

**STATE OF SOUTH CAROLINA
In the Court of Appeals**

Appeal from Charleston County
Court of Common Pleas
Mikell Scarborough, Master-in-Equity

Case No. 2010-CP-10-5449
App. No. 2015-002550

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OCT 26 2016

SC Court of Appeals

Nathan Bluestein, Ettaleah Bluestein, M.D.,
Theodore Albenesius, III, and Karen Albenesius,

Appellants,

v.

Town of Sullivan's Island and Sullivan's Island Town Council,

Respondents.

APPELLANTS' FINAL REPLY BRIEF

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ARGUMENT IN REPLY

I. The Plaintiffs' claims are not time-barred.

The Town asserts, as an additional sustaining ground, the argument that the Plaintiffs' claims are time-barred under S.C. Code Ann. §6-29-760 because they did not challenge the validity of the zoning ordinances within 60 days of passage of the 1995 and/or 2005 rewritten trimming ordinances. The Town raised this argument in the Trial Court, but the motion was denied without discussion in the Trial Court's Form 4 Order of August 4, 2014. [ROA 28, 365; Motion for Summary Judgment on All Causes of Action Due to Expiration of Statute of Limitations or Unreasonable Delay, filed February 28, 2014; Form Order.] The Plaintiffs maintain that the Trial Court properly denied the Town's motion because this action is not a direct challenge to the zoning ordinances subject to the 60-day period. Rather, the Plaintiffs assert breach of contract claims under the 1991 Deed as well as a nuisance claim which are not time-barred.

The Plaintiffs have attempted to make very clear that while the Town's trimming ordinances are in issue, this is not an ordinary zoning case. Rather, this is a land contract case founded, at its core, in the unique 1991 Deed which was prompted by the unique geology of the Island's shoreline for the intent of preserving and maintaining the character of the beach as it existed in February 1991.

The 1991 Deed is a sealed instrument as evidenced by the language of the signatures and attestation clauses on the document. [ROA 96.] S.C. Code Ann. § 19-1-160; S. Carolina Dep't of Soc. Servs. v. Winyah Nursing Homes, Inc., 282 S.C. 556, 561, 320 S.E.2d 464, 467 (Ct. App. 1984) (citing S.C. Code Ann. Section 19-1-160; Wallingford v. Western Union Telegraph Co., 60 S.C. 201, 38 S.E. 443 (1901); Cook v. Cooper, 59 S.C. 560, 38 S.E. 218 (1901); C.J.S.

Limitations on Actions § 102. Thus, pursuant to S.C. Code Ann. §15-3-520 a 20-year period of limitations applies to the breach of contract claims:

Within Twenty Years states:

(b) an action upon a *sealed instrument*, other than a sealed note and personal bond for the payment of money only whereon the period of limitation is the same as prescribed in Section 15-3-520, except that a sealed contract for sale or an offer to buy or sell good whereon the period of limitation is the same as prescribed in Section 36-2-725. (Emphasis added).

This same 20-year period applies to the claim for breach of contract accompanied by a fraudulent act in that such claim simply is a breach of contract -- a sealed instrument -- claim in which punitive damages are recoverable upon proof of a fraudulent act. Ateyeh v. Volkswagen of Florence, Inc., 288 S.C. 101, 103, 341 S.E.2d 378, 379-80 (1986); Stevenson v. B. B. Kirkland Seed Co., 176 S.C. 345, 180 S.E. 197, 200 (1935).

In an alternate view, the statute of limitation on the “fraudulent act” had not even begun running until after this action was in that the fraudulent acts in connection to the opinion surveys was not even uncovered until during discovery. Santee Portland Cement Co. v. Daniel Int'l Corp., 299 S.C. 269, 271, 384 S.E.2d 693, 694 (1989) *overruled on other grounds by* Atlas Food Sys. & Servs., Inc. v. Crane Nat. Vendors Div. of Unidynamics Corp., 319 S.C. 556, 462 S.E.2d 858 (1995) (HELD: the discovery rule is applicable to contract actions).

As to the claim for nuisance – which is constant and abatable – the statute of limitations cannot be a complete bar because a new statute of limitations begins to run upon each invasion of the property. Silvester v. Spring Valley Country Club, 344 S.C. 280, 287, 543 S.E.2d 563, 567 (Ct. App. 2001).

II. Clarification regarding the Right to an Ocean View

In an apparent attempt to trivialize the Plaintiffs' claims arising from its breach of the Deed, the Town quotes from Theodore Albenesius' deposition testimony that all he wants is "the view." The Town also argues that the Deed Restrictions were never intended to protect the Plaintiffs' "porch views." From one view point, the Town should not be disparaging the Plaintiff's longing for the ocean views from his oceanfront home which are completely obscured. The Plaintiff's personal, heartfelt desire does not define his legal rights under the 1991 Deed or limit his available remedies for the Town's breach of the Deed restrictions. While those views hold an emotional and aesthetic value to each of the Plaintiffs, their ocean-front property – with the scenic ocean views – are a valuable asset¹ that has been lost because of the Town's failure to honor the obligations and restrictions under the 1991 Deed that is intended to preserve the Accreted Land in the condition that it existed in February 1991.

In a further attempt to belittle and diminish the rights of these Plaintiffs, the Town presents an illogical, irrational hypothetical in footnote 12 about a car lease. It is absurd to equate a daughter's rights under a parent's car lease – whatever those could conceivably be – to the enforcement rights expressly provided in the 1991 Deed to these property owners. No logical comparison can be made between a Toyota and a Lexus with the 1991 dunes of low-growing sea oats and wildflowers with the current jungle that exists in the Accreted Land. The record is clear that the Plaintiffs are not seeking to force the Town to provide them with something more/better

¹ Thomas F. Hartnett, G.A. A, C.B., a South Carolina Certified General Real Estate Appraiser has expressed the opinion that the unchecked vegetation growth in the accreted land has reduced the fair market value of the Plaintiffs' properties by at least one million (\$1,000,000.00). [ROA 152; Hartnett letter – Exhibit 14 to Second Amd. Complt.]

than they had in 1991. They only want to maintain the Accreted Land in the condition as it existed in February 1991.

In its Statement of Facts, the Town makes references to Hurricane Hugo, and implies that the Hurricane destroyed all the trees and vegetation on the Accreted land and gave the Plaintiffs a better view. However, as required by the express terms of the Deed, photographs were taken to document the condition of the Accreted Land at the time of the execution of the Deed in February 1991. There is no evidence of record to support any such finding or inference, nor do the photographic evidence prior to Hurricane Hugo support such a finding or inference. Rather, photographic documentation proves that there was vegetation low in height, with absolutely no maritime forest in front of the Plaintiffs' properties.

The Town argues that the Deed Restrictions are intended to keep the Accreted Land an undeveloped plant/wildlife habitat and brags that it has done a good job of limiting human intervention. [Respondents' Brief, p. 25.] However, these contentions fail to give proper consideration of the true impact of the Town's failure to honor the Deed Restrictions. The change in trimming policies, or as the Town describes it – allowing nature to take its course – has created a maritime jungle that has completely obliterated any views of the shoreline from the front-row (also including the first three rows) property owners' porches and also the inland views from the beachgoers on the shoreline.

III. Clarification regarding the Intent of the 1991 Deed

A. The express intended purpose of the Deed is to preserve the accreted land in the condition as it existed in February 1991.

In this case, the Parties' intent is expressed in the language of the Deed and also in the Summary of Deed. The Town argues that the Deed and the Summary do not mention "porch

views.” While in fact, neither the Deed nor the Summary, use the term “porch views,” they do express the intent to preserve the Accreted Land in the condition as it existed in February 1991. The 1991 Deed expressly describes the aesthetic value of the Accreted Land and the intended purpose of preserving the scenic condition of the Land and contemplates that the Town will trim and control the vegetation for “scenic enhancement” and “providing views of the ocean and beaches to its citizens.” The Deed even goes so far as to specifically provide for documenting, with photographic evidence, the aesthetic and scenic condition of the Land as of February 1991 – for just this type of legal action seeking enforcement of the Restrictions. Protecting natural plant life to allow growth of a maritime forest was not, by any reasonable interpretation, the purpose of the Deed Restrictions. [ROA 97, 96.] Furthermore, the Plaintiffs have produced evidence in this case that Mayor Melvin Anderegg, Sullivan’s Island’s mayor at the time of the 1991 land transfer, explained – in a March 1991 article in the Post and Courier – his understanding of what “scenic enhancement” meant, as used in the 1991 Deed:

[S]cenic enhancement means getting a better view of the ocean. [Mayor Anderegg] said people owning front beach property pay a high price for property and should be allowed to cut back growth. ‘The whole purpose of having front beach property is to have a view of the ocean,’ [Mayor Anderegg] said.

[ROA 210, 211.]

The Plaintiffs maintain that these express statements of intent and provisions in the Deed make it readily apparent that the overriding intent of the Town and the Land Trust was to literally and figuratively take a snapshot in time and preserve the Accreted Land in the same condition *as it existed in February 1991*, for the benefit of the property owners as well as the benefit of the entire Township. The Town attacks this snapshot comparison with absurd

hypotheticals that such a position would require it to do the impossible and maintain a never-changing Bonsai garden, preserving every blade of grass. [Respondents' Brief, p. 22.] Despite the Town's aspersions as to the snapshot in time comparison, the use of deed covenants and other land-use restrictions can be found in any number of communities to preserve a historical time period. The Plaintiffs have not made any such unreasonable demands – they only seek for the vegetation to be trimmed as allowed in 1991 to maintain the Accreted Land in a condition substantially the same as it existed in February 1991.

B. The intent of the majority of voters for the Town Council members is not relevant to interpretation of the 1991 Deed.

The Town also seemingly makes a convoluted, unfounded argument that the Plaintiffs' interpretation of the Deed is held by only a minority of residents and these Plaintiffs – as “a special class of near-beach property owners” – do not have the right to enforce the Deed. [Respondent's Brief p. 21.] First, the fact that the properties owned by these Plaintiffs are front-row does not present any basis (legal or moral) for the Town's attempt to question or diminish the validity of their rights to seek enforcement of the Deed Restrictions because Paragraph 5 of the 1991 Deed expressly grants *any* property owner within the Town (as well as any registered voter) the right to enforce the Restrictions. [ROA 98-99.] Second, there is no evidentiary or legal basis for the Town to argue that the “collective will” of a majority of the island residents and property owners do not agree with these Plaintiffs' claims.

The Town argues that “the various votes of the Town Council make clear that a majority of the Island's resident do not agree with the interpretation put forth by the Appellants.” [Respondents' Brief, p. 21.] In so arguing, it appears that the Town contends that the voters' elections of the various Council members that voted for the 1995/2005 rewritten trimming

ordinances evidences the majority's interpretations/intent as to trimming on the accreted land. However, such a convoluted argument fails for several reasons.

ONE – from a legal point, the individual voters' intent or interpretations are not relevant to the Court's interpretation and enforcement of the 1991 Deed because the Town, as a corporate governmental body, contracted and executed Deeds through its Council. Mason v. Williams, 194 S.C. 290, 9 S.E.2d 537, 542 (1940) (The mayor and town councilmen act together for the municipal corporate entity in entering contracts.); *see also* Aspinwall v. Bd. of Comm'rs of Cty. of Daviess, 63 U.S. 364, 371 (1859) (contract created when legal entity takes actions necessary to execute agreement – not complete upon vote by electorate).

TWO – as a matter of contract law, the intent of the contracting parties is to be ascertained at the time the contract was entered:

In ascertaining intent, the court will strive to discover the situation of the parties, along with their purposes ***at the time the contract was entered***. *Kluttz Resort Realty, Inc. v. Down'Round Development Corp.*, 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977); *Bruce v. Blalock*, 241 S.C. 155, 161, 127 S.E.2d 439, 442 (1962); *Mattox v. Cassady*, 289 S.C. 57, 61, 344 S.E.2d 620, 622 (Ct.App.1986).”

Ecclesiastes Prod. Ministries v. Outparcel Associates, LLC, 374 S.C. 483, 498, 649 S.E.2d 494, 502 (Ct. App. 2007) (emphasis added).

THREE – as an evidentiary point, the election of particular Council members does not evidence any specific intent of the individual voters that formed the electoral majority regarding the issue of ocean views and trimming on the accreted land – only a referendum could do that. Notably, Paragraph 8 of the Deed provides for modification of the Restrictions by a referendum with 75% of the registered voters and a unanimous vote of the Town Council. [ROA 99.] And, if the voters' intent/interpretation of the Deed Restrictions were relevant and ascertainable, it

would certainly make even more compelling the Plaintiffs' claim that tampering with the surveys was a fraudulent act by attempting to manipulate the voters' opinions.

The Plaintiffs would make one final point that bears serious thought on this notion of using the political process and voters' intent to interpret and oppose enforcement of the Deed Restrictions. The two-step transfer of ownership – as originally conceived and executed by the Town and the Land Trust – was deemed “necessary to ensure enforceability of the restrictions and prevent a future Town Council with different motivations from changing or weakening the restrictions or doing away with them altogether.” [ROA 80; Summary of Deed Restriction.]

The Town argues that the Plaintiffs have resorted to this action because they are supposedly “unhappy” that they have been unable form a majority coalition capable of electing Town Council members to effectuate change to the trimming ordinances through the political process. [Respondents' Brief, p. 41.] However, the majority's election of new/different council members over the past 20+ years did not empower the Town to avoid the legally binding obligations under the 1991 Deed.

IV. Clarification regarding the Paragraph 6 Reference to “More Restrictive” Ordinances

As discussed in the Appellants' Brief, the Trial Court based its ruling, in part, on Paragraph 6 of the Deed which contains the language: "The Town may enact ordinances and regulations affecting the Property which are more restrictive than these Regulations or which are not inconsistent with these Restrictions." [ROA 99.] The Plaintiffs maintain that the Trial Court's construction to allow the Town to limit trimming and allow overgrowth does not serve the intent of the Deed to preserve the accreted land in the condition as it existed in February

1991, and that when viewed in the proper context, the “more restrictive” provision of Paragraph 6 might allow the Town to limit the trimming to shorter – but not taller – heights.

The Town refers to this argument pejoratively as an “Alice in Wonderland” argument. However, it is the Town’s reasoning that is nonsensical. First, this two-step deed transfer was not prompted or spearheaded by the Land Trust, as a nature conservation organization. The Summary documents that the Town and its residents were prompted to explore options for protecting the Accreted Land in the face of scientific studies that the accretion would continue and the potential for development on the Accreted Land. Their purpose was to provide a more permanent solution to prevent development to preserve the character/lifestyle of the Town – not to promote growth of a maritime forest. Second, the fact that there was no specific beachfront homeowners’ association directly involved as a party in the drafting of the Deed does not negate the evidence of record that protecting ocean views was a consideration. The Town has acknowledged that the residents of Sullivan’s Island were aware of disputes over rights to ocean views and breezes and beach access on accreted land on the Isle of Palms which was a factor in prompting the Land Trust transfer. [ROA 744; Town MIS Motion (right to a view), p. 6.] Historically, as the Accreted Land grew, property owners had been given opportunities to purchase the newly accreted land abutting their lots, and by their support (political and monetary) they anticipated a long-term solution to prevent development on the accreted land and to preserve their ocean views and beach access.

V. Clarification regarding the OCRM Letter and the Critical Line

Apart from the Town’s trimming ordinances, State regulations govern trimming on parts of the accreted land located in a “Critical Line” as designated by SCDHEC’s Coastal Division (“OCRM”), pursuant to State law. S.C. Code § Ann. 48-39-10 (J). One of the grounds upon

which the Town opposes the Plaintiffs' claims for monetary damages rests on a letter from the Chief Counsel of the DHEC OCRM Office, written during the pendency of this action offering comment on the Plaintiffs' Second Amended Complaint – inviting their attention to the OCRM trimming regulation and the need for a permit:

Although I do not know the extent of your clients' desires to cut, trim and prune the shrubs and trees seaward of their homes, I would invite your attention to S.C. Regulations §30-11D(6). This regulation prohibits “[t]he destructions of beach or dune vegetation seaward of the setback line ... unless there is no feasible alternative.” Furthermore, S.C. Regulation §30-21F(4) states that “[a]ny activity that will disturb the beach or dune vegetation within the critical area requires a Coastal Council permit.” I mention these regulations in an effort to help your clients avoid violating them if they prevail in the above-referenced action.

[ROA 359; Churdar/DHEC letter 1/24/14.] Relying on that letter, the Trial Court struck the damage claims because the Plaintiffs have not yet applied for or obtained a trimming permit from the OCRM. [ROA 25; 7/30/15 Order.] As more fully discussed in their opening brief, the Trial Court has misapprehended the import of that letter and the Regulations cited therein.

Most fundamentally, the Trial Court misapprehends or ignores the fact that under Regulation 30-2, these Plaintiffs cannot even apply for a OCRM “cutting permit” without the Town’s permission since they are not the owners of the accreted land. Under S.C. Regulation 30-2, in order to receive a permit from OCRM for non-exempt activities seaward of the setback line, an application must include: “A certified copy of the deed, lease or other instrument under which the applicant claims title, possession or permission from the owner of the property to carry out the proposal.” In the face of the Town’s position on trimming, this action is functionally a prerequisite to filing any application for an OCRM permit because an administrative proceeding in the OCRM would not be the appropriate venue to litigate the issue of these Plaintiffs’ rights

under the 1991 Deed. Notably, this is a point acknowledged in the OCRM Chief Counsel by his by reference to the need for a OCRM permit “if” the Plaintiffs prevail in this action.

Perhaps a question worth pondering is why the OCRM Chief Counsel took it upon himself to contact the Plaintiffs in the first place. The Plaintiffs had not submitted any application and there was no matter on this point pending before his agency. To the Plaintiffs’ knowledge, there has never been any dispute or contested issue with OCRM about trimming on the Accreted Land. Why then would the OCRM Chief Counsel send an unsolicited opinion letter advising (or warning) the Plaintiffs about a possible violation for trimming without an OCRM permit?

On a final note, the facts are that not all the Accreted Land lies within the current OCRM Critical Line and the Critical Line is overdue for redrawing. In addition, the OCRM permitting process is permissive and discretionary. But, even if the Plaintiffs could not obtain a OCRM permit for trimming, they still are entitled to enforcement of the Deed Restrictions to improve their views (and abate the nuisances) over and across the Accreted Land outside of the Critical Line.

CONCLUSION

WHEREFORE, based on the foregoing and each and all arguments of their opening brief, the Appellants respectfully ask the Court to reverse each and all of the Trial Court’s orders of granting summary judgment and/or striking the claims seeking declaratory and injunctive relief, or in the alternative, monetary damages, for breach of contract, breach of contract accompanied by a fraudulent act, violation of the Constitutional Contract Clauses, and nuisance. The Appellants further request that the Court remand the case for full consideration on the merits of

their claims seeking to compel the Town to honor and abide by the Deed Restrictions to preserve the Accreted Land on Sullivan's Island in the condition as it existed in February 1991.

Respectfully submitted,
Hood Law Firm, LLC



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October 26, 2016

Certification of Counsel

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SC Court of Appeals

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

October 26, 2016



Robert H. Hood, Sr.
James B. Hood

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 26th day of October, 2016, a copy of the Final Brief and Final Reply Brief on behalf of Appellants Nathan Bluestein, Ettaleah Bluestein, M.D., Theodore Albenesius, III, and Karen Albenesius, were served by depositing said copy of each in the U.S. Mail, with sufficient first class postage, on the following counsel at the addresses listed below:

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October 26, 2016

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court, Court of Appeals
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Re: Nathan Bluestein, Ettaleah Bluestein, M.D., Theodore Albenesius, III, and Karen Albenesius v. Town of Sullivan's Island and Sullivan's Island Town Council
C/A No. 2010-CP-10-5449
Appeal No. 2015-002550
HLF File No. 625.002

Dear Ms. Kitchings:

Enclosed please find the original and fifteen copies of the Record on Appeal, Final Brief, and Final Reply Brief on behalf of the Appellants Nathan Bluestein, Ettaleah Bluestein, M.D., Theodore Albenesius, III, and Karen Albenesius in the above-referenced matter. Also enclosed is the original and one copy of the Certificate of Service for the Record on Appeal and Final Briefs. Please return a clocked-in copy of each in the enclosed envelope. By copy of this letter we are serving counsel for the Respondents with a hard copy of each brief and the Record on Appeal.

Kind regards,

Yours truly,


James B. Hood

JBH/jad

Enclosures

cc: J. Brady Hair, Esquire (w/ enclosures)
Derk Van Raalte, IV, Esquire [*Via E-Mail*]