home Owners Association,
Inc , Respondents-Appellants,

of whom Robert L Cullen,
Andrew A Corriveau and
Andrea Hucks are Appellants-Respondents

Appeal From Beaufort County
Carmen T Mullen, Circuit Court Judge

Opinion No 4750
Heard February 10, 2010 – Filed October 6, 2010
Withdrawn, Substituted and Refiled July 1, 2011

00053

AFFIRMED

John E North and Pamela K Black, both of
Beaufort, for Appellants-Respondents

Joel D Bailey, of Beaufort, for Respondents-
Appellants

LOCKEMY, J · In this cross-appeal, the Appellants-Respondents (the Homeowners) argue the circuit court erred in (1) considering extrinsic evidence in interpreting the Declarations for Wright's Point, (2) construing the term "Developer", (3) finding undeveloped land was a part of Wright's Point, (4) finding B McNeal Partnership, L P was a "successor developer", (5) finding the Developers were entitled to continue to control the Association, (6) finding the Developers were entitled to continue to control the Committee, and (7) failing to find the Homeowners were entitled to pursue the claims of the Association derivatively and seek attorney's fees. The Respondents-Appellants (the Developers) argue the circuit court erred in finding they were not entitled to attorney's fees. We affirm.

FACTS/PROCEDURAL BACKGROUND

Robert L Cullen, Andrew A Corriveau, and Andrea Hucks (the Homeowners) are property owners in Phase I of Wright's Point Plantation, a planned waterfront community in Beaufort County.¹ J Bennett McNeal, B McNeal Partnership, L P, and Anthony R Porter (the Developers) are real estate developers involved with the development of Wright's Point.

¹ The Homeowners are part of an original group of seven property owners in Wright's Point who initiated this litigation against the Developers. Cullen, Corriveau, and Hucks are the only Homeowners who have appealed the circuit court's order.

In 1997, Anthony Porter acquired a 1.7 acre tract, a 19.74 acre tract (Parcel B), and a 10.45 acre tract (Parcel C) of land in Beaufort County from Mary P. Logan, Lewis H. Wright, and John D. Wright. Anthony Porter's father, Jimmy Porter, acquired an 8.41 acre tract (Parcel D) from Lewis Wright and John Wright. Pursuant to a recorded plat entitled "Wright's Point Phase I," portions of the 1.7 acre tract and Parcels B, C, and D were subdivided into 44 lots, roads, and community spaces. A majority of the land within Parcels B and D was labeled "Future Development" and not subdivided into lots.

In June 1998, the Declarations of Covenants, Conditions, Restrictions, and Easements (the Declarations) for Wright's Point, which subjected all four parcels owned by Anthony Porter and Jimmy Porter to the Declarations, were recorded. Pursuant to the Declarations, the Wright's Point Homeowner's Association (the Association) was incorporated to administer Wright's Point and enforce the Declarations. Porter and his father conveyed the open spaces, ponds, streets, and certain other areas in Wright's Point to the Association. Also, pursuant to the Declarations, all construction and improvements made within Wright's Point were subject to review and approval by the Wright's Point Architectural Committee (the Committee), which consisted of Anthony Porter, Jimmy Porter, and subsequently included their appointees, including McNeal. In April 1999, Anthony Porter conveyed undeveloped Parcel B and four lots in Phase I of Wright's Point to McNeal, d/b/a McNeal Land Company². In July 2002, Jimmy Porter conveyed undeveloped Parcel D to B. McNeal Partnership, L.P.

In May 2003, Homeowner Cullen convened a meeting of a group of property owners in Phase I and formed a separate entity called the Wright's Point Property Owners Association. According to the minutes of the meeting, those present wanted "a total revamping of the [Committee]" so as to permit the use of hard-plank siding. They also expressed their concern over the use of amenities in Phase I by new property owners in subsequent phases. The newly-formed association elected Cullen as president and McNeal was elected as a board member, although he was not present at the meeting. In an October 2003 letter to property owners in Wright's Point,

² McNeal sold his four lots in Phase I of Wright's Point prior to this litigation.

Cullen explained that McNeal informed him Phase I was only part of the total Wright's Point development, and plans to develop the remaining properties were moving forward. Cullen also explained that McNeal informed him Wright's Point was a "walking community" and owners in new phases should have access to the Wright's Point common areas and docks. In November 2003, Cullen presented McNeal with a document which purported to "represent a consensus of the existing homeowners and residents." The document asserted that Phase I should be a "separate and independent area" from the remaining phases of Wright's Point, and residents in any additional phases should not have access to the common areas and docks.

In December 2003, Anthony Porter sent a letter to Cullen objecting to the existence of the Wright's Point Property Owner's Association and asserting that he was the Developer of Wright's Point, and thus, he was entitled to appoint and remove the Association's board members and officers. In January 2004, the Homeowners, together with other property owners, held an annual meeting of the Wright's Point Property Owners Association. Anthony Porter attended the meeting with his attorney and presented the Homeowners with a memorandum which stated (1) he was the Developer of Wright's Point and still owned lots there, so he retained "the sole authority under the [Declarations] to appoint and remove the directors of the [Association]", (2) the meeting being held was "not an official meeting" and several property owners, including himself, had not been given notice of the meeting, and (3) any meetings convened by the Homeowners had been done without his knowledge and were "not legal." In March 2004, at a supplemental annual meeting of the Wright's Point Property Owner's Association, the property owners in attendance ratified the filing of this declaratory judgment action.

The Homeowners filed suit against the Developers in March 2004. In their first cause of action for a declaratory judgment, the Homeowners asked the circuit court to find (1) Anthony Porter's right to control the appointment of directors and officers of the Association had terminated, and this right belonged to the owners of the lots within Wright's Point, (2) the Homeowners were validly-elected directors of the Association, (3) McNeal did not have the right to act as the Developer or the Developer's representative in connection with the business and affairs of the Association, (4) McNeal and

B McNeal Partnership, L P did not have the right to annex real estate owned by either of them to Wright's Point, or to permit owners of any part of that real estate access to or use of the common areas and amenities owned by the Association and located within Wright's Point, (5) only those owners of lots depicted on the plat of the development and recorded in Plat Book 64 at page 150 (Phase I) had the right to access or use the common areas of Wright's Point owned by the Association, and (6) Anthony Porter and McNeal did not have the right to include additional real estate within the scope of the Declarations

In their third cause of action, the Homeowners sought both a temporary and permanent injunction "restraining and enjoining [the Developers] from asserting or attempting to assert control over the business or affairs of the Association," and "restraining and enjoining [the Developers] from granting to any owner of real estate outside of Wright's Point Subdivision any purported right to access or use of the common areas of the Association "³

In their Answer and Counterclaim, the Developers asserted counterclaims for damages under multiple causes of action, including civil conspiracy, breach of contract, breach of implied covenant of good faith and fair dealing, conversion, tortious interference with contractual relationships, and defamation. The Developers also sought declaratory and injunctive relief prohibiting the Homeowners from (1) taking any action reserved to the Developer under the Declarations, (2) taking any action in the name of the Wright's Point Architectural Committee, and (3) taking any action in the name of the Association, or any other entity purporting to be legally entitled to act on behalf of the members of such association. The Developers also asked the circuit court to require the Homeowners to "account for and return all monies collected from Wright's Point property owners "

On February 27, 2007, McNeal, the owner of all the land other than the 44 lots depicted on the official plat, conveyed a portion of the property he acquired from Anthony Porter and a portion of the land he acquired from Jimmy Porter to Richard Ratcliff Homes, Inc. On February 28, 2007,

³ The Homeowners withdrew their second cause of action for an accounting prior to trial

Anthony Porter executed a document entitled "Supplemental Declaration to Declaration of Covenants, Conditions, and Restrictions for Wright's Point Covenants" (Supplemental Declaration), wherein he acknowledged that Jimmy Porter was a Developer although his name was not set forth in § 1 12 of the Declarations. In June 2007, Anthony Porter and Jimmy Porter assigned their rights as Developer of Wright's Point to B McNeal Partnership, L P.

After a March 2007 non-jury trial, the circuit court issued an order in October 2007 denying all of the declaratory and injunctive relief sought by the Homeowners. The circuit court found Anthony Porter had not relinquished his right as Developer to appoint and remove officers and directors of the Association or members of the Committee. The circuit court also determined Wright's Point was not confined to the properties in Phase I, and the remaining land within the development could be developed as part of subsequent phases. Furthermore, the circuit court determined the amenities and common areas within Phase I were not restricted for use solely by owners in Phase I, but were for the use and enjoyment of all current and future property owners within Wright's Point. The circuit court also found Jimmy Porter was an official developer of Wright's Point and B McNeal Partnership, L P was an assignee and successor developer of Wright's Point.

The circuit court denied the Developers' counterclaims for damages and granted the Developers' request for injunctive relief with respect to the ability of the Developer to control the Association, and the right of all property owners to use and access the amenities and common areas of Wright's Point. The circuit court also granted the Developers' request for specific performance, requiring the Homeowners to perform their contractual obligations under the Declarations, particularly with respect to recognizing and adhering to the rights of the Developer to control the Association and complete the development. The circuit court denied both the Homeowners' and Developers' requests for attorney's fees. This appeal followed.

STANDARD OF REVIEW

The Homeowners asserted causes of action for declaratory judgment and injunctive relief. "Actions for injunctive relief are equitable in nature."

Wiedemann v Town of Hilton Head Island, 344 S C 233, 236, 542 S E 2d 752, 753 (Ct App 2001) "In equitable actions, the appellate court may review the record and make findings of fact in accordance with its own view of a preponderance of the evidence " Id A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue Burton v York County Sheriff's Dept., 358 S C 339, 345-46, 594 S E 2d 888, 891-92 (Ct App 2004) "To determine whether an action is legal or equitable, this [c]ourt must look to the action's main purpose as reflected by the nature of the pleadings, evidence, and character of the relief sought " Fesmire v Digh, 385 S C 296, 303, 683 S E 2d 803, 807 (Ct App 2009) Here, the Homeowners' primary purpose in bringing this action was to enjoin the Developers from controlling the Association and allowing Wright's Point property owners outside of Phase I to access the common areas of the subdivision Therefore, we find this suit is an action in equity and this court may review the circuit court's factual findings in accordance with its own view of the preponderance of the evidence See Cedar Cove Homeowners Ass'n, Inc v Di Pietro, 368 S C 254, 264, 628 S E 2d 284, 288 (Ct App 2006) (holding "an action to enforce restrictive covenants by injunction is in equity")

LAW/ANALYSIS

I Homeowners' Appeal

A Extrinsic Evidence

The Homeowners argue the circuit court improperly relied upon extrinsic evidence in interpreting the Declarations without finding they were ambiguous We disagree

"The main guide in contract interpretation is to ascertain and give legal effect to the intentions of the parties as expressed in the language of the [contract] " Gilbert v Miller, 356 S C 25, 30, 586 S E 2d 861, 864 (Ct App 2003) "If a contract's language is clear and capable of legal construction, this [c]ourt's function is to interpret its lawful meaning and the intent of the parties as found in the agreement " Id at 30-31, 586 S E 2d at 864 "A clear and explicit contract must be construed according to the terms the parties

have used, with the terms to be taken and understood in their plain, ordinary, and popular sense " Id at 31, 586 S E 2d at 864 Under the parole evidence rule, extrinsic evidence is inadmissible to vary or contradict the terms of a contract Penton v J F Cleckley & Co, 326 S C 275, 280, 486 S E 2d 742, 745 (1997) "However, where a contract is ambiguous, parole evidence is admissible to ascertain the true meaning and intent of the parties " Id

While the Homeowners argue the circuit court erred in relying upon extrinsic evidence, the Developers contend the circuit court determined the Declarations were unambiguous, and relied upon the Declarations' express language and clear meaning in making its findings The Developers note the circuit court referenced cases in its order where the language of the contracts was clear and unambiguous Furthermore, the Developers argue the circuit court's review of the evidence was done either to determine the resulting effect upon the rights or duties of the parties after it had interpreted the applicable provisions of the Declarations, or by way of support or confirmation of its interpretation

We find the circuit court properly interpreted the Declarations in accordance with the rules of construction A review of the circuit court's order reveals the court relied upon the express language of the Declarations and treated the specific covenants at issue as unambiguous While the circuit court relied upon evidence presented at trial in its order, the evidence relied upon was used to determine the rights of both parties pursuant to the Declarations The circuit court did not use extrinsic evidence to ascertain the intention of the parties

B Definition of "Developer"

The Homeowners argue the circuit court erred in finding Jimmy Porter was a Developer of Wright's Point They contend the term "Developer" should be limited to the definition contained in § 1 12 of the Declarations We disagree

The Homeowners contend the circuit court erred in considering Anthony Porter's testimony that the omission of Jimmy's name from § 1 12 was a clerical error, and in considering the Supplemental Declaration which

states that Jimmy Porter was a Developer although his name was not set forth in § 1 12 "In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties " Ecclesiastes Prod Ministries v. Outparcel Assocs., LLC, 374 S C 483, 497, 649 S E 2d 494, 501 (Ct App 2007) "Contracts should be liberally construed so as to give them effect and carry out the intention of the parties " Id "The parties' intention must, in the first instance, be derived from the language of the contract " Id "To discover the intention of a contract, the court must first look to its language - if the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect " Id at 498, 649 S E 2d at 501 "The parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof " Id at 498, 649 S E 2d at 502

The circuit court determined the omission of Jimmy Porter's name from § 1 12 was a clerical error The circuit court noted that while Jimmy Porter's name was not included in the definition of the term "Developer" in § 1 12, an examination of the Declarations in their entirety supported its determination that Jimmy Porter was an official Developer of Wright's Point The circuit court noted Jimmy Porter's name was included as "Developer" in the language on the first page of the Declarations, on the signature page, and in § 1 01 Furthermore, the circuit court noted the Declarations state that a "[d]eveloper is the owner of certain real property described in Exhibit A " Exhibit A of the Declarations contains a description of all four parcels of land, including Parcel D which was owned by Jimmy Porter The circuit court also noted the deed conveying the common areas in Phase I to the Association lists Anthony Porter and Jimmy Porter as grantors

We find the Declarations, read in their entirety, support a finding that Jimmy Porter was a Developer of Wright's Point The first sentence of the Declarations states "This Declaration made this 24th day of April, 1998, by Anthony R Porter and Jimmy W Porter (hereinafter referred to as 'Developer') " Furthermore, the first "[w]hereas" clause on page one of the Declarations states that the "Developer" is the owner of certain real property described in Exhibit A " Exhibit A includes Parcel D owned by Jimmy Porter Moreover, Anthony Porter and Jimmy Porter signed the Declarations

under the "Developer" heading Accordingly, we find the circuit court did not err in determining that Jimmy Porter was a Developer of Wright's Point

C Undeveloped Land

The Homeowners argue the circuit court erred in finding Wright's Point included the areas identified as "Phase II" and "Future Development" on the recorded plat The Homeowners contend Wright's Point is limited to the 44 lots, amenities, and common areas shown on the plat, and does not include the additional areas shown as "Phase II" and "Future Development " We disagree

The circuit court held Wright's Point was not confined to the properties in Phase I The circuit court found the recorded plat of Wright's Point included a Phase II and an area designated for Future Development The circuit court noted the marketing materials used to sell properties in Wright's Point clearly stated the development would include multiple phases Furthermore, the circuit court determined Wright's Point consisted of the four parcels described in "Exhibit A" attached to the Declarations

The Homeowners argue phases subsequent to Phase I must be developed and submitted by the Developer pursuant to § 2 03 of the Declarations § 2 03 states

Subdivision Plat Developer reserves the right to modify, amend, revise and add to the Plat, at any time and from time to time, setting forth such information as Developer may deem necessary with regard to the Subdivision, including, without limitation, the locations and dimensions of the Lots, the private roads, utility systems, drainage systems, utility easements, drainage easements, access easements and building and set-back line restrictions

Developer reserves unto himself, his heirs and assigns, the right to develop and submit additional phases to this Declaration of Covenants, Conditions, Restrictions and Easements, Wright's Point Homeowner's Association, Inc and related documents. Such additional phases shall be limited to the property which Developer has acquired from Lewis H Wright, et al and/or Mary P Logan, or any properties contiguous thereto. Such additional phases will be subject to all of the Covenants, Conditions, Restrictions and Easements and the By-Laws upon Developer, his heirs and assigns, filing a copy of the plat signed by the Developer showing such additional phases or in the alternative filing with the Clerk of Court for Beaufort County, South Carolina his intention to add additional phases to the development.

The Homeowners argue land in "Phase II" and "Future Development" must be developed and submitted as additional phases and are not "already" a part of Wright's Point, as determined by the circuit court. The Homeowners also contend that when the Developer sold the undeveloped land to McNeal, his personal right to develop and submit additional phases was extinguished.

While the Homeowners contend Wright's Point consists only of Phase I, we find an examination of the Declarations in their entirety reveals Wright's Point includes the undeveloped land labeled "Phase II" and "Future Development" on the recorded plat. The Declarations define Wright's Point as the property described in Exhibit A, which includes Phase II and Future Development. The Declarations also refer to a "Community-Wide Standard" and define that term as the standard "generally prevailing throughout the Property." "Property" is defined in § 1.19 as all of the land described in Exhibit A. Furthermore, all of the property in Exhibit A was obtained by the Developers from Lewis H Wright, et al and Mary P Logan as required by § 2.03. To the extent the Homeowners argue the development of additional phases would constitute an impermissible annexation of land into Wright's Point, we note § 2.03 provides for additional phases of development of

existing property already subject to the Declarations and not an annexation of property not described in Exhibit A. Furthermore, although the undeveloped property was sold to McNeal, the Declarations provide that all of the property in Exhibit A "shall be held, transferred, sold, mortgaged, conveyed, leased, occupied and used subject to the covenants." Accordingly, we find the circuit court did not err in determining that Wright's Point is not confined to the properties within Phase I.

D McNeal as "Successor Developer"

The Homeowners argue the circuit court erred in approving the assignment of development rights to McNeal Partnership, L P. We disagree.

§ 1.12 of the Declarations provides for a successor-in-title or successor-in-interest to the Developer of Wright's Point. § 1.12 states:

"Developer" shall mean and refer to (a) Anthony R. Porter, or (ii) [sic] any successor-in-title or any successor in interest to Anthony R. Porter, to all of the Property then subject to this Declaration and provided in the instrument of conveyance to any such successor-in-title or interest is expressly designated as "Developer" hereunder by the grantor of such conveyance, which grantor shall be the "Developer" hereunder at the time of such conveyance.

In June 2007, Anthony Porter and Jimmy Porter assigned their development rights in Wright's Point to McNeal Partnership, L P. The Homeowners requested the circuit court "reopen the trial" and "include in its ruling a declaration as to the right of McNeal to act as the Developer." In its order, the circuit court held the assignment of Developer rights to McNeal was "done properly" and "was executed in accordance with the applicable language of the covenants." The circuit court noted the conveyance met the requirements of § 1.12 by expressly identifying Anthony Porter and Jimmy Porter "collectively as 'Developer'."

First, the Homeowners argue the Developers' rights were extinguished and could not be conveyed. They contend Anthony Porter and Jimmy Porter conveyed their interests in the undeveloped land more than five years before the assignment in June 2007. Second, the Homeowners argue (1) it was a legal impossibility for McNeal to succeed to all of the property subject to the Declarations, (2) none of the deeds which conveyed Parcels B and D contained any designation that the grantee was deemed the successor developer, and (3) McNeal did not take title to all of the property from the Developer. Third, the Homeowners argue the circuit court erred when it determined McNeal was a successor developer when the Assignment of Developer's Rights stated McNeal was not liable for the Developers' actions which occurred prior to the assignment.

The Developers note that according to § 1 12, a successor developer becomes Developer "to all of the Property then subject to this Declaration." The Homeowners argue Parcel C was subdivided and the lots sold thus making it impossible for McNeal to succeed as Developer of "all the property." The Developers contend § 1 12 does not state that lots are no longer subject to the Declarations once they have been conveyed to subsequent owners. The Developers also contend § 1 12 provides that a successor developer may either be a successor-in-title or a successor-in-interest. They note that while a successor-in-title would derive authority through a deed, a successor-in-interest may derive authority through another instrument of conveyance. Here, McNeal did not become a successor developer through a deed, but rather through the Assignment of Developer's Rights. The Developers also note McNeal was specifically identified as the successor developer by the grantor.

We find a preponderance of the evidence demonstrates that McNeal is a successor developer. The Assignment of Developer's Rights was properly executed and specifically identified McNeal as the successor developer. As a successor-in-interest and not a successor-in-title, there was no requirement that the deeds to Parcels B and D designate McNeal as a successor developer. Furthermore, § 12 04 provides that the provisions of the Declarations "shall run with and bind title to the Property" and are binding upon "all Owners and their respective heirs, successors and assigns." Thus, the Declarations do not indicate that lots are no longer subject to the Declarations once they

have been conveyed to subsequent owners. Additionally, the Homeowners have failed to prove that a successor developer cannot assume the rights of Developer and also disclaim liability for actions of the Developer prior to the assignment of rights. Accordingly, we affirm the circuit court's finding that McNeal is a successor developer of Wright's Point.

E Control of the Association

The Homeowners argue the circuit court erred in finding the Developer was entitled to continue to appoint and remove officers and directors of the Association. We disagree.

§ 7 01 of the Declarations states, in part

Developer shall have the right to appoint and remove all members of the Board and any officer or officers of the Association until such time as the first of the following events shall occur: (i) the date as of which the last Lot in the Subdivision shall have been conveyed to a Person other than Developer or Builder, or (ii) the surrender by Developer of the authority to appoint and remove directors and officers of the Association by an express amendment to this Declaration executed and recorded by Developer.

The circuit court determined the language of §§ 7 01 and 12 01 was "clear and unambiguous" and that neither of the conditions set forth in § 7 01 and reiterated in § 12 01 had occurred. The circuit court found neither Anthony Porter nor Jimmy Porter had surrendered their authority to control the Association. In addition, the circuit court found Anthony Porter's transfer of title to his lots in Wright's Point to himself as Trustee of a Personal Residence Trust did not divest him of his property for purposes of control under § 7 01. The circuit court noted Anthony Porter testified the transfer of title in his lots was for tax purposes only, and that he continued to pay his Association dues. Furthermore, the circuit court determined the last lot in Wright's Point had not been conveyed to a person other than "Builder." The circuit court noted the Declarations define "Builder" as "any Person or legal

entity engaged principally in the business of construction of structures to whom the Developer sells or has sold one or more Lots " The circuit court also noted that Ratcliff and Lloyd Denny, both licensed general contractors, testified as to their ownership of lots in Phase I

First, the Homeowners argue Anthony Porter's conveyance of his lots in Phase I to his Personal Residence Trust constituted a conveyance "to a Person other than Developer" under § 7 01 They argue Porter's Trust is a different legal entity from "Developer " According to § 1 17 of the Declarations, "Person shall mean and refer to a natural person, corporation, partnership, association, trust or other legal entity or any combination thereof " Second, the Homeowners contend none of the owners of lots in Phase I meet the definition of a "Builder" under the Declarations They argue Ratcliff and Denny are not "Builders" simply because they hold contractor's licenses in their own names, as required by law Third, the Homeowners argue Porter was no longer entitled to control the Association because he no longer had a financial interest in Wright's Point

Based upon our finding that McNeal is a successor developer of Wright's Point, we affirm the circuit court's finding that the Developer was entitled to continue to appoint and remove officers and directors of the Association Pursuant to § 7 01, the Developer has the right to control the Association "until the date as of which the last Lot in the Subdivision shall have been conveyed to a Person other than Developer or Builder," or he surrenders the authority by express amendment to the Declarations Here, lots in Phase I are still owned by builders, and McNeal has not surrendered his right to control the Association Accordingly, we affirm the circuit court's finding that the Developer was entitled to continue to appoint and remove officers and directors of the Association

F Control of the Committee

The Homeowners argue the circuit court erred in finding the Developer had the right to continue to control the Committee after Phase I was developed We disagree

§ 1 01 of the Declarations states, in part

"Wright's Point Architectural Committee" shall mean and refer to Anthony R Porter and Jimmy W Porter or such other individual(s) as Developer may appoint, or such entity to which the Wright's Point Architectural Committee may assign its duties, until all improvements constructed thereon and sold to permanent residents. At such time as all of the Lots in the Subdivision have been fully developed, the Developer shall notify the Board and all Owners of Lots in the Subdivision to that effect, at which time the Developer's rights and obligations as the Wright's Point Architectural Committee shall forthwith terminate. Notice to the Board and all the owners by Developer under this provision shall be in writing.

The circuit court found that because there were not improvements on all of the lots in Phase I, and because not all of the lots were owned by permanent residents, the Developer was entitled to remain in control of the Committee. The circuit court also found the Developer had not given notice to the Board and Owners as required by § 1 01.

The Homeowners argue it is impossible to determine whether all of the lots were owned by permanent residents, or whether all improvements had been constructed. They contend the Developer was no longer entitled to control the Committee because he sold all of the lots and had no financial interest in the development of the undeveloped land. The Developers maintain the evidence produced at trial demonstrates that not all of the lots were owned by permanent residents, and that not all of the lots had improvements.

We find a preponderance of the evidence demonstrates there were lots in Phase I not owned by permanent residents, and vacant lots in Phase I with no improvements. Homeowner Caldwell testified there were vacant lots in Phase I and lots that had not been sold to permanent residents. Richard Ratcliff and Homeowner Hucks both testified they owned lots in Phase I that had not been improved. Moreover, § 1 10 provides that the Developer retains

control over the Committee until all of the lots are fully developed and the Developer notifies the Board and all Owners to that effect Anthony Porter testified lots in Wright's Point would not be fully developed until all improvements within the entire development were complete to his satisfaction He also testified that "fully developed" does not mean "the completion and sale of all lots " Furthermore, there was no evidence produced at trial showing Anthony Porter ever notified the Board or the Owners that all of the lots had been fully developed as required by § 1 01 Accordingly, we affirm the circuit court's finding that the Developer had not relinquished the right to control the Committee

G Derivative Claims and Attorney's Fees

The Homeowners contend the circuit court erred in failing to find their claims were derivative and that they were entitled to attorney's fees We disagree

A party cannot recover attorney's fees unless authorized by contract or statute Jackson v Speed, 326 S C 289, 307, 486 S E 2d 750, 759 (1997), see also Hegler v Gulf Ins Co, 270 S C 548, 549, 243 S E 2d 443, 444 (1978) ("As a general rule, attorney's fees are not recoverable unless authorized by contract or statute ") The Homeowners argue they are entitled to attorney's fees pursuant to section 33-7-400 of the South Carolina Code (2006), which provides that "[d]erivative suits may be maintained on behalf of South Carolina corporations in federal and state court in accordance with the applicable rules of civil procedure " The Homeowners contend that while the statute does not specifically authorize attorney's fees, the statute's Official Comment provides for recovery The Official Comment to section 33-7-400 of the South Carolina Code states in part "[t]he right of successful plaintiffs in derivative suits to this recovery is so universally recognized, both by statute and on the theory of a recovery of a fund or benefit for the corporation, that specific reference was thought to be unnecessary " Assuming without deciding that this suit is a derivative action, the Homeowners are not entitled to attorney's fees under section 33-7-400 This section does not specifically authorize the recovery of attorney's fees, and the Official Comment is specifically limited to "successful plaintiffs "

Accordingly, we affirm the circuit court's denial of the Homeowner's request for attorney's fees

II Developers' Appeal

The Developers argue the circuit court erred in denying their request for attorney's fees This issue is not preserved for our review

The Developers contend the language of § 11 01 of the Declarations provides a contractual basis that mandates an award of attorney's fees to the Developers and the Association § 11 01 states, in part

Each Owner shall comply strictly with the covenants, conditions and restrictions set forth in this Declaration Failure to comply with any of the same shall be grounds for instituting an action for damages and/or for injunctive relief, such actions to be maintainable by Developer, the Board on behalf of the Association, or in a proper case, by an aggrieved Owner Should Developer or the Association employ legal counsel to enforce any of the foregoing, all costs incurred in such enforcement, including court costs and reasonable attorneys' fees, shall be paid by the violating Owner

The Developers argue the Homeowners' attempts to gain control of the Association, dictate and limit the use of common amenities, and prevent future phases of development, as well as their movement of Association funds to an unauthorized account, constitute non-compliance with the Declarations The Developers also argue they are entitled to attorney's fees pursuant to the Uniform Declaratory Judgments Act Section 15-53-100 of the South Carolina Code (2005) provides that "[i]n any proceeding under this chapter the court may make such award of costs as may seem equitable and just "

In order for an issue to be preserved for appellate review it must have been raised to and ruled upon by the trial court Staubes v City of Folly

Beach, 339 S C 406, 412, 529 S E 2d 543, 546 (2000) A party must "present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments " I'On, L L C v Town of Mt Pleasant, 338 S C 406, 422, 526 S E 2d 716, 724 (2000) Here, the Developers failed to present their arguments on appeal to the circuit court In their Answer and Counterclaim, the Developers asserted they were entitled to recover attorney's fees due to the frivolous nature of the Homeowners' claims However, the Developers did not assert they were entitled to attorney's fees pursuant to § 11 01 of the Declarations or section 15-53-100 of the South Carolina Code Therefore, because the circuit court did not rule on these arguments and the Developers failed to file a Rule 59(e) motion requesting a ruling from the circuit court, these arguments are not preserved for our review

CONCLUSION

For the foregoing reasons, the order of the circuit court is

AFFIRMED

SHORT and WILLIAMS, JJ , concur