THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS

THE HONORABLE MARVIN H. DUKES, III,
BEAUFORT COUNTY MASTER-IN-EQUITY

Case No.: 2011-CP-07-02497

Appellate Case No.: 2015-001568

Quartermaster at Broad Creek Landing Owners' Association, Inc., Appellant,

v.

Broad Creek Landing Horizontal Property Regime, Respondent.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES ON APPEAL

1. DID THE TRIAL COURT PROPERLY DETERMINE THAT THE RECIPROCAL EASEMENT AND AMENITY USE AGREEMENT WAS CLEAR AND UNAMBIGUOUS WITH REGARD TO THE MANNER IN WHICH ASSESSMENTS FOR COSTS ASSOCIATED WITH THE COMMON AREAS AND AMENITIES WERE TO BE MADE?

2. SINCE THE APPELLANT WAS ADMINISTRATIVELY DISSOLVED WHEN THIS LITIGATION WAS COMMENCED, DID THE TRIAL COURT ERR IN FINDING THAT THE APPELLANT LACKED STANDING TO PURSUE THIS MATTER?

3. DID THE TRIAL COURT PROPERLY BAR RECOVERY BY THE APPELLANT FOR ALLEGED DAMAGES OCCURRING OUTSIDE THE THREE-YEAR STATUTE OF LIMITATIONS, WHERE THE RECIPROCAL EASEMENT AND AMENITY USE AGREEMENT DID NOT CONSTITUTE A SEALED INSTRUMENT?

4. DID THE TRIAL COURT PROPERLY DETERMINE THAT THE RECIPROCAL EASEMENT AND AMENITY USE AGREEMENT WAS A VIABLE CONTRACT WHICH COULD BE ENFORCED AGAINST MEMBERS OF THE QUARTERMASTER OWNERS ASSOCIATION FOR PURPOSES OF ASSESSMENTS ASSOCIATED WITH THE USE OF THE BROAD CREEK LANDING COMMON AREA AND AMENITIES?

5. DID THE TRIAL COURT PROPERLY DISREGARD TESTIMONY REGARDING THE LACK OF KNOWLEDGE BY THE PRESIDENT OF THE BROAD CREEK LANDING HORIZONTAL PROPERTY REGIME AND MEMBERS OF ITS BOARD OF DIRECTORS REGARDING HOW THE COMMON AREA AND AMENITIES WERE TO BE ASSESSED WHEN THAT FUNCTION WAS APPROPRIATELY DELEGATED TO A PROFESSIONAL MANAGEMENT COMPANY?

6. DID THE TRIAL COURT PROPERLY REFUSE TO REQUIRE THAT MATTERS UTILIZED IN ESTABLISHING THE ASSESSMENT OF MEMBERS OF THE QUARTERMASTER OWNERS ASSOCIATION BE LIMITED TO THOSE MATTERS WHICH JOINTLY BENEFITED MEMBERS OF THE ASSOCIATION AND MEMBERS OF THE CONDOMINIUM REGIME?

STATEMENT OF THE CASE

This matter was commenced when the Appellant Quartermaster at Broad Creek Landing Owners' Association, Inc. filed a Complaint on June 9, 2011 with the Clerk of Court for Beaufort County. (R. pp. 19 - 23). In its Complaint, Appellant asserted that the Respondent Broad Creek Landing Horizontal Property Regime had breached a Reciprocal Easement and Amenity Use Agreement which, among other matters, provided a means by which costs associated with the jointly shared common areas and amenities of the Broad Creek Landing development might be proportionately paid for by the owners of property within the Quartermaster development. Appellant requested that the court make a determination of the proper method of the assessment of fees to be paid under the agreement and award damages for overcharged assessments and attorneys' fees. Respondent duly filed its Answer on August 11, 2011. (R. pp. 23 - 25). It subsequently filed a motion for summary judgment, which was denied. (R. pp. 26 – 27, 31 - 32). On October 21, 2013, a non-jury trial was held before the Beaufort County Master-In-Equity, Marvin H. Dukes, III. He thereafter issued an order on September 30, 2014 in which he found that the Reciprocal Easement Agreement was clear and unambiguous with regard to the manner in which assessments for the use of common areas and amenities within the Broad Creek Landing development were to be made. (R. pp. 2 - 3). Based upon that finding, Judge Dukes determined that the agreement had not been breached. Appellant thereafter filed a motion for new trial and/or amendment of judgment. On June 19, 2015, Judge Dukes issued an order denying that motion. (R. pp. 4 - 18). Appellant thereafter timely filed a notice of appeal on July 17, 2015. (R. p. 86)

STATEMENT OF FACTS

This appeal arises out of a dispute between a property owners association (Appellant) (hereinafter Quartermaster) and a condominium regime (Respondent) (hereafter condominium regime), which are both located within the Broad Creek Landing development in Beaufort County, South Carolina. As initially developed, the Broad Creek Landing was composed of the horizontal property regime and property reserved to the developer for further development. The developer ultimately opted to construct fee simple townhouses on the property previously reserved to it. (R. pp. 346 – 382). Because both the condominium regime and fee simple properties were located within the same property development, they were required to share certain common areas and amenities. In order to facilitate this relationship, a Reciprocal Easement and Amenity Use Agreement was drafted (hereafter reciprocal easement agreement). Among the provisions of the reciprocal easement agreement was an article which set forth alternative methods for calculating the amount that the owners in the Quartermaster development were to pay for the use and maintenance of roads, amenities and open spaces. (R. pp. 354 - 360). Appellant instituted this litigation, asserting that this article within the reciprocal easement agreement was ambiguous and that it had been used to overassess owners within the Quartermaster development for the use of the common areas and amenities, contrary to the intent of that agreement. (See R. 19 - 23).

Article 4.2 of the Reciprocal Easement Agreement provides that the Condominium Regime could assess the Quartermaster development owners a monthly fee of $100 per each dwelling unit and $25 per each unimproved lot. In the alternative,

the condominium regime could assess the Quartermaster owners pursuant to the following formula per each improved lot:

> [an] amount equal to its pro rata share, [as] if such dwelling unit were an "Average Unit", within the Regime[,] provided that the budgetary line items entitled "Building Maintenance" and "Termite Bond" are subtracted from the monthly regime for the "Average Unit" and provided further that, [sic] two thirds (2/3) of the "Property Insurance" line from the "Average Unit" monthly regime fee is subtracted.

The term "Average Unit" is defined by the Reciprocal Easement Agreement to be the "[t]otal combined assessment for all regime property owners divided by the number of regime property owners." From this definition and the use of that term in the above quoted portion of the agreement, it is clear that the budget to be utilized in determining the appropriate assessment is the budget used by the condominium regime. If the total budgeted expenses for Broad Creek Landing are used as a starting point, with the total amounts for building maintenance and termite bond being subtracted as well as two-thirds of the property insurance expense being subtracted, the total amount of the annual fee for owners within the Quartermaster development can be computed. That total amount is then divided by the number of units within the Broad Creek Landing Condominium Regime as well as by the number of applicable months in the year to render the monthly fee to be assessed against the Quartermaster owners.

Appellant argues that Article 4.3 of the Reciprocal Easement Agreement requires that a separate budget for the maintenance and operating expenses of the common areas and amenities must be prepared and should be utilized in determining the proper assessment. However, the provision providing for the methods of assessment make no reference to a separate common area budget. In fact, Article 4.2 provides that the funds for the operation of the common area are to be placed in the condominium regime

account. Appellant simply confuses the function of funding the budget with the function of determining how those funds are to be spent. The method of funding of the budget does not require that only matters which concern the use or benefit of the common areas by the owners within the Quartermaster development be considered. Instead, funding can be based upon any method agreed upon by the parties, so long as the method generates sufficient funds to meet the requirements of the budgetary expenditures. Article 4.2 provides for this methodology by utilizing the condominium regime budget as a basis for assessment. Even if that budget includes matters which are not beneficial to the owners within the Quartermaster development, it nonetheless provides a method for sufficient budgetary funding. To hold otherwise and to require that any method be related only to matters which are tied to the Quartermaster owners use and enjoyment of the regime common areas not only requires the court to rewrite the reciprocal easement agreement but also would preclude use of the flat fee amount also set forth in Article 4.2 of the reciprocal easement agreement.

ARGUMENTS

I. SINCE APPELLANT WAS DISSOLVED WHEN THIS ACTION WAS COMMENCED, IT LACKED STANDING TO PURSUE THIS MATTER. (Issue 2).

A corporation is a creature of statute and therefore derives its powers and abilities from those which are allowed by statute. Where a corporation has been dissolved, it lacks the power and ability to pursue any activities other than those appropriate for winding up its activities. Pursuant to Section 33-14-210(d) of the S.C. Code (1976, as amended), an administratively dissolved corporation may not carry on any business except that which is necessary to wind up or liquidate its business and affairs or to notify claimants of its dissolution.

Appellant was administratively dissolved in 1998. (R. p. 390). Notwithstanding this dissolution, suit was filed in its name in 2011. (R. p. 19 - 22). Appellant only attempted to reincorporate by filing articles of incorporation on May 16, 2013. (R. pp. 385 - 386). As a result, the Appellant did not exist when the present action was instituted and had not existed for thirteen years. The Complaint sought to recover for "overcharged" assessments since 1999 through the Appellant, a year after the Appellant was dissolved.

Appellant attempts to sidestep these limitations by arguing that it is in compliance with section 33-14-210 by instituting suit to recover assets and distribute property to its shareholders. By so arguing, Appellant disregards the directive of section 33-14-105 which requires a corporation, upon dissolution, to devote itself to winding up its affairs and liquidating its assets. A corporation may not carry on business except as may be appropriate for winding up. See § 33-14-105, official comment. In this instance,

Appellant is not attempting to wind up its business or liquidate assets as shown by the fact that it filed Articles of Incorporation in May 2013. (R. pp. 387). Instead, its intent was to continue as if it were a viable business, which, when this litigation began, it was not.

Notwithstanding the fact that it was a dissolved corporation at all times relevant to this action, Appellant maintains that it has standing under the doctrine of associational standing. Pursuant to this doctrine, an association has standing to bring suit on behalf of its members when

(1) the members would otherwise have standing to sue in their own right;

(2) the interests which the association seeks to protect are germane to its purposes; and

(3) neither the claim asserted nor the relief requested required the participation of the individual members in the lawsuit.

Carnival Corp. v. Historical Ansonborough Neighborhood Ass'n, 407 S.C. 67, 753 S.E.2d 846 (2014).

Where, as is true in this case, there is a need for fact intensive individual inquiry, the third factor listed above is not met and there can be no associational standing. See Pennsylvania Psychiatric Society v. Green Spring Health Services, 280 F.3d 278 (3d Cir. 2002). In the instant case, the Appellant seeks to recover damages for overpaid assessments. (R. p. 21). These assessments were not paid by the Appellant but were made in fact paid by the individual owners of property within the Quartermaster development. (R. pp. 357 – 358; R. p. 149, l. 20 to p. 150, l. 25). As noted by the United States Supreme Court in Warth v. Seldin, 422 U.S. 496, 45 L.Ed.2d 343, 95 S.Ct. 2917 (1975), "[a]n organization generally lacks standing to sue for money damages on behalf of its members if the damage claims are not common to the entire membership, nor shared equally, so that the fact and extent of injury would require individualized proof."

In this case, the alleged damages due to an overassessment of individual members of the Quartermaster development would necessarily vary in a number of ways, including, but not limited to, how long the member had owned the fee simple property, whether the property was improved or unimproved, whether the property was owned by more than one individual or entity and whether the owner actually paid the assessments.

While the declaratory prospective relief which the Appellant seeks does otherwise appear to fall within the requirements for an associational standing, it fails in this instance under the second listed factor: the interest which the association seeks to protect are germane to its purposes. As noted above, the Appellant was a dissolved corporation during the time of the alleged overassessment and at the time of filing. As a dissolved corporation, its only function and reason for existence was to wind up the affairs of its business. Winding up those affairs did not include pursuing litigation to establish an overassessment of fees for the use of regime common areas and amenities.

Clearly, there is no standing for a company which has been dissolved and only exists to shut itself down. Instead, any viable cause of action must be undertaken by the individual owners within the Quartermaster development.

II. SINCE THE CONDOMINIUM REGIME HAD NOT BEEN DISSOLVED AND SINCE THERE WERE TWO VIABLE PARTIES TO THE RECIPROCAL EASEMENT AGREEMENT, A CONTRACT EXISTED WHICH EMPOWERED THE BROAD CREEK LANDING HORIZONTAL PROPERTY REGIME TO ASSESS THE QUARTERMASTER AT BROAD CREEK LANDING PROPERTY OWNERS FOR THE USE OF AND ACCESS TO COMMON AREAS AND AMENITIES (Issue 4).

The Appellant argues that the Reciprocal Easement and Amenity Use Agreement, which gives rise to the methods of assessment for the use of and access to the common areas and amenities (See R. pp. 357 - 358) is void because the Broad Creek Landing Horizontal Property Regime was administratively dissolved at the time the agreement was entered into. (R. p. 384). The Appellant also argues that the agreement is void since the Appellant did not exist at the time the agreement was finalized, thereby leaving insufficient parties to create a contract.

Although the condominium regime was administratively dissolved at the time the reciprocal easement agreement was reached, the regime, in compliance with Section 33-14-220, S.C. Code (1976, as amended) was reinstated through the South Carolina Secretary of State within five months of its dissolution. (R. pp. 389, 383). Pursuant to section 33-14-220, when a corporation is reinstated within a two-year period from the effective date of administrative dissolution, the reinstatement permits the corporation to resume business as if the dissolution had never occurred.

At the time it was entered into, the reciprocal easement agreement was purportedly made between three entities: the developer of Quartermaster at Broad Creek Landing; Quartermaster at Broad Creek Landing Owners' Association, Inc.; and Broad Creek Landing Horizontal Property Regime. (R. p. 346). The Appellant argues that it did not exist at the time and could not have entered into an agreement. The Appellant also argues that the Respondent was administratively dissolved at the time and could not

enter into the agreement. However, as noted above, the Respondent was reinstated and this reinstatement related back to the time of dissolution as if no dissolution had occurred. As a result, the Reciprocal Easement Agreement was a viable contract between the developer and the Respondent. Moreover, because the covenants, conditions and agreements of that contract were deemed to be covenants running with the land (R. p. 364), it was also binding upon those who became owners of the lots within the Quartermaster development at Broad Creek. This had the effect of binding both the Respondent and the fee simple owners of property within the Quartermaster development with the assessment methodology for the use of and access to the common area property and amenities within the bounds of the Broad Creek Landing Horizontal Property Regime.

III. SINCE THE RECIPROCAL EASEMENT AGREEMENT WAS NOT A SEALED INSTRUMENT, APPELLANT'S ACTION TO RECOUP EXCESS ASSESSMENTS IS BARRED AS TO ALL CLAIMS FALLING OUTSIDE OF THE THREE-YEAR STATUTE OF LIMITATIONS. (Issue 3).

If it is assumed that the Appellant had standing to pursue this action, that pursuit is limited to those claims occurring within three years of the filing of this lawsuit. The Appellant has nonetheless argued that the twenty-year statute of limitations, as set forth in section 15-3-520 (S.C. Code (1976, as amended), rather than the three-year statute, as set forth in section 15-3-530, is applicable. Section 15-3-520 concerns actions upon sealed instruments, while section 15-3-530 concerns actions upon contracts.

Relying upon section 19-1-160, the Appellant argues that the parties intended for the Reciprocal Easement and Amenity Use Agreement to be sealed. In making this argument, the Appellant relies upon the use of the term "seal" in the attestation clause of the agreement as well as the probate clause signed by the notary public. (R. pp. 368, 369).

The Court of Appeals in Carolina Marine Handling, Inc. v. Lasch, 363 S.C. 169, 609 S.E2d 548 (Ct. App. 2005) recognized that where the language set forth in the attestation clause is generic, that boilerplate language, by itself, will not serve to transform an instrument into a sealed document. However, the Court of Appeals has recognized the existence of a sealed instrument, where the generic language set forth in the attestation clause is used in conjunction with other conspicuous language indicating an intent to treat the document as sealed. In Treadaway v. Smith, 325 S.C. 367, 479 S.E2d 949 (Ct.App. 1996), the Court noted that the standard attestation clause in conjunction with capitalized language stating "SIGNED, SEALED AND DELIVERED IN THE PRESENCE OF" was sufficient to manifest an intent to create a sealed

instrument. Likewise, in South Carolina Dept. of Social Services v. Winyah Nursing Homes, Inc., 282 S.C. 556, 320 S.E.2d 464 (Ct.App. 1984), the use of "L.S." adjacent to contracting parties' signatures was sufficient. The Court noted that "L.S." was an abbreviation of locus sigilli, which means "the place of the seal; the place occupied by the seal of the written instruments."

In this case, however, the Appellant cannot rely upon contractual language used in conjunction with generic language set forth in the attestation clause of the Reciprocal Easement and Amenity Use Agreement which would manifest an intent by the parties that this instrument be treated as sealed. Instead, the Appellant relies upon the use of the term "seal" in the probate clause of the agreement. Unlike the additional language relied upon in Smith and Winyah Nursing Homes, the language relied upon here is not set forth in conjunction with the signature of the parties. Instead, it is set forth on a separate page, signed by a notary public rather than a party and is located within standardized, generic language used in conjunction with a probate clause. The additional indicia are insufficient to demonstrate that the parties intended that the agreement be treated as sealed. If the parties had so intended, they could easily have set forth this intent through language which would be used in conjunction with the signatures of the parties to that document, as was true in in Smith and Winyah Nursing Homes. In fact, the probate clause for representatives of the Broad Creek Landing Horizontal Property Regime has no reference to a seal. Since there was no manifest intent on the part of the parties that the instrument be sealed, the three-year statute of limitations is applicable, thereby precluding recovery for claims falling outside the three-year period just prior to the commencement of this litigation.

IV. BECAUSE THE RECIPROCAL EASEMENT AGREEMENT PLAINLY REQUIRED THE USE OF THE REGIME BUDGET, THE TRIAL COURT PROPERLY DETERMINED THAT THE RECIPROCAL EASEMENT AGREEMENT WAS CLEAR AND UNAMBIGUOUS REGARDING THE ASSESSMENT OF FEES FOR THE USE OF AND ACCESS TO THE COMMON AREAS AND AMENITIES. (Issues 1 and 5)

The Reciprocal Easement and Amenity Use Agreement created by the property developer and the Respondent provides for the assessment of the owners of the fee simple property in the Quartermaster at Broad Creek Landing development to pay for their proportionate share of the maintenance of the common areas. (R. pp. 354 - 357). The Agreement provides that Quartermaster residents are to bear a portion of the cost associated with the maintenance based upon one of two alternative methods:

(1) payment of monthly flat fee; or

(2) payment of a fee based upon a formula set forth in the agreement.

(R. pp. 354 – 357). As a course of performance, the fees paid by the Quartermaster residents have always been based upon the agreement formula. (R. p. 147, ll. 21 – 12; pp. 33 - 35).

The Appellant contends that the methodology utilized to assess maintenance fees is vague and ambiguous. The determination of whether the language of a contract is ambiguous is a question of law for resolution by the court. McGill v. Moore, 381 S.C. 179, 672 S.E.2d 571 (2009). An ambiguity exists when a contract is capable of more than one meaning or when its meaning is unclear. Bardsley v. GEICO, 405 S.C. 68, 741 S.E.2d 436 (2013). A review of the Reciprocal Easement Agreement reveals that, as the trial court found, the agreement is not ambiguous but is clear upon its face. See Schulmeyer v. State Farm Fire & Cas. Co., 353 SC 491, 579 S.E.2d 132 (2003). Pursuant to Article 4.2 (b)(1) of the Reciprocal Easement Agreement:

> Each improved lot within the Quartermaster property, shall pay unto the regime a monthly assessment equal to its pro rata share, [as] if such dwelling unit were an "average unit" within the regime [,] provided further that the budgetary line items entitled "Building Maintenance" and "Termite Bond" are subtracted from the monthly regime fee for the "average unit" and provided further that, [sic] two-thirds (2/3) of the "Property Insurance" line item from the "Average Unit" monthly regime fee is subtracted.

The Appellant argues that the agreement is ambiguous as to whether the budget to be utilized is a common area budget or the budget for the Broad Creek Landing regime. However, a close look at the paragraph quoted above reveals that in fact the intent of the parties was that the regime budget be utilized. In fact, no mention is ever made of a particular common area budget.

The term "average unit" is defined by the Reciprocal Easement Agreement in Article 2.6 to be the "[t]otal combined assessment for all regime property owners divided by the number of regime property owners." The total combined assessment for the regime would be concerned with the total cost and expenditures associated with the operation of the regime and not just those associated with the common areas. As a result, the regime budget must be utilized.

Moreover, when determining the assessment for the Quartermaster residents, the formula set forth in Article 4.2(b)(1) of the Reciprocal Easement Agreement utilizes the concept of the "average unit," which by definition requires consideration of the total combined assessment for condominium owners. This assessment includes more than costs associated with the common area, which would also preclude use of a common area budget.

Additionally, the formula set forth in Article 4.2(b)(1) makes reference to such budgetary items as "building maintenance," "termite bond" and "property insurance."

When used in conjunction with the definition of an "average unit," it is clear that these line item costs refer to all buildings within the condominium regime and not just those which might be associated with the common areas or amenities. If the parties had wished to exclude other matters normally within the regime budget from the formula, they could have done so.

The Appellant has nonetheless argued that the Reciprocal Easement Agreement must be interpreted as a whole and not from a particular paragraph within the agreement. As a general rule of construction, this is correct. Based upon that general rule of construction, the Appellant argues that the agreement makes reference to a common area budget, which, in order to meet the dictates of this rule of construction, must be utilized in conjunction with the assessment formula. As noted by the Appellant, Article 4.1 of the agreement provides that Quartermaster residents are to bear a portion of the expense and operation of the regime common areas. Article 4.3 requires that an annual budget for the maintenance and operating expenses of the common area and its improvements be prepared.

The annual budget referred to in Article 4.3 of the Reciprocal Easement Agreement, like all budgets, has two general aspects to it: projected income and projected expenses or costs. An organization such as the Respondent typically generates income by assessing its members either a flat amount over a specified period of time or through a formula based upon specified factors for a particular period of time. In this instance, the Reciprocal Easement Agreement in fact provided two ways for the assessment of Quartermaster residents to be made: (1) $100 per month for each dwelling or $25 per month for each unimproved lot (in December of 1990 dollars); or (2) the

monthly assessment of an "average unit" less all expenditures for "building maintenance" and "termite bond" and two-thirds of any "property insurance" costs or premium. (R. pp. 354 - 357). The Appellant argues that the assessments utilized to generate the income for a budget should be equal to the value of the services received as measured by the costs of those services. While this approach is often utilized, there is no rule or requirement limiting a formula utilized to create budgeting income simply reflect the services provided. The particular formula can be based on any number of factors, some of which may be totally unrelated, so long as it generates sufficient income to which the budget expenditures can be adjusted. There is no barrier in law to the parties establishing whatever formula they wish to utilize to determine how the income for the assessment is to be generated. The Appellant's argument that the determination of assessment is dependent upon what costs will be incurred in maintaining the common area is nowhere set forth in the agreement. It should be noted that if the flat fee approach was taken it also is not dependent on the costs associated with maintaining the common areas. In fact, utilizing the regime budget as a basis for determining the assessment against the Quartermaster residents fits within the overall scheme established by the contract so that there are sufficient monies to finance the proposed expenditures for the maintenance of the common areas. The Appellant has not argued or demonstrated these funds have been inappropriately used.

Finally, it should be noted that the use of the regime budget as opposed to a common area budget has been established by a course of dealing between the Respondent and the owners and residents of the Quartermaster at Broad Creek Landing development. Ron Fenstermaker, the regime's management agent, testified that the method of

calculating the assessment for the Quartermaster residents followed the same calculation for 14 years. (R. p. 147, ll. 21 – 12; p. 33 - 35.) That calculation always utilized the regime budget. Until the claims for overassessment which serve as the basis for this litigation were made, there were no protests against using this methodology.

A course of dealing is a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct. Restatement (2d) Contracts, § 223. The Restatement further provides that there is no requirement that the agreement be ambiguous before the parties' course of dealing may be considered. Id., comment (b). In this instance, the parties followed the formula by using the regime budget, less the specified line items, to determine the assessment to be applied. Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance, as was true here, and where each party has an opportunity to object to that performance, any course of conduct which accepted or acquiesced in without objection is to be given great weight in the interpretation of the agreement. Restatement (2d), Contracts § 202(4). Because this course of conduct has been adhered to for a substantial time by the Respondent and the owners and residents of the Quartermaster property, the fact that members of the Respondent's board of directors or its president were unaware of how the assessment was calculated is irrelevant. Moreover, the relevance of the board's knowledge of the method of assessment is a matter to be determined as a factual finding by the trial court, which is not subject to appellate review. Townes Associates Ltd. v. City of Greenville, 266 SC 81, 221 S.E.2d 772 (1976). Respondent's board and president simply had the duty of assessing Quartermaster owners

which was done by delegating this function to a professional third party which undertook the assessment properly and without protest.

V. THE TRIAL COURT PROPERLY REFUSED TO REQUIRE THAT MATTERS UTILIZED IN ESTABLISHING THE ASSESSMENT OF MEMBERS OF THE QUARTERMASTER OWNERS ASSOCIATION BE LIMITED TO THOSE MATTERS WHICH JOINTLY BENEFIT MEMBERS OF THE OWNERS ASSOCIATION AND MEMBERS OF THE CONDOMINIUM REGIME. (Issue 6).

The Appellant argues that the trial court erred in permitting the formula utilized to set the assessment of its members to include matters such as insurance and building reserves which were of no benefit to its members. In other words, the assessment should be based only upon factors which would benefit the Appellant's members. According to this argument, to include factors which do not generate a benefit for the Appellant's members creates an overcharge of the assessment. Instead, the assessment should be limited to a separate common area budget rather than the regime budget, which includes matters of no benefit to the Appellant's members.

In making this argument, the Appellant is requesting that the Court review findings of fact made by the trial court. The Appellant argues that the court's scope of review includes not only matters of law but findings of fact since this is an equitable matter. However, this appeal does not involve an equitable matter, since the trial court was requested to undertake an interpretation of a contract, and, assuming a finding in favor of the Appellant, assess damages. However, the interpretation of a contract is an action at law. Jacobs v. Service Merchandise Company, 297 S.C. 123, 375 S.E.2d 1 (Ct. App. 1988). On appeal from an action at law without a jury, an appellate court's standard of review extends only to corrections of law. Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976). The factual findings of a trial judge are not to be disturbed unless a review of the record discloses there is no evidence which reasonably supports the findings of fact. Id.

This requires a review of what the Reciprocal Easement and Amenity Use Agreement provides. As noted, under the Reciprocal Easement Agreement, two methods of funding the budget were specified:

> (1) A flat fee monthly payment for each property within the Quartermaster at Broad Creek Landing; or
>
> (2) A formula based upon the condominium regime budget with certain specified deductions.

(R. pp. 9 – 12).

By course of dealing (R. p. 147, ll. 21 - 12), the formula set forth above has always been utilized to determine the appropriate assessment. The Appellant argues that the Respondent, through its agent, has included as factors within that formula matters such as insurance which only apply to the condominiums and monies set aside for the improvement of condominium buildings, which are to the benefit of the condominium regime but not to the members of Quartermaster. This argument conflates the method of funding a budget with those factors which go into determining which expenditures are made under that budget. The true issue presented by this appeal is whether the Reciprocal Easement Agreement requires such an approach. By reviewing the Reciprocal Easement Agreement, the trial court determined factually that this approach was not required.

Instead, the trial court, in its Order of September 30, 2014, made two factual findings:

> (1) As defined by the Reciprocal Easement Agreement, the term "average unit" does not include Quartermaster property but is limited to property that is part of the horizontal property regime; and

(2) Assessment under the Reciprocal Easement Agreement was to be calculated by using the same budget as used in the calculation of the monthly assessment for the "average unit."

(R. pp. 2 - 3).

Article 4.2 of the Reciprocal Easement Agreement provides the methods for assessment for the provision of certain common area expenses. Utilizing that formula, as opposed to the flat fee, requires a determination of what an "average unit" would pay. "Average unit" is defined within the agreement to include the "[t]otal combined assessment for all regime property owners divided by the number of regime property owners." Obviously, to determine the assessment against the regime property owners (owners of condominiums) would require a consideration of the regime budget. A common area budget, as argued by the Appellant, would not be the equivalent of the regime budget since it is limited to those matters which concern only the common areas. The assessment against the owners within Quartermaster is lessened by subtracting out budgetary items such as "building maintenance" and "termite bond." A further reduction requires the subtraction of two-thirds of the cost for "property insurance." If a common area budget were utilized, these subtractions would in all likelihood serve to reduce the basis for assessment below the average cost of a common area service since the budgetary line items for "building maintenance," "termite bond" and "property insurance" would not have been included under the common area budget.

Since the trial court had an evidentiary basis for its factual holdings, the scope of appellate review in this matter would preclude any reconsideration of those findings. Moreover, even if those factual findings were to be reviewed, it is clear that the contractual formula utilized by the agent for this Respondent was correct. Appellant's position requiring that the assessment be limited to those matters which would fall within

a common area budget has no basis under the contract. Moreover, the argument advanced by the Respondent conflates the requirement of how a budget is to be funded, which is set by contract, with how those monies collected pursuant to that formula are to be spent. The two are not necessarily intertwined.

Appellant attempts to create an issue of law by arguing that the Reciprocal Easement Agreement is ambiguous as to how the assessments are to be determined. A contract is ambiguous when it is capable of more than one meaning or when its meaning is unclear. Bardsley v. GEICO, 405 S.C. 68, 747 S.E.2d 436 (2013). However, as noted above, the Reciprocal Easement Agreement specifically makes reference to the regime budget. Moreover, the subtractions to be undertaken in determining the assessment makes sense only with regard to using the regime budget rather than a hypothetical common area budget. Where a contract's language is clear and unambiguous, the language of a contract alone is sufficient to determine the contract's force and effect. Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 579 S.E.2d 132 (2003). Even if there were an ambiguity as to which budget to use, the parties' course of dealing over the years would indicate that the regime budget was to be utilized. Either way, the trial court's determination that the regime budget was to be utilized without limitation to those factors which would benefit the Appellant is supported by both the clear language of the contract and the course of dealings of the parties and therefore should be affirmed.

CONCLUSION

Appellant has essentially requested the Court to engage in a revision of the Reciprocal Easement and Amenity Use Agreement by inserting language into that contract which would alter the agreed-upon formula utilized to assess members of the Quartermaster at Broad Creek development for their use of the common areas and amenities available to both members of the condominium regime and owners of the Quartermaster development. Since Appellant was administratively dissolved when it instituted this litigation, it has no standing to pursue this matter. That right belongs solely to the individual owners of the property within the Quartermaster development. Moreover, any recovery for alleged overassessment must be limited to those assessments occurring within three years of the commencement of this litigation pursuant to the bar established by the applicable three-year statute of limitations. To the extent, if any, that the Appellant may pursue this matter, it is bound by the clear and unambiguous provisions of the Reciprocal Easement and Amenity Use Agreement, particularly with regard to this assessment of fees for the use of the common areas and amenities within the Broad Creek Landing development. This agreement clearly provides that the determination of the appropriate assessment will be based upon either a flat fee or upon a formula utilizing the condominium regime budget as a basis. In light of the above, the trial court Order should be affirmed.

(Signature on next page)

Respectfully submitted,

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September 19, 2016

As Attorneys for Broad Creek Landing Horizontal Property Regime

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

THE HONORABLE MARVIN H. DUKES, III
BEAUFORT COUNTY MASTER-IN-EQUITY

RECEIVED
SEP 19 2016
SC Court of Appeals

Case No.: 2011-CP-07-02497

Appellate Case No.: 2015-001568

Quartermaster at Broad Creek Landing Owners' Association.....Appellant,

vs.

Broad Creek Landing Horizontal Property Regime.....Respondent.

CERTIFICATE OF SERVICE

I, David L. Moore, Jr., an employee at TURNER, PADGET, GRAHAM & LANEY, P.A., Attorneys for Respondents in the above referenced matter, hereby certify that I have served the **FINAL BRIEF OF RESPONDENT** on Terry A. Finger, Esquire, Attorney for Appellant, by depositing one copy of the same in the United States Mail, postage prepaid, on September 19, 2016, addressed to:

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Greenville, South Carolina

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies this **Final Brief of Respondent** complies with R211(b), SCACR.

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September 19, 2016