THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Circuit Court Judge

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SC Court of Appeals

Case No.: 2016-000281

ANCHORAGE PLANTATION
HOMEOWNERS ASSOCIATION,

Respondent,

v.

JOHN B. WALPOLE AND THEODORA
W. WALPOLE

Appellants.

BRIEF OF RESPONDENT

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Procedural Background

Respondent Anchorage Plantation Homeowners Association ("Respondent" or the "Association") brought this action against Appellants, John B. and Theodora W. Walpole ("Appellants" or the "Walpoles"), seeking to invalidate a recorded easement granted by Southern Lifestyles, VIII, LLC ("Southern Lifestyles") in favor of the Walpoles over common areas owned by the Association. The Walpoles are not members of the Association. The Association's complaint sought a declaration that the easement is legally invalid and requested an injunction invalidating the easement in the public records of the RMC Office for Charleston County. R.p.46 ¶¶ 29 and 34.

After trial, the lower court, Honorable R. Markley Dennis, Jr., circuit judge, ruled in favor the Association entering a 36-page order on November 3, 2015, with extensive findings of fact and conclusions of law (the "Order"). R.pp.1-36. The circuit court based its decision on five alternative grounds:

1. That Southern Lifestyles did not have the authority under the declaration encumbering the common areas to grant the easement to the Walpoles, R.p.24;
2. That the purported easement to the Walpoles placed an undue burden on the servient estate of the Association and is invalid under the law of easements, R.pp.26-28;
3. That the easement was invalid as a contract entered by the developer during its control of the Association that imposed an unfair and unconscionable obligation on the Association, R.pp.28-29;

4. That any right of access of Southern Lifestyles to the common areas expired when it no longer owned any property within the Association,R.p.26; and,
5. That Southern Lifestyles' right of access or alleged easement rights were appurtenant and not subject to transfer, R.p.27.

In their appeal, the Walpoles challenge only ground No. 1 above. They assert that "[b]ecause the Covenants do not clearly and unambiguously prohibit the transfer of the easement rights of the access to the Appellants, the Covenants do not invalidate the Easement." (App. Brief at 12; Statement of Issues on Appeal, No. 2). The Walpoles do not address the alternative factual and legal bases for the lower court's determination the easement was invalid.

The Walpoles premise their remaining issues on appeal on their affirmative defenses: lack of standing (Issue No. 1); statute of limitations (Issue No. 3); equitable defenses of waiver, laches, and estoppel (Issue No. 4); and unjust enrichment (Issue No. 5). The Walpoles challenge the lower court's conclusions on these issues but do not identify a single finding of fact that they allege was unsupported by the evidence.

Factual Background

In 1980, the Walpoles acquired over a thousand acres on Wadmalaw Island known as Anchorage Plantation. Plaintiff's Exhibit 1, R.pp.500-503; R.p.2. In 1997 the Walpoles started the development of Anchorage Plantation by recording a plat for "the Anchorage Plantation-Phase I" and subjecting these 8.839 acres to the Declaration of Covenants, Conditions, Easements, Restrictions, Charges and Liens for the Anchorage Plantation Homeowners Association (the "Original Declaration"). R.pp.2-3; Plaintiffs Exhibits 2, 3, and 4, R.pp.504-505, 506-524, 525-544. Phase I included the first section of an entry

road from Maybank Highway called Anchor Watch Drive that led to five new lots near the terminus of Anchor Watch Drive and an existing lot owned by Kelly T. McGee and Gladys H. McKee (the "McKees") that was not part of the Anchorage Plantation development. R.pp.2-3. The Walpoles signed a note on the recorded plat dedicating the roads and drainage easements on the plat of Phase 1 to the Association. R.pp.2-3; Plaintiff's Exhibit 2, R.pp.504-505.

The only easement reserved to the Walpoles under the Original Declaration was in their capacity as declarant over the common areas for installation of utilities. R.p.3; Plaintiff's Exhibit 4 at Sec. 8.02, R.p.534. The Original Declaration did not establish a right of access or easement over the common areas in favor of the Walpoles as owners of the remaining acreage that was not subject to the Original Declaration. In contrast, the Original Declaration granted to the McKees the right to use Anchor Watch Drive for ingress to and egress from their lot that was not part of the Association and imposed a $125 annual fee to offset the costs of the road that could be enforced in the same manner as an assessment of the Association. R.p.4; Plaintiff's Exhibit 4 at Sec. 11.06, R.p.539. The McKees signed the Original Declaration. Plaintiff's Exhibit 3, R.p.521.

Although they had recorded the Phase I plat, the Walpoles did not intend to be the ultimate developer of Anchorage Plantation, but instead sought to sell the property to a developer. The developer that they chose was Southern Lifestyles.

On January 11, 2000, the Walpoles entered a Purchase Agreement for Real Estate with Southern Lifestyles (the "First Purchase Agreement") to sell for $10,100,000 Phase I as well as an additional 278 acres including approximately 70 more lots known as "Anchorage Plantation - Phase II" along with an extension of Anchor Watch Drive and any

interior roads. R.p.4; Plaintiff's Exhibit 5, R.pp.545-558. Approximately half the lots in Phase II fronted on Bohicket Creek. Exhibit A to Plaintiff's Exhibit 5, R.p.556. The First Purchase Agreement included an option for Southern Lifestyles to purchase the remaining 778 acres of Anchorage Plantation, described as Phase III, for $3,500,000. Plaintiff's Exhibit 5 at Sec. 7.1, R.p.550.

Article X of the unrecorded Purchase Agreement granted the Walpoles the right to access the community boat ramp and courtesy dock within Phase II until the closing on the option property and the right to use any road within either the property conveyed or the option property for access to the adjoining property owned or leased by the Walpoles:

> 10.3 Purchaser agrees to provide Seller access to Bohicket Creek over the community boat ramp and courtesy dock located in Phase II until such time as Purchaser closes on the purchase of the Option B Property. Seller shall have the right to use any road within the Property and the Option Property for purposes of ingress and egress to properties owned or leased by Seller. . . .

R.pp.4-5; Plaintiff's Exhibit 5, Sec. 10.3, R.p.552.

Section 11.2 of the Purchase Agreement provided that the commitments made by the Seller, i.e., the Walpoles, in the First Purchase Agreement survived the delivery of the deed and the closing, but did not specify that any obligations of the Purchaser, Southern Lifestyles, survived the closing. R.p.5; Plaintiff's Exhibit 5, R.p.552.

Southern Lifestyles closed on the purchase of Phases I and II on June 16, 2000. Plaintiff's Exhibit 7, R.pp.565-569. That same day, before conveying title to Southern Lifestyles, the Walpoles recorded a plat for Phases I and II that included a signed dedication by the Walpoles of the roads and drainage easements to the Association identical to the one on the 1997 plat for Phase I. Plaintiff's Exhibit 6, R.pp.559-564. Also

that same day before the closing, the Walpoles recorded the First Amendment to the Original Declaration subjecting Phase II to the Original Declaration. Plaintiff's Exhibit 8, R.pp.570-573.

The Walpoles did *not* reserve an easement across or right of access to the common areas of the Association in their deed of Phases I and II to Southern Lifestyles. Plaintiff's Exhibit 7, R.pp.565-569.

Less than a week after the closing, Southern Lifestyles completely revamped the covenants encumbering all of Phases I and II. On July 21, 2000, Southern Lifestyles recorded the Second Amendment to and Restatement of Declaration of Covenants, Conditions and Restrictions for the Anchorage (the "Restated Declaration"). R.pp.6-7; Plaintiff's Exhibit 10, R.pp.576-652. The Restated Declaration bound "all parties having any right, title, or interest in the described properties [Phases I and II] or any portion thereof, and their respective heirs, successors, successors-in-title, and assigns,..." Plaintiff's Exhibit 10, R.pp.583-584. Southern Lifestyles was the owner of the property encumbered by the Restated Declaration as well as the Declarant under the Restated Declaration.

Under the terms of the Restated Declaration, the roads, boat landing, and courtesy dock were deemed "common areas" of the Association even though the Association had not yet received legal title to them.[1] R.pp.7-8; Plaintiff's Exhibit 10, Section 1.1(g), R.p.584. According to the terms of the Restated Declaration, "[a]ll common areas are to be devoted to and intended for the common use and enjoyment of the Declarant, Owners,

[1] As previously noted, the Walpoles dedicated the roads to the Association before transferring title of Phases I and II to Southern Lifestyles and before Southern Lifestyles recorded the Restated Declaration.

and their respective guests, and invitees, as well as third-parties with easements in and to such common areas, as herein provided." Plaintiff's Exhibit 10, R.p.584.

The Restated Declaration retained the specific easement in favor of the McKees to use Anchor Watch Drive to access their lot. R.p.8; Plaintiff's Exhibit 10, Sec. 6.4.2, R.pp.601-602. The Restated Declaration did *not* grant an easement to the Walpoles, the owners of the adjoining 778 acres, for use of or access to any portion of the common areas. Instead, the Restated Declaration includes a provision specifically *excluding* any interest of adjoining owners in the Association's properties except to the extent specifically granted by its terms: "this Declaration will be filed of Record for the benefit of Declarant, the Owners, and their Mortgagee as herein provided, and **by such recording, no adjoining property owner or third party will have any right, title or interest whatsoever in the Development, except as provided herein.** . ." R.p.10; Plaintiff's Exhibit 10, Section 16.12, R.p.628 (emphasis added).

The Restated Declaration describes with particularity the limited rights in the common areas of persons other than the members of the Association. The Restated Declaration also specifically enumerates the exact easements reserved to the Declarant over the common areas and prescribes the Declarant's limited authority to grant easements to others over the common areas.

The easements specifically reserved to the Declarant under Article 6 of the Restated Declaration, "PROPERTY RIGHTS," are the right to add contiguous property to the Association under Section 2.2 and grant an easement over the common areas in favor of the newly added property; an easement over the common areas "[d]uring the period that Declarant owns any of the property for sale" for the purposes of constructing,

maintaining, repairing, and replacing improvements on the common areas or other property including doing all things reasonably necessary and proper in connection therewith; and the power to grant and accept easements over the common areas for the purpose of providing utilities. R.pp.9-10; Plaintiff's Exhibit 10, Secs. 6.5.1, 6.5, and 6.7, R.pp.601-602.

The Restated Declaration does *not* include a provision authorizing the Declarant to grant an easement over the common areas, or to transfer the Declarant's easement rights over the common areas, to the owner of contiguous property. The only provision authorizing the Declarant to grant an easement to contiguous property over the common areas is Section 2.2 allowing the Declarant to add that property to the Association through supplemental declaration. The attorney for Southern Lifestyles acknowledged at trial the Restated Declaration did not include a provision authorizing the Declarant to grant an easement for access and use of the common areas in favor of contiguous property unless that property were annexed into the Association through supplemental declaration. R.p.465:4-14.

After closing on Phase I and II, Southern Lifestyles and the Walpoles entered a separate purchase agreement on December 15, 2000, for the 778 acres subject to the option in the Purchase Agreement (the "Second Purchase Agreement"). Plaintiff's Exhibit 13, R.pp.661-671. The Second Purchase Agreement specified a closing on Phase III no later than June 15, 2002. (Plaintiff's Exhibit 13, R.p.664). The unrecorded Second Purchase Agreement revived the Walpole's right of access in the unrecorded First Purchase Agreement as follows: "10.13 The provisions of the [First] Agreement between the parties dated January 11, 2000 contained in Articles VI and X shall apply to this

[Second] Agreement as contemplated under the [First] Agreement of January 11, 2000." Plaintiff's Exhibit 13, R.p.668.

Southern Lifestyles, VIII, LLC, intended to submit Phase III to the Restated Declaration and make it a part of the Association when it acquired Phase III. R.pp.459-461. Had that occurred, the lot purchasers in Phase III would have been subject to all the terms and conditions of the Restated Declaration, including being liable for assessments and subject to rules and regulations applicable to the common areas, just like the other member-owners of the Association. In anticipation of purchasing Phase III and bringing it into the Association, Southern Lifestyles had its engineers prepare an extensive subdivision site plan for Phase III. Defendant's Exhibit 16, R.p.1022.

But, it did not work out as the Walpoles and Southern Lifestyles had hoped. Southern Lifestyles ran into financial difficulties. On July 5, 2001, Southern Lifestyles granted a mortgage to the Walpoles on 23 of the lots in Phases I and II to secure amounts owed the Walpoles under the Second Purchase Agreement, as amended. Plaintiff's Exhibit 15, R.pp.678-683. Southern Lifestyles sought to extend the Second Purchase Agreement but the Walpoles were reluctant to allow additional time. R.pp.453-458. The Walpoles decided that they would allow further negotiations over Southern Lifestyle's desire to purchase Phase III but only if Southern Lifestyles granted them and the future owners of the 778 acres an easement across the common areas of the Association as "protection" in the event that Southern Lifestyles did not close on Phase III.

Charles Altman, lawyer for the Walpoles, wrote Neil Robinson, lawyer for Southern Lifestyles, a letter to this effect on October 30, 2001, enclosing the easement he drafted that the Walpoles insisted be signed as a condition of continuing to negotiate.

Defendants' Exhibit 17, R.p.1023. Since it was a "take it or leave it" proposition, Southern Lifestyles believed it had no choice and signed the easement exactly as prepared by Altman. R.pp.457-458. This is the easement that gives rise to this case and this appeal.

Signed by Southern Lifestyles on November 8, 2001, the Easement Agreement (the "Easement") purported to grant the Walpoles, their heirs and assigns, as owners of the adjoining 778 acres, an easement over the roads in Phases I and II described as the "Burdened Property", for purposes of ingress and egress to the Walpoles' property, described as the "Benefited Property." Plaintiff's Exhibit 17, R.pp.688-692. The Easement granted "the right for the Grantees [the Walpoles], their heirs and assigns to use the community boat ramp and courtesy dock located on the Burdened Property [Phases I and II] for the purpose of access to Bohicket Creek." Plaintiff's Exhibit 17, R.p.688. The Easement specified that if the Benefited Property was subdivided and sold to third persons, each subsequent owner of a lot would be obligated to pay an annual fee "for the right to enjoy the easements granted herein" of $50 to the Association for the first year, increasing by $5 per year thereafter. Plaintiff's Exhibit 17, R.pp.688-692.

Southern Lifestyles discussed the Easement at length with Robinson before signing it. R.p.459:8. Southern Lifestyles expressed concerns to Robinson about the amount of the fee to be paid by the future lot owners, but felt that if they closed on Phase III and brought the adjoining 778 acres into the Association by supplemental declaration, these new members of the Association would be paying on the same basis as the other members of the Association. R.p.459:1-22. Robinson and Southern Lifestyles went so far as to discuss the possibility that someone down the road might challenge the validity

of the Easement, but believed that if it closed and brought the 778 acres into the Association, it could cancel the Easement. R.pp.460:14-461:5.

The applicable zoning allowed the subdivision of the 778 acres into 107 residential lots; those future purchasers would receive the benefit of the Easement. R.pp.433-434. At the time of Southern Lifestyles' execution of the Easement on November 8, 2001, the deeds recorded in the RMC Office for Charleston County show that Southern Lifestyles had already sold and conveyed title to over 50 of the 74 lots in Phases I and II. R.p.15. This number is consistent with the mortgage granted by Southern Lifestyles VIII, LLC, to the Walpoles on July 5, 2001, that was secured by only 23 of the 74 original lots. R.p.15; Plaintiff's Exhibit 15, R.pp.678-683.

On June 13, 2002, Southern Lifestyles and the Walpoles entered an Amended Easement Agreement that was essentially the same except that it capped at $100 the fee per lot on the 778 acres that started at $50 and increased $5 per year. Plaintiff's Exhibit 18, R.pp.693-697 (the Easement Agreement and the Amended Easement Agreement jointly referenced herein as the "Easement"). The Walpoles offered no testimony as to the rationale behind the calculation of $50 as the fee to be paid by the lot owners within the 778 acres. William Walpole, the guardian for Respondent John Walpole, testified he had no knowledge how the fee in the Easement was derived. R.pp.430:18-431:14.

Attorney Elizabeth W. Settle, whom the court qualified as an expert in real estate development matters, testified the Easement of November 8, 2001, would not appear in the chain of title for the lots purchased by persons before the purported easement was recorded. R.pp.247-248. She also rendered her opinion, consistent with the testimony of Robinson, the lawyer for Southern Lifestyles, that the terms and conditions of the

Restated Declaration did not vest Southern Lifestyles with the authority to encumber the common areas and grant the Easement to the Walpoles. R.pp.262-263.

The lower court agreed and ruled Southern Lifestyles did not have the authority to submit the Association's common areas to the Easement in favor of the adjoining 778 acres owned by the Walpoles:

> I find and conclude that the Restated Declaration did not reserve to the Declarant the right to grant the easement in question. The easement is outside the authority reserved to the Declarant in the Declaration. Further, the members of the Association purchasing lots before the easement was granted had no notice that the Declarant might grant such an easement since the Restated Declaration did not vest the Declarant with such authority. The purchasers of the 50 or so lots would not have had record notice of the Easement Agreement since it was executed after title was conveyed for their lots. As such, the Easement Agreement falls outside the chain of title for the subsequent purchasers of those lots who would not have record notice of the purported easement.

R.p.24.

In Settle's opinion, the easement over the common areas in favor of owners of the 778 adjoining acres would be valid only if that acreage was brought into the Association through supplemental declaration under Section 2.2 of the Restated Declaration or if the Restated Declaration had reserved an easement in favor of them and the adjoining acreage as it did for the McKees. R.pp.262-263. Robinson testified that if the goal was for the Walpoles to have an easement over the common properties for the benefit of their 778 acres, then the method he would have used if he had been representing them at the time of the closing would have been through the express reservation of an easement in their favor in the deed executed on June 16, 2000, conveying Phases I and II to Southern Lifestyles. R.p.466:1-6.

Regardless of whether the fee imposed on the owners of lots outside the Association is $50 or $100 for use of the Association's common areas, the circuit court found that it is grossly out of whack with the expenses of the association for the common areas and the assessments paid by the individual lot owners within the Association. R.p.24. As set forth in the lower court's Order, there was abundant, uncontradicted proof of the high cost of maintaining these common areas, the assessments paid by members of the Association, the potential adverse impact on the Association, and the concerns of the Association if outsiders were granted access and use of the Association's common areas:

> The current annual assessment for each of the 74 lots and Phases I and II of the Anchorage is $1,400. R.pp.367, 370-371. Approximately $343 of this assessment is budgeted to road repair and maintenance. R.p.367.
>
> The Association spent over $400,000 building the outdoor picnic area and men's and women's bathrooms located at the community boat landing and dock, which the members describe as their amenity center. R.pp.335-336. There are a dozen parking spaces for cars with trailers to launch and retrieve boats. R.pp.315-316.
>
> Brostoff [the Association's president] testified to the Association's extensive concerns about the purported easement if the 107 lots are subdivided on the residual property owned by the Walpoles as allowed under Charleston County zoning. These concerns included the following: that the fee to be paid is far below a fair proportionate share to repair and maintain the roads, boat landing, and community dock, R.pp.312-315; that there is insufficient parking for the anticipated cars and boat trailers from the owners of the 107 lots, R.pp.315-316; that there is insufficient fresh water capacity at the community boat landing if the number of boats were considerably increased, R.pp.315-317; that the Association has no means to enforce collection or to deny access to a property owner who did not pay the fee, R.p.341; privacy and security concerns if the Association has to provide an access code to the entrance security gate to all the lot owners in the residual property, R.p.320; the high costs of maintaining the automatic access gate which would have to be funded entirely by the members of the Association, not by the outside property owners, R.pp.309, 337; that the outside owners, not being members of the Association, would not be bound by the rules and regulations of the Association governing the use of and

> access to the community boat landing and dock, R.pp.319-321; and that the large trucks associated with the construction of houses on the interior lots would cause significant wear and tear on Anchor Watch Drive accelerating its deterioration and need for repair, R.p.319.

R.pp.18-19.

As one of his many findings and conclusions and as one of the several alternative bases for his decision, the lower court found and concluded that even if the Restated Declaration had granted the Declarant an easement to the common areas for their recreational use, which it did not, the Declarant's purported grant of this easement in favor of the adjoining 778 acres was invalid under the law of easements as set forth by this court in Rhett v. Gray, 401 S.C. 478, 736 S.E.2d 873 (Ct. App. 2012). R.pp.26-28. In Rhett this Court ruled that the owner of an easement cannot materially increase the burden on the servient estate by extending the right in favor of third persons and that an easement holder's enlargement of an easement to include adjoining tracts constitutes such an impermissible increase in the burden on the servient estate. R.pp.26-27. The lower court found facts that are unchallenged by the Walpoles on appeal that fully support this alternative ground for invalidating the Easement:

> ...the purported easement granted by Southern Lifestyles VIII, LLC, to the Walpoles would materially and unfairly increase the burden on the servient estate. The easement purports to grant the right to use the Association's roads, boat landing, and community dock to as many as 107 lot owners and their guests, more than doubling the burden on these common areas of the Association. As the testimony indicated, these owners would be paying only a fraction of the cost of repairing and maintaining those common areas.

R.p.28.

The lower court also looked to the law governing servitudes as yet another additional ground for striking down the Easement. The trial court commented on the fiduciary duty of a developer with respect to the common areas before deeding them to

the property owners recognized in Concerned Dunes West Residents v Georgia-Pacific, 349. S.C. 251, 562 S.E.2d 633 (2002). The lower court then referred to the Restatement (Third) of Property (Servitudes) § 6.19 (2000) for the proposition that a property owners' association has the power to terminate, without penalty, any contract entered by the developer while in control of the association that is not bona fide or was unconscionable to the members other than the developer at the time it was entered. R.p.28. The Court found and concluded that the Easement was voidable by the Association under this test:

> ...the Easement Agreement, as amended, if enforced would be unconscionable to the 74 members of the Association based on the Court's previous findings concerning the burdens the Easement Agreement, as amended, places on the members of the Association and the common areas.

R.p.29.

The Walpoles have not challenged the lower court's finding that the Easement was unconscionable to the Association at the time it was entered nor the law relied upon by the lower court in reaching its conclusion of invalidity on this alternative basis.

In yet another ground for invalidating the Easement, the lower court found and concluded that even if the Restated Declaration granted an easement to Southern Lifestyles to the common areas, as it purported to grant to the Walpoles, Southern Lifestyle's easement expired when it no longer owned any property in the Association.[2] R.p.26. This finding is in keeping with Section 6.5 of the Restated Declaration, "Easements for Declarant," that limits the Declarant's easement over the common areas for construction and development purposes "[d]uring the period that Declarant owns any

[2] By 2004 or 2005 at the latest, Southern Lifestyles no longer owned any property in the Association. R.p.439:12-20.

property for sale." Plaintiff's Exhibit 10, Sec. 6.5, p. 20, R.p.602. The Walpoles have not appealed this alternative holding of the trial court for the invalidation of the easement.

The Walpoles have also not appealed the fifth alternative ground for the lower court's determination the Easement was invalid on the basis that any easement reserved to Southern Lifestyles as Declarant under the Restated Declaration was appurtenant to Phases I and II and could not be extended in favor of properties outside Phases I and II:

> Further, any right of access or alleged easement of Southern Lifestyles, VIII, LLC, was appurtenant to Phases 1 and 2. It was not a right of Southern Lifestyles, VIII, LLC, that it could transfer to anyone. Under the fundamental legal principles governing easements, Southern Lifestyles, VIII, LLC, could not extend its purported easement to include the more than 700 interior acres owned by the Walpoles that have never been incorporated into the Association. Any easement held by Southern Lifestyles, VIII, LLC, was appurtenant to Phases 1 and 2, and was not appurtenant to the Walpoles' interior acreage. For this additional reason, the purported easement granted to the Walpoles is invalid and unenforceable.

R.p.27.

Rather than challenge the four alternative grounds for invalidating the Easement that are in addition to the lower court's holding the Restated Declaration did not authorize Southern Lifestyles to grant the Easement, the Walpoles bank the remainder of their appeal on their affirmative defenses. The lower court addressed and disposed of each of them in his Order with supported findings and controlling law to sustain his rejection of these arguments of the Walpoles, as will be evident in the discussion of each of the appeal issues below.

SCOPE OF REVIEW

As noted by the lower court, "'Normally an action to quiet title to property is an action in equity.' Clark v. Hargrave, 323 S.C. 84, 86, 473 S.E.2d 474, 476 (Ct. App. 1996)." R.p.20. Characterization of an action as equitable or legal depends on the

appellant's main purpose in bringing the action and the character of the relief sought; the main purpose of the action should generally be ascertained from the body of the complaint including the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action. Verenes v. Alvanos, 387 S.C. 11, 13, 690 S.E.2d 771, 772 (S.C. 2010).

In this case the Association sought a declaratory determination that the Easement was legally invalid and unenforceable and an injunction requiring that this invalidation be made a matter of public record in the RMC Office for Charleston County. The complaint did not seek any damages. The primary purpose of the complaint was equitable relief in the form of invalidation of the Easement and the recording of the invalidation in the records office in Charleston County.

In an appeal from an action in equity tried by a judge, appellate courts may find facts in accordance with their own views of the preponderance of the evidence. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775-76 (1976). "However, this broad standard of review does not require the appellate court to disregard the factual findings of the trial court or ignore the fact that the trial court is in the better position to assess the credibility of the witnesses." Nutt Corp. v. Howell Rd., LLC, 396 S.C. 323, 327, 721 S.E.2d 447, 449 (Ct. App. 2001). This Court is not required to ignore the fact the trial judge, who saw and heard the witnesses, was in a better position to evaluate their credibility. Snow v. Smith ex rel. Stoudenmire, 784 S.E.2d 242, 249 (Ct. App. 2016). This Court may reverse a factual finding by the court when the appellant has demonstrated the finding is against the greater weight of the evidence. Id. The Walpoles

have not asserted in their brief that any factual findings of the lower court are against the greater weight of the evidence.

ARGUMENT

I. The Walpoles' failure to appeal the alternative grounds for setting aside the Easement is fatal to their argument that the Restated Declaration authorized the Declarant to grant the Easement. If this Court considers the issue despite the four other grounds for the lower court's decision, the lower court correctly determined the Restated Declaration did not empower the Declarant to grant an easement over the common areas for the benefit of adjoining land unless the land was brought into the Association.

The failure to appeal an alternative ground of the judgment below will result in affirmance. South Carolina Tax Comm'n v. Gaston Copper Recycling Corp., 316 S.C. 163, 447 S.E.2d 843 (1994). See Town of Mt. Pleasant v. Jones, 335 S.C. 295, 516 S.E.2d 468 (Ct.App.1999) (holding an unappealed ruling becomes the law of the case, and the appellate court must assume the ruling was correct).

This case does not involve the interpretation of an easement as suggested by the Walpoles (App. Brief at 8) but rather whether the Easement was legally valid at the time Southern Lifestyles purported to grant it.

Contrary to the statement in the Walpoles' brief (App. Brief at 9), the right of access in Section 10.3 of the unrecorded Purchase Agreement did *not* survive the closing of Phases I and II. See Statement of the Facts, p. 4 supra. It was instead revived by reference in the Second Purchase Agreement.

The Walpoles suggest that this provision in the two unrecorded contracts of sale where Southern Lifestyles granted them access until the time of closing of the 778 acres, somehow obligated Southern Lifestyles to grant the Easement if it did not close the

purchase of the 778 acres. However, there is no provision in either the Purchase Agreement or the Second Purchase Agreement that says that.

Further, there was nothing in the language of Sec. 10.3 of the unrecorded Purchase Agreement that created an easement in favor of the adjoining property to use the common areas in perpetuity. The word easement is not even mentioned in Sec 10.3. Plaintiff's Exhibit 5, Sec. 10.3, R.p.552. The Walpoles admit in their brief that the provision described a personal right of access and falls short of creating an easement, much less a permanent easement: "The contracts created a valid and binding obligation on the part of Developer to grant access to Appellants (Seller above) until such time as Developer consummated the purchase of Phase III. Such purchase never occurred." App. Brief at 9.

Realizing that neither of the unrecorded purchase agreements granted a permanent easement in favor of the 778 acre parcel over the common areas of the Association, as opposed to a limited personal right of access, the Walpoles make the argument that the Easement is valid because Southern Lifestyles still held legal title to the common areas, including the roads, community boat ramp, and courtesy dock at the time it executed the Easement. App. Brief at 9-10.[3] In conjunction with this contention the Walpoles argue that the Restated Declaration, as a restrictive covenant, must be construed against the party seeking to enforce it.[4] App. Brief, pp. 10-11. The Walpoles

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[3] Southern Lifestyles, did not convey legal title to Anchor Watch Drive and the other roads within Phases I and II of the Anchorage to the Association until January 13, 2003. Plaintiff's Exhibit 20, R.pp.704-708. Southern Lifestyles deeded title to the community boat landing dock and land for the amenity center to the Association on July 29, 2003. Plaintiff's Exhibit 22, R.pp.717-721.

[4] The rule of construction cited by the Walpoles – that covenants and restrictions should be construed in the least restrictive manner – actually works against their position.

then point to the right of access of the Declarant in Section 2.3 of the Restated Declaration as granting the Declarant a perpetual non-exclusive easement over the common areas which the Declarant could grant to adjoining property owners outside the Association.

Putting aside that the roads were dedicated to the Association by the Walpoles' own hand from the moment they were created by plat, and putting aside that there were at least 50 members of the Association who took title to their lots with no notice that 107 property owners outside the Association would be using the Association's common areas, Section 2.3 did not grant the Declarant an unrestricted easement to access the common areas in perpetuity. Section 2.3 titled "Conveyance of Common Areas" requires the Declarant to convey or lease to the Association a common area within two years of the completion of improvements on that common area and imposes the obligation on the Association to maintain and repair those common areas. Section 2.3 (b) provides that the deed or lease of conveyance to the Association of the common area is subject to "[t]he right to access of the Declarant, its successors and assigns, over and across such property." Plaintiff's Exhibit 10, Sec. 2.3 (a), R.p.588. This section is addressing the form of deeds or leases of common areas from the Declarant to the Association. It does not set forth the easement rights of the Declarant. Those are set forth in Section 6.

The lower court fully addressed and disposed of the Walpoles' arguments and did not commit legal error in so doing:

> Here, the pertinent provisions of the Restated Declaration are clear and unambiguous. The Restated Declaration does not empower the Declarant to grant an easement to an outside property owner to use the common areas except as specifically stated in the Restated Declaration.

Applying it to the Restated Declaration, it would be interpreted not to authorize the Declarant to encumber the Association's common areas with easement rights in favor of non-members.

Section 6 of the Restated Declaration (Plaintiff's Exhibit 10, R.pp.576-652) specifically enumerates the various "PROPERTY RIGHTS" in Phases 1 and 2. As found above, none of the property rights reserved to the Declarant in the Restated Declaration includes the right to grant a perpetual easement to a third person to use the common areas. Robinson acknowledged this omission.

"The canon of construction 'expressio unius est exclusio alterius' or 'inclusio unius est exclusio alterius' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'" Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (S.C. 2000). The failure of the Declaration to instill such a right in the Declarant legally implies that it was excluded.

If under the terms of the Restated Declaration, Southern Lifestyles, VIII, LLC, did not have the authority to grant the easement, then the easement is of no legal effect. "No person can convey an interest which the grantor does not have in the land described in the deed, even though the terms of the deed may purport to do so." Cummings v. Varn, 413 S.E.2d 829, 832 (1992).

If a declarant could validate actions and transactions that are contrary to the terms of a declaration by contending such actions and transactions were in its capacity as owner rather than declarant, a developer could entirely defeat the purpose of the declaration simply by asserting that a prohibited action was done in its capacity as owner. Such alleged authority in the capacity of the owner rather than as declarant would entitle the owner/declarant to circumvent the restrictions in the declaration that are matters of record and relied upon by the members of an association in purchasing their properties Here, Southern Lifestyles, VIII, LLC, sold as many as 50 lots before entering and recording the Easement Agreement. Neither the Restated Declaration in this case nor the law makes this distinction. The commitments of Southern Lifestyles, VIII, LLC as Declarant in the Declaration would become meaningless if this were the case. Moreover, Southern Lifestyles, VIII, LLC specifically stated in the recitals that it purchased Phases I and II and was proceeding with the Declaration "as the owner of the Walpole property, which is more fully described in Exhibit "A". Plaintiff's Exhibit 10, p. 1, R.p.583.

In Raman Chandler Properties, L.C. vs. Caldwell's Creek Homeowners Association, Inc., 178 S.W.3d 384 (Ct. Tex. 2005), a homeowners' association brought suit against a developer seeking a determination that a declaration of restrictive covenants did not authorize the declarant-developer to grant an access easement over the plaintiff association's common areas in favor of the property owners in a new adjoining development. Just as in this case, the defendant in Raman

Chandler Properties, L.C. asserted that the developer had the right to grant the easement because it still held legal title to the common areas when it granted the easement. The court rejected this argument:

> Under these facts, the actual legal ownership of the common areas is irrelevant. The primary issue is whether the Developer, in 1999, retained the right to unilaterally amend the plat or create and burden the common area for the benefit of a different association by granting it an easement. The answer is "No." Restrictive covenants that run with the land such as these generally burden and govern all lots with in the subdivision to which they were intended to apply. . . Thus, **only if the Developer followed the specific procedure for amending the restrictions or the plat as set forth in the Covenants could it have had the right to create such an easement for the benefit of some entity or owner other than the Association and its lot owners**. . . Additionally, regardless of ownership, the lots comprising the common areas were and are subject to the Restrictive Covenants created by the original dedication and restrictions as well as any amendments to them. Once an Association shows that a plan or scheme exists for the benefit of all lot owners, it has shown a right to enforcement of such covenants and restrictions.

178 S.W.3d 393-394 (emphasis added).

As previously found, the Restated Declaration's definition of common areas includes those parcels within the development intended for the common use of the owners even though legal title will be conveyed to the Association sometime in the future. Plaintiff's Exhibit 10, Section 1.1.(g), R.p.584.

I find and conclude that the Restated Declaration did not reserve to the Declarant the right to grant the easement in question. The easement is outside the authority reserved to the Declarant in the Declaration. Further, the members of the Association purchasing lots before the easement was granted had no notice that the Declarant might grant such an easement since the Restated Declaration did not vest the Declarant with such authority. The purchasers of the 50 or so lots would not have had record notice of the Easement Agreement since it was executed after title was conveyed for their lots. As such, the Easement Agreement falls outside the chain of title for the subsequent purchasers of those lots who would not have record notice of the purported easement.

***

> The Walpoles rely, in part, on Section 2.3 of the Restated Declaration. This section governs conveyance of the common areas and does not authorize the Declarant to grant the easement at issue. This section specifies that conveyances of the common areas by the Declarant to the Association are subject to, among other things, the restrictive covenants of record at the time of conveyance and the "right of access of the Declarant, its successors and assigns over and across such property. . . ."
>
> A right of access is not an easement. A right of access is in the nature of a license by which an owner allows another to come onto land for a specific purpose, unlike an easement which is a grant of an interest in real property that burdens the servient estate for the benefit of the dominant estate. 25 Am. Jur. 2d, Easements and Licenses Section 2. Additionally, the Restated Declaration specifically distinguishes between rights and easement by recognizing they are different. Section 6.2.2 refers to the "rights and easements specifically reserved to Declarant in this Declaration." Plaintiff's Exhibit 10, R.p.599. The Declarant's easement over the roadways that are common areas are specifically for the purpose of constructing and maintaining, repairing and replacing improvements to the property, as set forth in Section 6.5. Plaintiff's Exhibit 10, R.p.602.

R.pp.21-25.

In Snow v. Smith ex rel. Stoudenmire, supra, this Court compared a right of access and an easement, making the same distinction as the lower court:

> 'An easement is a right which one person has to use the land of another for a specific purpose, and gives no title to the land on which the servitude is imposed.' Windham, 381 S.C. at 201, 672 S.E.2d at 582 (quoting Douglas v. Med. Inv'rs, Inc., 256 S.C. 440, 445, 182 S.E.2d 720, 722 (1971)). Access is defined in Black's Law Dictionary as "[a] right, opportunity, or ability to enter, approach, [or] pass to and from . . ." *Access*, Black's Law Dictionary (10th ed. 2014).

784 S.E.2d 249.

The lower court correctly found and concluded the right of access to the common areas the Declarant could reserve in the deeds of conveyance of the common areas referenced in Section 2.3 (a) was not tantamount to a permanent alienable easement that could be transferred to third persons. Similarly, the right of access in the two unrecorded purchase agreements between Southern Lifestyles and the Walpoles did not create an

easement over the described common areas of the Association in favor of the Walpoles' 778 acres.

Even though Settle placed a handwritten note that Section 2.3(a) was "ambiguous at best" as she read through the Restated Declaration for the first time, the question of whether the covenants are clear and unambiguous is for the court and is not a factual issue. Snow v. Smith ex rel. Stoudenmire, supra at 249. Even the Walpoles acknowledge in their brief that, after reviewing the entirety of the Restated Declaration several times, Settle came to the conclusion that the Restated Declaration did not grant the Declarant an unrestricted easement for use of the common areas that it could grant to an adjoining owner whose land was not part of the Association. App. Brief at 11.

The last argument by the Walpoles is that the "Covenants do not explicitly prohibit Developer from the conveyance of the Easement." App. Brief at 11. The Association and the lower court disagree. A grantor cannot convey an interest in land which the grantor does not have, even though the terms of the grant may purport to do so. Cummings v. Varn, 307 S.C. 37, 42, 413 S.E.2d 829, 832 (1992). As previously discussed in the Statement of the Facts, the Restated Declaration did not grant a non-exclusive easement in the Declarant to use the common areas beyond the uses described in the particular easements specifically described in Article 6,[5] and even those expired when the Declarant no longer owned any land in the Association. The Restated Declaration did not have to prohibit the Declarant from granting an easement in the common properties in perpetuity in favor of the adjoining 778 acres outside the Association because the Restated

[5] Article 6 titled "Property Rights" sets forth all the property rights of the various parties in the common areas of the Association. Plaintiff's Exhibit 10, p. 17, R.p.599.

Declaration did not grant an easement to the Declarant to use the common properties beyond the time it owned land in the Association.

The Walpoles assert that the separate deeds for the roadways in January 2003, Plaintiff's Exhibit 20, R.pp.704-708, and for the other common areas in July 2003 "were made subject to matters of record." App. Brief at 12. This is incorrect. The January 2003 deed of the roadways does not state it is subject to matters of record. Plaintiff's Exhibit 20, R.pp.704-708. While the July 2003 deed of the other common areas states it is subject to matters of record, the Easement is not among the nine specifically listed items of record called out in the deed. Plaintiff's Exhibit 22, p. 3, R.p.719.

Regardless of whether the 2003 deeds stated they were subject to matter of record, the question is whether the Easement was legally valid, and the lower court held the Easement was legally invalid for five alternative reasons. The lower court correctly held the Restated Declaration did not grant the Declarant the right to grant the Easement to the Walpoles, the only one of the five grounds appealed by the Walpoles.

II. The lower court correctly held that the Walpoles did not have standing to question whether the Restated Declaration required the Association's members to approve this litigation and that the Restated Declaration did not require such member approval in this instance where no damages were sought and the Association was enforcing the provisions of the Restated Declaration.

The Walpoles incorrectly assert that the "trial court failed to address and rule on the matter of standing of the Respondents to bring the suit below." App. Brief at 6. The lower court in fact spent three pages discussing the question of the Association's authority to bring the action, finding and concluding that it did and that the Walpoles had no standing to raise the question since they are not members of the Association. R.pp.30-

32. The Walpoles do not assert that any findings in the lower court's analysis were incorrect nor that the legal conclusions of the lower court were erroneous.

Section 14.4 is the operative provision of the Restated Declaration that addresses legal actions and provides as follows:

> 14.4 Litigation. No judicial or administrative proceeding, including any mandatory procedure under Section 14.3 above, with an amount in controversy exceeding $25,000.00, will be commenced or prosecuted by the Association unless approved by 75% or more of the of the votes of the entire Association, by Referendum or at a duly held meeting of Members called for the purpose of approving the proceeding, which percentage will also constitute the quorum required for any such meeting. This Section will not apply, however, to (a) actions brought by the Association to enforce the provisions of this Declaration (including, without limitations, the foreclosure of liens); (b) the imposition and collection of Assessments; (c) proceedings involving challenges to ad valorem taxation; (d) counterclaims brought by the Association in proceedings instituted against it; or (e) actions brought by the Association to enforce written contracts with its suppliers and service providers.

Plaintiff's Exhibit 10, Restated Declaration, Sec. 14.4, R.pp.620-621.

Before reaching the merits of the issue, the Association must correct some other statements made by the Walpoles in their brief. The board of the Association did **not** determine that a vote of the membership was necessary as the Walpoles state. App. Brief at 7 ("The Board agreed that approval of the individual members would be necessary, but such approval ultimately was not sought (R. 3. Exhibit 32, Transcript of Proceedings, pp. 155)"). The text of minutes that are Plaintiff's Exhibit 32 referenced by the Walpoles states: "The Association's goal is to ensure the interests of Anchorage Plantation are protected and obtain membership approval to allow the Board of Directors to proceed with litigation *if necessary*." Plaintiff's Exhibit 32, Minutes of Board Meeting on August 3, 2009, at 2 (emphasis added),

In fact, Steven Brostoff, president of the Association testified at trial that the Restated Declaration did *not* require membership approval for the initiation of this action for equitable relief:

> Q: Was there a vote to bring the suit?
> A: By the association?
> Q: Yes sir.
> A: By the association as a whole at the annual meeting?
> No there wasn't not.
> Q: No there wasn't?
> A: No.
> Q: Okay. Do you believe that to be necessary?
> A: I do not, I do not believe it to be necessary, no.

R.p.352: 7-15.

The Walpoles' argument on this issue also incorrectly suggests that the Association was seeking damages and only entered proof of damages as to individual owners and not as to the Association. App. Brief at 7. The Association did not seek damages against the Walpoles. It brought claims for equitable relief. At trial the Association offered evidence of the current annual assessment of the individual owners and the costs of maintaining the roadways and other amenities to show the unfairness of the terms of the Easement. The Walpoles rather than the Association insisted on entering into evidence the financials and budget of the *Association*. R.pp.366-371; Plaintiff's Exhibits 30 and 31, R.pp.749-750. These financials served to demonstrate the burden on the Association if 107 outside owners and their guests were to be able use the Association's roadways, courtesy dock, and boat landing as well as the gross inadequacy of the $50 per lot fee specified in the Easement for this use, among other things.

Turning to the substance of the Walpoles' argument on the issue of whether the board of the Association had the authority to bring the action, the lower court rendered

the following findings and conclusions that are supported by the record and the law and have not been specifically appealed by the Walpoles:

> The Association established, and I find, that the board approved this litigation and that the members have been kept abreast of it. The Association did not establish that 75% of the members approved the suit by referendum or vote at a duly authorized meeting. However, that omission does not mean the Association has no standing or authority to bring this action.
>
> As stated in the terms of Section 14.4, its 75% vote requirement does not apply to litigation where the amount in controversy does not exceed $25,000. Here, the Association is not seeking damages of any amount. The relief sought is declaratory and injunctive. Hence, the conditions of Section 14.4 do not apply.
>
> Even if Section 14.4 were considered applicable, its terms exclude "(a) actions brought by the Association to enforce the provisions of this Declaration...." In this action the Association seeks to enforce the provisions of the Restated Declaration that, among other things, did not authorize the Declarant to grant the easement in question to the Walpoles and that reserves the common areas to "common use and enjoyment of the Declarant, Owners, and their respective guests, and invitees, as well as third parties with easements in and to such Common Areas, as herein provided.". Plaintiff's Exhibit 10, Restated Declaration, p. 2, R.p.584. No vote of the members was required.
>
> Section 11.2.2 (g) of the Restated Declaration specifically authorizes the Association: "To take any and all actions necessary to enforce these and all covenants and restrictions affecting the Property and to perform any of the functions or services delegated to the Association in any covenants or restrictions applicable to the Property..." Plaintiff's Exhibit 10, Restated Declaration, p. 29, R.p.611
>
> I find and conclude the Association has standing and authority to bring this action.
>
> The Court also notes that the Walpoles are third parties for purposes of the Restated Declaration and, as such, lack standing under both the controlling statutes and case law to assert that the initiation of the suit is *ultra vires* under the provisions of the Restated Declaration.
>
> S.C. Code Section 33-31-304 provides, in pertinent part, as follows:

> (a) Except as provided in subsection (b), the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.
>
> (b) A corporation's power to act may be challenged in a proceeding against the corporation to enjoin an act where a third party has not acquired rights. The proceeding may be brought by the Attorney General, a director, or by a member or members in a derivative proceeding.

S.C. Code Ann. § 33-31-304.

The Walpoles do not come within the limited category of persons described in section 33-31-304(b) who may challenge the authority of the Association to bring this action.

> This statute is in keeping with legal precedent that an outsider has no standing to challenge whether an adverse party was authorized to bring an action under its governance documents. DeBorde v. St. Michael & All Angels Episcopal Church, 272 S.C. 490, 501, 252 S.E.2d 876, 881 (1979) ("Petitioners contend that this grant is not broad enough to permit respondent's operation of a cemetery for the benefit of its parishioners. The simple answers to this contention are twofold: (1) this issue was not raised by the complaint; and, (2) **even had it been, petitioners, not being members of the Parish, have no standing to raise it.**" (emphasis added)). The Walpoles, not being members of the Association, have no standing to assert that the maintenance of this proceeding is not authorized under the provisions of the Restated Declaration. Indeed, the Restated Declaration expressly denies them standing. As previously found and discussed, section 16.12 of the Restated Declaration excludes the Walpoles from enforcing any provisions of the Restated Declaration: "...**no adjoining property owner or third party will have any right, title or interest whatsoever** in the Development, except as provided herein, or in the operation or continuation thereof **or in the enforcement of any of the provisions hereof,** ..." Plaintiff's Exhibit 10, Section 16.12, R.p.628.

R.pp.30-32 (emphasis in original).

The Walpoles have failed to assert, much less show, that the lower court's determination that Section 14.4 of the Restated Declaration did not require a vote of the members since this action fell within two exceptions - not seeking damages and seeking to enforce the terms of the Restated Declaration - is unsupported or legally erroneous. Similarly, the Walpoles have not addressed the legal conclusion that the Walpoles had

no standing to raise the issue under S.C. Code Ann. § 33-31-304 and the precedent of DeBorde v. St. Michael & All Angels Episcopal Church, supra, much less established that these separate legal holdings were erroneous. For these reasons, the trial court did not commit error in rejecting the Walpole's defense that the Association lacked standing to bring this action.[6]

III. The statute of limitations in S.C. Code §15-3-530 (1) and (3) does not apply to this action and, therefore, does not bar it.

The lower court determined that the Association's equitable claims were not barred by the statute of limitations. R.pp.32-34. On appeal the Walpoles argue that the Association's causes of action are barred under S.C. Code §15-3-530 that imposes a three year statute of limitations for the following:

> (1) an action upon a contract, obligation, or liability, express or implied, excepting those provided for in Section 15-3-520;
>
> * * *
>
> (3) an action for trespass upon or damage to real property;

S.C. Code Ann. § 15-3-530(1) and (3).

Neither applies.

The Association did not bring a claim for breach of contract against the Walpoles. There is no contract between the Association and the Walpoles. The Easement was

[6] The Walpoles argue that the Association's need to consult with the membership about a settlement shows that the members needed to authorize this action before it was brought. App. Brief at 7. Not true. Section 14.4 deals with the bringing of litigation, not the settlement of litigation. The meeting of the members referenced by the Walpoles during a break in the trial was necessary to consider any settlement that involved consideration of granting a right to use any of the common areas under Section 15.4 (f) of the Restated Declaration. Plaintiff's Exhibit 10, Sec. 15.4, R.p.622 (the vote of at least 67% of the members of the Association is necessary to grant any "Rights to use Common Areas and Limited Common Areas.")

entered between Southern Lifestyles and the Walpoles. The Association was not a party to it, even though Southern Lifestyles purported to grant a right to use its common areas.

The Association brought this action to clear and quiet its title to the common areas by seeking a determination that the Easement was invalid. One of the grounds for the Easement's invalidity was that the Restated Declaration encumbered the common areas at the time the Easement was executed and it did not empower Southern Lifestyles, the Declarant, to grant the easement.

The Restated Declaration is in the nature of a contract among the Association and its owner members. Snow v. Smith ex rel. Stoudenmire, supra at 250 ("Restrictive covenants are construed like contracts and may give rise to actions for breach of contract."). But, since the Walpoles are not members, there is no legal theory of a contract with them based on the Restated Declaration. Further, as already shown, the Association asserted and prevailed upon alternative grounds for the invalidation of the Easement that were not grounded on the limitations of the Declarant's rights in the Restated Declaration.

As to the second section of the statute relied upon by the Walpoles, the Association's complaint did not assert a cause of action for "for trespass upon or damage to real property." Because the Association did not assert a cause of action for either breach of contract or trespass or injury to real property, neither subsections that provide the basis for the Walpole's appeal on the statute of limitations apply.

Although not pertinent to the ruling by this Court, the Walpoles incorrectly assert that the Association would have had record notice of the Easement when it was first recorded in 2001 since it was in its chain of title. However, the Easement was not in the chain of title of the Association at that time. The Easement makes no reference to the

Restated Declaration, and Southern Lifestyles had not yet conveyed the dedicated common areas to it. As for the property owners in the Association, the Easement is outside the chain of title of over 50 of the 74 owners who took title to their lots from Southern Lifestyles before it recorded the Easement.

The Association would also point to the additional separate reasons why the Association's claim is not barred by the statute of limitations that were set forth by the lower court in its discussion of the question in the Order under I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (S.C. 2000) ("The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment."). These additional sustaining grounds were ruled upon by the trial court and not appealed by the Walpoles, thereby requiring affirmance of the lower court's ruling on limitations set forth in the following:

> Turning to the statute of limitations, the Walpoles assert that this action is time barred because as early as March 18, 2004, a lawyer for the Association was on notice of the easement and asserted it was ineffective for being in violation of the provisions of the Restated Declaration. Defendant's Exhibit 3, Letter of Harper dated March 18, 2004, R.pp.774-776. The Walpoles assert the Association should have brought this lawsuit within the three year statute of limitations set forth in section 15-3-530 of the South Carolina Code, applicable to "Actions *Other* Than for the Recovery of Real Property." (emphasis added). By its terms, this particular statute of limitations does not apply.
>
> This action falls under the provisions of S. C. Code §15-67-10 entitled "Recovery of Real Property" that provides as follows:
>
> > Any person in possession of real property, by himself or his tenant, or any person having or claiming title to vacant or unoccupied real property may bring an action against any person who claims or who may or could claim an estate or interest therein or a lien thereon adverse to him for the

purpose of determining such adverse claim and the rights of the parties, respectively."

S.C. Code §15-67-10.

The statute of limitations for the "recovery of real property" is ten years. Section 15-3-340 of the South Carolina Code, applicable to "Actions for Recovery of Real Property," requires simply that a party seeking to bring an action for the recovery of real property bring suit within 10 years of his possession of such property: "No action for the recovery of real property . . . may be maintained unless it appears that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question *within ten years before the commencement of the action.*" (emphasis added). This action is timely since the Association is still in possession of, and holds title, to the Association's common areas.

The Court further notes that because this is an action in equity the statute of limitations does not apply. Dixon v. Dixon, 362 S.C. 388, 400, 608 S.E.2d 849, 855 (2005); Mazloom v. Mazloom, 382 S.C. 307, 675 S.E.2d 746 (S.C. Ct. App. 2009).

R.pp.32-34.

For these reasons, this Court should deny the Walpoles' appeal based on limitations and affirm the lower court's ruling on the issue.

IV. The Association's claims are not barred under the equitable doctrines of laches or estoppel.[7]

The lower court correctly held the Association's claim was not barred by laches or estoppel.

In their brief the Walpoles argue that the initiation of this suit by the Association in 2010 was somehow inconsistent with its previous position on the Easement and that the

[7] Although Argument heading No. IV in the Walpoles' brief refers to the defenses of waiver, laches, and estoppel, the text of the argument refers only to the defenses of laches and estoppel. App. Brief at 15 ("Respondent's claims in equity are barred by the doctrines of laches and estoppel.").

Walpoles somehow relied on this inconsistency to their detriment. This assertion is not supported by the facts.

The Association has consistently maintained that the Easement is invalid since learning of it. The Walpoles admitted into evidence letters in a battle between lawyers for the Association and the Walpoles over the legitimacy of the Easement starting on February 5, 2004. Defendants' Exhibits 1, 2, 3, and 4, R.pp.771-779. In the first letter for the Association dated February 5, 2004, the lawyer for the Association specifically asserted that the Easement was invalid under the terms of the Restated Declaration. Defendants' Exhibit 4, R.pp.771-772, ("I ... do not believe that Mr. Walpole (or the owner of the Walpole Property) has the right either to enter onto Anchorage Plantation for the development of the Walpole Property, or to connect the roads on the Walpole Property to the current roads in Anchorage Plantation for use by the owner(s) of the Walpole Property.").

Later, the lawyer for the Association objected in writing to the application of the Walpoles to subdivide the 778 acres into six parcels on this same basis. In his letter to the planning director for Charleston County dated March 7, 2005, opposing the subdivision application, the lawyer for the Association asserted that the Easement was invalid and ineffective because "[t]he Declaration did not reserve to the Developer the right to grant the access easement to the Walpoles set forth in the Walpole Easement Agreement." Defendants' Exhibit 15, R.p.1021.

The Association has been consistent in its position over the years that the Easement is invalid. The Walpoles were aware of this position through the letters of the Association's lawyer and discussions with representatives of the Association. The

Walpoles had the burden of proof on their affirmative defenses and failed to show by the preponderance of the evidence that the Association relinquished its position on the invalidity of the Easement or misrepresented its position on the Easement or that the Walpoles somehow relied on a misrepresentation of the Association as to its position to their detriment.

The Walpoles' efforts in rezoning and subdividing the 778 acres after Southern Lifestyles did not close were not in reliance on anything the Association said or did but were in furtherance of their effort to develop the property. These steps were taken either before the Association became aware of the Easement or after the Association communicated its position to the Walpoles as to the invalidity of the Easement. Southern Lifestyles, not the Walpoles, prepared the master site plan for the development of Phase III that included roads and amenities at a time when it hoped to close on the 778 acres and add them to the Association through supplemental declaration. Defendant's Exhibit 16 (Engineered Site Plan of Phase III by Southern Lifestyles dated August 27, 2001), R.p.1022. Moreover, this site plan preceded the execution of the Easement by more than two months.

The facts of this case are not similar at all to those in Janasik v. Fairway Oaks Villas Horizontal Property Regime, 307 S.C. 339, 415 S.E.2d 384 (1992), cited by the Walpoles. There the horizontal property regime and its management company were aware of the member's construction activities for at least four years before making their first objection to them on the basis they were not allowed under the governing documents. 415 S.E.2d 388. Here the Association lodged its objection to the Easement soon after learning of it and has consistently maintained its position.

The Walpoles have failed to establish that the following findings of the lower court are without evidentiary support or that the following conclusions constituted an error of law:

> As explained by our Supreme Court, "[l]aches is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. Whether a claim is barred by laches is to be determined in light of [the] facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party; delay alone in assertion of a right does not constitute laches." Robinson v. Estate of Harris, 391 S.C. 114, 118, 705 S.E.2d 41, 43, (2011). In Robinson our Supreme Court found laches where the plaintiff had waited more than sixty years to challenge a conveyance in 1946, the property had been transferred through probate, and other irreversible actions had occurred.
>
> Here the Walpoles did not establish that failure to bring the suit before January 20, 2010, caused injury, prejudice, or disadvantage to them. The Walpoles have been on notice since 2004 that the Association asserted the purported easement was ineffective. There was no proof the Walpoles had conveyed lots to third persons nor that any third person has relied on the purported easement. I find and conclude the Walpoles did not establish the basis for the defense of laches by the preponderance of the evidence.

R.p.34.

Although the lower court did not separately discuss the defense of estoppel, its rejection of the defense was proper.[8] Earlier this year in Thompson v. Pruitt Corp., 784 S.E.2d 679 (Ct. App. 2016) this Court enumerated the well-established elements of the defense of equitable estoppel as follows:

> Under South Carolina law, the elements of equitable estoppel as to the party to be estopped are
>
> (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that

[8] "I have considered the remaining affirmative defenses alleged in the Walpoles' Answer and, without separately enumerating them, find and conclude that they are either not legal defenses to the claims asserted by the Association or that the Walpoles did not establish such defenses by the preponderance of the evidence." R.p.35.

> the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention, or at least expectation, that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the real facts. As related to the party claiming the estoppel, they are: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) action based thereon of such a character as to change his position prejudicially.

784 S.E.2d 688-689.

The record does not establish any of the three essential elements of equitable estoppel as to either the Association or the Walpoles. The Association has never misrepresented to the Walpoles its position as to the invalidity of the Easement for the purpose of inducing them to take action.

For these reasons, this Court should affirm the lower court's decision that the Walpoles did not establish their defenses of laches and equitable estoppel by the preponderance of the evidence.

V. The lower court did not err in rejecting the defense of unjust enrichment. Unjust enrichment is a claim, not a defense. The Walpoles did not assert a counterclaim based on unjust enrichment, and the facts do not support unjust enrichment even if a counterclaim had been alleged.

The Walpoles alleged unjust enrichment as their tenth defense in their answer. R.p.152, ¶¶ 43-45. Unjust enrichment is not a defense. Even if it were, the evidence did not support its assertion. The lower court correctly denied the defense.

"[T]he equitable doctrine of quantum meruit allows an aggrieved party to recover for unjust enrichment. To prevail on this theory, a plaintiff is required to establish the following three elements: (1) a benefit conferred by plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for [the defendant] to retain it

without paying its value." QHG of Lake City, Inc. v. McCutcheon, 600 S.E.2d 105, 108, 360 S.C. 196, 202-203 (Ct. App. 2004) (internal citations omitted).

Here, the Walpoles did not allege a counterclaim for unjust enrichment. Since unjust enrichment is a claim, rather than a defense, the lower court correctly rejected it.

Additionally, the record does not establish a basis for the claim much less support it by the preponderance of the evidence. The Walpoles assert that they sold Anchorage Phases I and II to Southern Lifestyles as part of a greater transaction where Southern Lifestyles was later supposed to buy the 778 acres as Phase III and, if they did not, the Walpoles were to receive an easement for the benefit of their 778 acres to use the common areas of the Association even though their 778 acres is not part of the Association.

Neither the Association nor its members who bought lots under the Restated Declaration were part of the negotiations between Southern Lifestyles and the Walpoles. They would have had no basis to know what those outside dealings were and had no notice of the unrecorded purchase contracts that contained a limited right of access. Neither the Walpoles nor Southern Lifestyles conferred a benefit on the Association under circumstances where the Association knew that the Walpoles would be looking to it to pay the Walpoles for that benefit.

In fact, contrary to the Walpoles' argument, Section 16.12 of the Restated Declaration refutes the notion that the Association and its members should have realized they received an alleged benefit from the Walpoles and should have known they would be required to provide an easement in favor of the Walpoles' property to use the Association's common areas: "**no adjoining property owner or third party will have**

any right, title or interest whatsoever in the Development, except as provided herein. . ." R.p.10; Plaintiff's Exhibit 10, Section 16.12, R.p.622 (emphasis added).

"It is not enough that the defendant has knowledge of the plaintiff's conduct; he must have induced the plaintiff to confer the benefit." Niggel Associates, Inc. v. Polo's of North Myrtle Beach, Inc., 296 S.C. 530, 533, 374 S.E.2d 507, 509, (Ct. App. 1988). Here there is no proof that the Association or its members were even aware of the right of access in the unrecorded purchase agreements. They certainly did not induce the Walpoles to do anything. Any inducement was at the behest of Southern Lifestyles. Further, just as in Niggel Associates, Inc., where this Court agreed the plaintiff failed to establish the elements for quantum meruit, this Court should reject it in this case where the facts are even more persuasive.[9] The Walpoles made their agreement with another party and expected that party to perform. The Association and its members were unaware of those dealings and did not request the Walpoles do anything. They had no reason to believe the Walpoles would look to them to provide use of the Association's common areas for the future owners within the Walpole property even though not a part of the Association.

[9] "In this case, the Contractors [Walpoles] did the work under contracts with Beach [Southern Lifestyles]. They expected to be paid by Beach. They had no dealings whatever with Windy Hill [the Association]. Indeed, they did not know Windy Hill had an interest in the property when they agreed to perform the work. Windy Hill did not request the work. It did nothing to cause the Contractors to rely on it for payment. It had no reason to suppose the Contractors looked to it for payment. The Contractors were not induced to furnish their labor and materials by any expectation that Windy Hill would pay for them. In these circumstances, Windy Hill had no duty to make restitution to the Contractors. Any benefit it received was an incidental result of dealings between others in which it did not participate and over which it assumed no control." Niggel Associates, Inc. v. Polo's of North Myrtle Beach, Inc., 296 S.C. 530, 533, 374 S.E.2d 507, 509 (Ct. App. 1988).

As to the Walpoles' entreaty that this Court should remand the matter "to consider the equities of amending the scope of the Easement and its obligation to more appropriately balance the equities between the parties" (App. Brief 18), as the lower court noted: "Not only has no claim been asserted to reform the instrument but the threshold question is whether the easement is valid and enforceable in the first instance regardless of the reasonableness of the fee to be paid by the owners of the future lots." R.p.24.

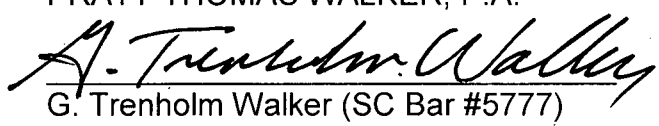
For the foregoing reasons the lower court properly rejected the defense of unjust enrichment.

CONCLUSION

For the foregoing reasons, the Association submits that the comprehensive order of the lower court finding for the Association on multiple grounds should be affirmed.

Respectfully submitted,

PRATT-THOMAS WALKER, P.A.



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October 10, 2016

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Certificate of Counsel

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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October 10, 2016

Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Circuit Court Judge

RECEIVED
OCT 12 2016
SC Court of Appeals

Case No.: 2016-000281

ANCHORAGE PLANTATION
HOMEOWNERS ASSOCIATION,

Respondent,

v.

JOHN B. WALPOLE AND THEODORA
W. WALPOLE

Appellants.

PROOF OF SERVICE

I, Nancy Jane Dennis, an employee of Pratt-Thomas Walker, P.A., hereby certify that I have served this 10th day of October, 2016, a copy of Respondent's Brief and Certificate of Counsel on counsel of record, by placing same in the United States Mail, first class postage prepaid to the following:

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The Honorable Jenny Abbott Kitchings
South Carolina Clerk, Court of Appeals
John C. Calhoun Building
1220 Senate Street
Columbia, SC 29201

Re: Anchorage Plantation Homeowners Association v. John B. Walpole and Theodora W. Walpole
SC Court of Appeals Case No.: 2016-000281
Our File No.: 7279-001

Dear Ms. Kitchings:

Enclosed please find the original and 15 copies of Respondent's final brief with certificate of counsel and proof of service. These were due last Wednesday during the shutdown of state offices for Hurricane Matthew. We understand that all deadlines during the period of the shutdown were extended until the next working day, today.

If there is anything more needed to accomplish this filing, please let me know. Thank you for your courtesies herein.

Sincerely,

PRATT-THOMAS WALKER, P.A.

G. Trenholm Walker

GTW/njd
Enclosures (As noted)
c: Charles S. Altman, Esq.
Meredith L. Coker, Esq.