

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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CERTIFIED QUESTIONS FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
Beaufort Division

Patrick Michael Duffy, United States District Judge

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Appellate Case No. 2016-001765

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Paula Fullbright and Mark Fullbright.....Plaintiffs,

v.

Spinnaker Resorts, Inc. d/b/a Spinnaker Resorts South Carolina, Inc.....Defendant.

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**PLAINTIFFS' BRIEF**

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S.C. SUPREME COURT

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## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does the South Carolina Real Estate Commission (the "Commission") have exclusive jurisdiction to determine whether a violation of the South Carolina Vacation Time Sharing Plans Act, S.C. Code Ann. §§ 27-32-10 to -410 (2007 and Supp. 2015) (the "Timeshare Act"), has occurred?
2. Is the Commission's determination of a violation of the Timeshare Act a condition precedent to a purchaser bringing a private cause of action to enforce the provisions of the Timeshare Act?
3. Are the Commission's determinations as to whether the Timeshare Act was violated binding on courts of the Judicial Branch?

## STATEMENT OF THE CASE

This action involves a timeshare purchase contract entered into on June 24, 2014, between timeshare purchasers Paula and Mark Fullbright ("Plaintiffs") and timeshare developer and seller Spinnaker Resorts, Inc. d/b/a Spinnaker Resorts South Carolina ("Spinnaker"). The parties entered into a contract for the sale and purchase of a timeshare interest contained within the Bluewater by Spinnaker ("Bluewater") vacation time sharing plan.

On June 24, 2014, when the parties entered into a contract for the sale and purchase of a Bluewater timeshare interest, the Commission did not have in its possession the Bluewater time sharing plan materials or the initial registration fee and subsequent annual registration renewal fees. Furthermore, when the parties entered into a contract for the sale and purchase of a Bluewater timeshare interest, the Commission had not issued any Order of registration authorizing the offering and selling of Bluewater timeshare interests.

On September 2, 2014, after the parties entered into a contract for the sale and purchase of a Bluewater timeshare interest, the Commission issued the Initial Registration Order for Bluewater authorizing the offering and selling of Bluewater

timeshare interests. However, Bluewater began presales on March 15, 2006, more than eight years prior to its Initial Registration Order authorizing the offering and selling of Bluewater timeshare interests. Prior to obtaining the Initial Registration Order authorizing the sale of Bluewater timeshare interests on September 2, 2014, Defendant had already sold 4,954 Bluewater timeshare interests for \$64,487,615.00.

On April 2, 2015, Plaintiffs commenced this action on behalf of themselves and all others similarly situated to recover from Spinnaker all monies paid under the contract, plus accrued interest, as a result of Spinnaker's non-compliance with the Timeshare Act's requirements. Plaintiffs' Amended Complaint alleges violations of the Timeshare Act and South Carolina Unfair Trade Practices Act, and seeks to obtain a declaratory judgment that no valid and binding contract exists between the parties.

On August 20, 2015, after Plaintiffs commenced this action, the Commission held a hearing upon Bluewater's request that its Initial Registration Order of September 2, 2014, be deemed retroactive to March 15, 2006. March 15, 2006 is the date Bluewater began presales without having first obtained an Order of registration from the Commission authorizing the offering and selling of timeshare interests in Bluewater and without Bluewater having paid the initial registration fee to the Commission.

Plaintiffs allege that Spinnaker's failure to comply with the Timeshare Act in properly registering Bluewater before offering and selling a Bluewater timeshare interest to Plaintiffs is in violation of the Timeshare Act. Plaintiffs were not parties to the Commission proceeding, and as non-parties the Plaintiffs were denied the right to appeal the Commission's retroactive registration Order, yet Spinnaker argues that the Commission's retroactive registration Order is binding upon the Courts, non-reviewable,

and should unilaterally divest Plaintiffs' of their express statutory private right of action to enforce the provisions of the Timeshare Act.

On May 17, 2016, after entertaining Spinnaker's allegations that the Commission has exclusive or primary jurisdiction to adjudicate allegations of violations of the Timeshare Act, the Honorable Patrick Michael Duffy issued his Order (Entry No. 41) denying Spinnaker's request to dismiss this lawsuit or abstain from ruling on its merits. Judge Duffy stayed this lawsuit and later filed an Order (Entry No. 44) certifying the three instant questions to this Court. The specific certified questions that this Court agreed to answer appear on page one of this brief.

### ARGUMENTS

"In answering a certified question raising a novel question of law, this Court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of the state as well as the Court's sense of law, justice, and right." *Drury Dev. Corp. v. Foundation Ins. Co.*, 380 S.C. 97, 668 S.E.2d 798, 800 (2008) (citing *Peagler v. USAA Ins. Co.*, 368 S.C. 153, 157, 268 S.E.2d 475, 477 (2006)).

I. **The Commission does not have exclusive jurisdiction to determine whether a violation of the Timeshare Act has occurred insofar as South Carolina law expressly provides for a timeshare purchaser's right to bring a private right of action as to same**

Does the Commission have exclusive jurisdiction to determine whether a violation of the Timeshare Act has occurred? No, South Carolina trial courts have general original jurisdiction in civil cases. *Dema v. Tenet Physician Services-Hilton Head, Inc.*, 383 S.C. 115, 678 S.E.2d 430, 433 (2009). "The Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases

in which exclusive jurisdiction shall be given to inferior courts . . . .” S.C. CONST. art V, 11.

“In determining whether the Legislature has given another entity exclusive jurisdiction over a case, a court must look to the relevant statute.” *Dema*, 383 S.C. at 115, 678 S.E.2d at 433. (citing *Unisys Corp. v. South Carolina Budget and Control Bd. Div. of Gen. Servs. Info. Mgmt. Office*, 346 S.C. 158, 175, 551 S.E.2d 263, 273 (2001)). “The cardinal rule of statutory construction is to ascertain and give effect to the intent of the legislature.” *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 439, 581 S.E.2d 836 (2003) (citing *Charleston County Sch. Dist. v. State Budget and Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993)). See *Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 580 S.E.2d 100, 110 (2003) (“Legislative intent is the paramount concern when interpreting a statute”). “It is not for the court to say whether the Legislature has made a good bargain or a bad bargain.” *State v. Broad River Power Co.*, 177 S.C. 240, 181 S.E. 41, 54 (1935).

"The primary source of the declaration of the public policy of the state is the General Assembly; the courts assume [the task of deciding what constitutes public policy] only in the absence of legislative declaration." *Taghivand v. Rite Aid Corp.*, 411 S.C. 240, 768 S.E.2d 385, 387 (2015) (citing *Citizens' Bank v. Heyward*, 135 S.C. 190, 204, 133 S.E. 709, 713 (1925)). The Timeshare Act is largely a "creature of statute." S.C. Code § 27-32-405(E) states:

**[t]he General Assembly declares that the purposes of this article are to recognize that . . . the purchaser of an interest in a vacation time sharing plan in this State is afforded significant and unique consumer protections not available to purchasers of other forms of real property.**

(emphasis added). “As such [the Court is] bound to strictly construe the terms of the statute and to rely on the General Assembly to amend the statute where necessary.” *Bi-Lo Inc.* 354 S.C. at 441, 581 S.E.2d at 836.

So important are the "significant and unique" rights afforded to timeshare purchasers in the Timeshare Act that the Legislature declared them to be **inalienable**. (See S.C. Code 27-32-110, entitled Prohibited practices, which states: “It is a violation of this chapter for a seller of vacation time sharing plans to . . . include in a contract a provision purporting to waive a right or benefit provided for purchasers pursuant to this chapter, or seek or solicit such a waiver during the effective period of these rules . . . .”)

If a statute's language is plain, unambiguous, and conveys a clear meaning "the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Bi-Lo, Inc.* 354 S.C. at 439, 581 S.E.2d 836. Here, the public policy is plainly and unambiguously codified by the Legislature in S.C. Code § 27-32-130 of the Timeshare Act:

**The Real Estate Commission is responsible for the enforcement and implementation of this chapter and the Department of Labor, Licensing and Regulation, at the request of the Real Estate Commission, shall prosecute a violation under this chapter. The Commission shall promulgate regulations for the implementation of this chapter, subject to the State Administrative Procedures Act. The provisions of this section do not limit the right of a purchaser or lessee to bring a private action to enforce the provisions of this chapter.**

(emphasis added). Despite granting the Commission the responsibility to enforce and implement the Timeshare Act and to request prosecution for violations of the same, the Legislature's plain and unambiguous language clearly intends to grant timeshare

purchasers an unqualified private right of action to enforce the provisions of the Timeshare Act irrespective of any Commission jurisdiction. *See Id.*

In *Tench v. S.C. Dep't of Labor, Licensing, and Regulation*, No. 98-ALJ-11-0041-JJ, 1998 WL 320770 (S.C. A.L.C. May 27, 1998), the Administrative Law Court reviewed S.C. Code § 27-32-130 of the Timeshare Act and confirmed that “[m]atters relating to alleged violations of the South Carolina Vacation Time Sharing Plans Act and any investigations conducted by the Commission pursuant to that act . . . are specifically reserved to the jurisdiction of the Circuit Court.” *Id.* at \*1 (emphasis added). The Legislature did not give exclusive jurisdiction to the Commission as argued by Defendants; in stark juxtaposition, the Legislature specifically reserved jurisdiction to the Court and granted timeshare purchasers a private right of action.

**II. The Commission’s determination of a violation of the Timeshare Act is not a condition precedent to a purchaser bringing a private cause of action to enforce the provisions of the Act insofar as South Carolina Law explicitly provides that a timeshare purchaser’s right to bring a private action claiming Timeshare Act violations is unqualified**

Is the Commission's determination of a violation of the Timeshare Act a condition precedent to a purchaser bringing a private cause of action to enforce the provisions of the Timeshare Act? No, the Commission’s responsibility to enforce and implement the Timeshare Act and to request prosecution for violations of the same does not create a condition precedent, limit, or qualify a timeshare purchaser’s private right of action to enforce the provisions of the Timeshare Act. *See* S.C. Code § 27-32-130.

“The legislative intent to grant or withhold a private right of action for the violation of a statute, or the failure to perform a statutory duty, is determined primarily from the form or language of the statute.” *Whitworth v. Fast Fare Markets of South*

*Carolina, Inc.*, 289 S.C. 418, 338 S.E.2d 155 (1985). The statute conferring an unqualified private right of action for violations of the Timeshare Act upon timeshare purchasers is S.C. Code § 27-32-130, *enforcement and implementation of chapter; regulations*; which provides:

**The Real Estate Commission is responsible for the enforcement and implementation of this chapter and the Department of Labor, Licensing and Regulation, at the request of the Real Estate Commission, shall prosecute a violation under this chapter. The Commission shall promulgate regulations for the implementation of this chapter, subject to the State Administrative Procedures Act. The provisions of this section do not limit the right of a purchaser or lessee to bring a private action to enforce the provisions of this chapter.**

(emphasis added). In order to avoid duplicating large portions of the brief hereinabove, please see the law and arguments hereinabove describing legislative intent, plain language, statutory construction, and the Courts' interpretations of the same language to date.

The Legislature very particularly granted the Commission certain responsibilities for the enforcement and implementation of the Timeshare Act and then immediately clarified, as if anticipating Defendants' very arguments today, that the same "**do[es] not limit** the right of a purchaser or lessee to bring a private action to enforce the provisions of this chapter." S.C. Code § 27-32-130 (emphasis added). Defendants argue that the statute should be understood to mean the very opposite of what it says, such that "does not limit" should be interpreted as "does limit," turning the English language on its head.

Further, the Timeshare Act does not state any condition precedent to bringing the private action, although certainly the Legislature could have included same. *See*

*Georgia-Carolina Bail*, 354 S.C. 18, 579 S.E.2d 334 ("If the legislature had intended for the [bail bondsmen] fee to be \$150 for each license, the legislature could have articulated this requisite with exactitude").

In *Tench*, the Commission investigated and determined that there were no violations, and the Court confirmed that despite the same the timeshare purchaser could still "pursue a civil action against those persons or entities whom he feels have wronged him. Such civil action is specifically authorized by the South Carolina Vacation Time Sharing Plans Act at S.C. Code Ann. § 27-32-130." *Tench* at \*1-\*3. Thus, not only is there no condition precedent, but the private right of action exists not only in the absence of any preceding finding of a violation by the Commission, but also when the Commission has investigated and affirmatively finds no violation.

The Legislature did not create any conditions precedent to Plaintiffs bringing a private cause of action to enforce the provisions of the Timeshare Act. Contrarily, the Legislature specifically reserved jurisdiction to the Court and expressly granted timeshare purchasers an unambiguous, unqualified, significant, unique, and inalienable private right of action irrespective of the Commission.

**III. The Commission's determinations as to whether the Act was violated are not binding on courts of the Judicial Branch insofar as Plaintiffs were not parties to any administrative proceedings**

Is the Commission's determinations as to whether the Act was violated binding on courts of the Judicial Branch? No, as such would be in violation of the United States Constitution, in violation of the South Carolina Constitution, and contrary to all notions of fairness and justice under the law.

A fundamental constitutional principle is that one cannot be bound by a judgment in litigation which he is not designated as a party or been made a party by service of process. *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714 (1878). The Commission did not have jurisdiction to make Plaintiffs parties to the Commission's hearing or Order, Plaintiffs were not parties to the Commission's hearing or Order, as non-Parties the Plaintiffs were refused the right to appeal, and, thus, Plaintiffs are not bound by the Commission's Order.

"No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard . . . and he shall have in all such instances the right to judicial review." S.C. CONST. art. I, 22. Even if the Commission had jurisdiction to have made Plaintiffs parties to the hearing and Order, and even if the Legislature had created any administrative prerequisite, Plaintiffs would still have had the right to judicial review.

On March 15, 2006, without having an Order of registration authorizing the offering and selling of Bluewater timeshare interests and without having paid the initial registration fee, Bluewater began presales. On September 2, 2014, the Commission issued the Initial Registration Order for Bluewater authorizing the offering and selling of Bluewater timeshare interests. By the time the Commission issued the Initial Registration, Spinnaker had already sold 4,954 Bluewater timeshare interests for \$64,487,615.00.

On April 2, 2015, Plaintiffs commenced this action on behalf of themselves and all others similarly situated. On August 20, 2015, the Commission curiously deemed Bluewater's plan registration to be retroactive to March 15, 2006, the date Bluewater

began presales, despite Spinnaker's attorney's admission that she did not pay the initial registration fee timely and that Spinnaker had not obtained an Order of registration when presales began on March 15, 2006.

The Commission does not have jurisdiction over Plaintiffs' claims for Timeshare Act violations. *See Tench, supra*. Moreover, Plaintiffs have not been parties to any proceedings or Orders of the Commission, and, thus, Plaintiffs cannot be bound by any Orders of the Commission. *See Pennoyer, supra*. Even if the Commission had jurisdiction to make Plaintiffs parties to any hearing or Order, the Commission has not done so. Furthermore, even if the Commission found no violations, Plaintiffs would still have the right to bring a private action for Timeshare Act violations. *See Tench, supra*.

Further, if Plaintiffs had been subject to the Commission's jurisdiction, been properly made parties and served, and the Commission found no violations, Plaintiffs would still have been entitled to judicial review if the Commission ruled (a) in violation of constitutional or statutory provisions, (b) in excess of the statutory authority of the agency, (c) based upon unlawful procedure, (d) affected by an error of law, (e) in clearly erroneous view of the reliable, probative, and substantial evidence on the whole record, or (f) arbitrarily or capriciously or characterized by abuse of discretion or clearly unwarranted exercise of discretion. *See S.C. Code § 1-23-380*.

To bind the Court and the Plaintiffs with same is inconsistent with both the Legislature's intent, as set forth in S.C. Code § 27-32-130, and the scope of review for direct appeals of agency actions set forth in S.C. Code § 1-23-380 as set forth herein above. *See Kiawah Development Partners v. S.C. Dep't of Health & Envtl. Control*, 766 S.E.2d 707, 714 (2014) ("[t]he Court may reverse the decision of the [administrative

agency] where it is in violation of a statutory provision or it is affected by an error of law"). *See also Georgia-Carolina Bail*, 354 S.C. 18, 26, 579 S.E.2d 334 ("Although not binding or controlling, this court gives deference to the opinion of a state agency charged with the duty and responsibility of enforcing a state statute.").

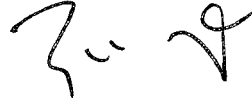
Although the Commission does not have jurisdiction over Plaintiffs, Plaintiffs were not parties to the Commission proceeding, and as non-parties the Plaintiffs were denied the right to appeal, Spinnaker argues that the Commission's retroactive registration Order is binding upon the Courts, non-reviewable, and should unilaterally divest Plaintiffs' of their express statutory private right of action to enforce the provisions of the Timeshare Act.

#### CONCLUSION

Plaintiffs respectfully submit that denial of Plaintiffs' express, unambiguous, unqualified, significant, unique, and inalienable statutory right to have their Timeshare Act claims adjudicated by the Court would be contrary to the express intent of the Legislature, the public policy of South Carolina, the South Carolina Constitution, the United States Constitution, and all notions of fairness and justice under the law. For all of these reasons, the Court should answer all three certified questions in the negative.

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Respectfully submitted,



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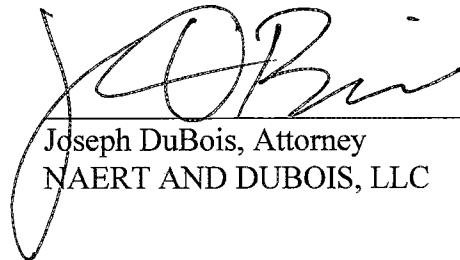
Spinnaker Resorts, Inc. d/b/a Spinnaker Resorts South Carolina, Inc.....Defendant.

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**CERTIFICATE OF COMPLIANCE WITH RULE 211(b), SCACR**

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The undersigned hereby certifies that the Plaintiffs' Brief complies with Rule 211(b), SCACR.

  
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October 19, 2016

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**CERTIFICATE OF SERVICE**

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The undersigned hereby certifies that on the date indicated he served counsel of record with a copy of the Plaintiffs' Brief by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:


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