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THE STATE OF SOUTH CAROLINA
In The Supreme Court

S.C. SUPREME COURT

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

Patrick Michael Duffy, United States District Judge

Appellate Case No. 2016-001766

Paul Chenard and Rebecca Chenard, Plaintiffs,

v.

Hilton Head Island Development Company, LLC d/b/a Coral Resorts and Sunrise Vacation Properties, Ltd. d/b/a Coral Resorts, Defendants.

James Nichols and Irene Nichols, Plaintiffs,

v.

Hilton Head Island Development Company, LLC, Sunrise Vacation Properties, Ltd., Sherri J. Smith, Patrick Budnik, and Robert Lauderman d/b/a Coral Resorts, Defendants.

Linda Renchkovsky, Plaintiff,

v.

Coral Resorts, LLC, and Sunrise Vacation Properties, Ltd. d/b/a Coral Resorts, Defendants.

Robert Curry, Jr. and Monica R. Curry, Plaintiffs,

v.

Hilton Head Island Development Company, LLC d/b/a Coral Resorts and Sunrise Vacation Properties, Ltd. d/b/a Coral Resorts, Defendants.

Charles Olenick and Karen Maniscalco, Plaintiffs,

v.

Coral Resorts, LLC and Sunrise Vacation Properties, Ltd. d/b/a Coral Resorts, Defendants.

Phillip Ross and Kimberly Ross, Plaintiffs,

v.

Hilton Head Island Development Company, LLC, Sunrise Vacation Properties, Ltd., Sherri J. Smith, David Watson, and Sheldon Stanhope, Defendants.

**PLAINTIFFS' RETURN IN OPPOSITION TO
DEFENDANTS' PETITION FOR REHEARING**

Plaintiffs hereby submit their Return in Opposition to Defendants Hilton Head Island Development Company, LLC, Coral Resorts, LLC, Sunrise Vacation Properties, Ltd., Sherri J. Smith, David Watson, and Sheldon Stanhope's Petition for Rehearing of Opinion No. 27720, filed May 17, 2017, as the Court requested of Plaintiffs by letter dated June 2, 2017.

Background

Opinion No. 27720 answered three certified questions posed by the South Carolina District Court, Honorable Patrick Michael Duffy presiding, concerning the interpretation of the South Carolina Vacation Time Sharing Plans Act, S.C. Code Section 27-32-10, et seq. ("Timeshare Act") relating to Plaintiff timeshare purchasers' claims for Defendants' violations of the Timeshare Act.

Standard for Petitions for Rehearing

Pursuant to Rule 221, SCACR, Petitions for Rehearing shall state with particularity

the points supposed to have been overlooked or misapprehended by the Court.

Defendants' Petition for Rehearing

Defendants' Petition for Rehearing, filed with the Court on June 1, 2017, seeks rehearing and reconsideration of Opinion No. 27720 based upon the following points alleged by Defendants to have been misapprehended by the Court:

1. That the Court misapprehends that Real Estate Commission determinations concerning timeshare plan registrations are distinct from Real Estate Commission determinations regarding the sale of timeshare interests, and that a timeshare purchaser's private right of action does not apply to Real Estate Commission determinations concerning timeshare plan registrations;
2. That the Court misapprehends that Defendants' arguments are premised upon public policy arguments rather than the language of the Timeshare Act;
3. That the Court's misapprehends that its Opinion will result in grave, unintended, and absurd results;
4. That the Court misapprehends the nature of a timeshare plan registration determination, which does not concern private rights of timeshare purchasers and, accordingly, is not entitled to judicial review;
5. That the Court misapprehends the distinction between the terms "enforce" and "prosecute" in Section 130 due to its interpretation of same in isolation from the remainder of the Timeshare Act, resulting in an erroneous interpretation of Section 130, which should be construed to limit the private right of action to enforcing final decisions of the Real Estate Commission only; and
6. That the Court misapprehends that the private right of action described in Section 130 of the Timeshare Act is restricted to timeshare purchasers bringing only certain types of actions codified elsewhere in the Timeshare Act, rather than actions claiming violations of the Timeshare Act.

In response Plaintiffs generally assert that Defendants' Petition for Rehearing is simply an attempt to re-litigate its position again, rather than to bring to the Court's attention any material fact or principle of law that has been either overlooked or misapprehended by the Court. Each of the six points referenced in Defendants' Petition were previously asserted,

argued, considered, and decided by the Court and, therefore, provide no basis for granting a rehearing as requested by Defendants.

Further, Plaintiffs respond to each of Defendants' six assertions specifically as set forth below.

Defendants' Allegations and Plaintiffs' Responses

1. That the Court misapprehends that Real Estate Commission determinations concerning timeshare plan registrations are distinct from Real Estate Commission determinations regarding the sale of timeshare interests, and that a timeshare purchaser's private right of action does not apply to Real Estate Commission determinations concerning timeshare plan registrations.

Defendants assert that the Court misapprehends that the Real Estate Commission makes determinations as to both timeshare plan registrations as well as sales to timeshare purchasers, and that such are distinct from one another.

Defendants further assert that a timeshare purchaser's private right of action only applies to determinations regarding timeshare sales and not timeshare plan registrations. In support of this assertion, Defendants offer an analogy relating to motor vehicle operator licensing as it relates to motor vehicle negligence claims.

In response, Plaintiffs assert that the Court does not misapprehend the Real Estate Commission's different roles relating to the timeshare industry as it indicated in its Opinion, including in Section II.B, which states:

[T]he [REC], as part of its regulatory mandate, scrutinizes the practices and procedures of persons developing or selling interests in vacation time sharing plans in this State...

The Timeshare Act prohibits developers from advertising or selling plans that have not been registered with the REC... To register a plan, the applicant must submit numerous documents to the REC, including copies of the proposed sales

contract, advertising materials, and any regulations on the use of the property the applicant intends to impose... If the REC determines the materials comply with the Timeshare Act, the REC is directed to issue an order approving their use, at which point the plan is considered registered.

Section 27-32-190 of the South Carolina Code describes the application process and the REC's duties in more detail. Among other things, the REC must examine the applicant's advertising materials to ensure they are not misleading, make sure neither the seller nor any officer or principal thereof has been convicted of certain crimes within the past ten years, and satisfy itself that there are no encumbrances on the property that could diminish the purchaser's interest in, or use of, the property...

Within thirty days from the date the [REC] receives an application for registration, the [REC] must enter an order registering the vacation time sharing plan or rejecting the registration. If an order of rejection is not entered within thirty days from the date of application, the vacation time sharing plan is considered registered unless the applicant has consented in writing to a delay.

In addition to the initial registration, a seller must obtain the REC's approval before making any substantial changes to a registered plan.

To perform its duties, the REC is empowered to conduct investigations, issue subpoenas and cease and desist orders, and seek court orders compelling compliance with the REC's requests... The REC can revoke a registration for a variety of reasons, including failing to comply with a cease and desist order or concealing a material fact in an application... As part of its "responsib[ility] for the enforcement and implementation of" the Timeshare Act, the REC can also direct the Department of Licensing, Labor and Regulation to prosecute violations of the Act... Critically for purposes of the certified questions before the Court, this authority "do[es] not limit the right of a purchaser or lessee to bring a private action to enforce the provisions of [the Timeshare Act].

Plaintiffs further respond that the certified questions presented by the District Court

did not seek for the Court to differentiate in its answers between different categories of Real Estate Commission determinations, and the Timeshare Act itself draws no distinction between categories of violations in the language of Section 130 ("The provisions of this Chapter do not limit the right of a purchaser or lessee to bring a private action to enforce the provisions of this chapter.").

Further, the Court's Opinion evidences the Court's understanding that the Plaintiffs claim violations of the Timeshare Act relating to both registrations and sales practices, as stated in Section I:

The Fullbrights commenced a purported class action against Spinnaker... alleging Spinnaker violated the Timeshare Act by failing to comply with the Act's registration requirements. The Fullbrights sought the return of all money paid under the contract, with interest, as well as a declaration that the contract was invalid and nonbinding.

...

Like the Fullbrights, the plaintiffs in the *Chenard* cases are individuals that entered into contracts to purchase interests in timeshare plans for Hilton Head resorts. In addition to claims for violations of the Timeshare Act, [the *Chenard* plaintiffs] brought claims for, among other things, fraud, negligent misrepresentation, and violations of the South Carolina Unfair Trade Practices Act. Their claims under the Timeshare Act included allegations that the timeshare plans they agreed to were not properly registered with the REC, and they sought to void their purchase contracts.

Despite the diversity of Plaintiffs' claims, the Court nonetheless answered the certified questions in a single Opinion, stating "[a]s these cases present the same legal questions, they were consolidated for oral argument before the Court. We now resolve them in a single opinion."

Finally, Plaintiffs respond that Defendants' analogy to a motor vehicle negligence claim in support of its assertion fails to include that Plaintiffs allege Defendants failed to meet the statutory requirements set forth in the Timeshare Act over a period of many years, yet the Real Estate Commission retroactively forgave such failures at the request of Defendants, such allegations being incongruous with Defendants' analogy's parallel assertion that the "defendant driver... took every necessary step to ensure that his license was valid." Is it precisely these failures by Defendants to comply with the Timeshare Act's requirements that this litigation concerns.

2. That the Court misapprehends that Defendants' arguments are premised upon public policy arguments rather than the language of the Timeshare Act.

Defendants assert that the Court failed to understand that Defendants' arguments were based not solely on public policy arguments but rather on the plain language of the Timeshare Act as well, which contains Defendants' public policy arguments in Section 405(M) of the Timeshare Act. Defendants further assert that interpreting Section 130 of the Timeshare Act to allow Plaintiffs to challenge timeshare registration determinations would contradict Section 405(M)'s stated purpose, thereby undermining the stability of the timeshare industry.

In response, Plaintiffs assert that the Court did not fail to understand that Defendants' public policy arguments are alleged to be supported by Section 405(M), as is clearly indicated in its Opinion, including in Section III.A.1, which recites Section 405(M)'s statutory language and compares it with Section 405(E)'s separate policy language relating to timeshare purchaser's rights ("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”).

3. That the Court misapprehends that its Opinion will result in grave, unintended, and absurd results.

Defendants assert that the Court misapprehends that its Opinion will result in grave, unintended, and absurd results, allowing for a multiplicity of litigation and chaos in the timeshare industry.

In response, Plaintiffs assert that the Court specifically addressed this point in Section III.A.1 in stating that:

We readily acknowledge there is considerable merit to Defendants' concerns, and we do not reject them lightly. However valid Defendants' concerns may be, they must yield to the plain language of a statute that commands a different result.

This passage indicates that while the Court appreciates Defendants' concerns regarding potential impacts on the timeshare industry, nevertheless such concerns do not override the plain language of the subject statutory provisions.

4. That the Court misapprehends the nature of a timeshare plan registration determination, which does not concern private rights of timeshare purchasers and, accordingly, is not entitled to judicial review.

Defendants assert that the Court misapprehends the nature of a timeshare plan registration determination, which does not concern private rights of timeshare purchasers and, accordingly, is not entitled to judicial review. In support of such assertion Defendants offer an analogy regarding the doctrine of public nuisance.

In response, Plaintiffs assert that the Court understands the the nature of a Real Estate

Commission's timeshare plan registration determination very well, as is indicated in its Opinion, including in Section II.B, which again states:

[T]he [REC], as part of its regulatory mandate, scrutinizes the practices and procedures of persons developing or selling interests in vacation time sharing plans in this State...

The Timeshare Act prohibits developers from advertising or selling plans that have not been registered with the REC... To register a plan, the applicant must submit numerous documents to the REC, including copies of the proposed sales contract, advertising materials, and any regulations on the use of the property the applicant intends to impose... If the REC determines the materials comply with the Timeshare Act, the REC is directed to issue an order approving their use, at which point the plan is considered registered.

Section 27-32-190 of the South Carolina Code describes the application process and the REC's duties in more detail. Among other things, the REC must examine the applicant's advertising materials to ensure they are not misleading, make sure neither the seller nor any officer or principal thereof has been convicted of certain crimes within the past ten years, and satisfy itself that there are no encumbrances on the property that could diminish the purchaser's interest in, or use of, the property...

Within thirty days from the date the [REC] receives an application for registration, the [REC] must enter an order registering the vacation time sharing plan or rejecting the registration. If an order of rejection is not entered within thirty days from the date of application, the vacation time sharing plan is considered registered unless the applicant has consented in writing to a delay.

In addition to the initial registration, a seller must obtain the REC's approval before making any substantial changes to a registered plan.

Plaintiffs further assert that these cases demonstrate the direct impact that timeshare plan registration determinations have on timeshare purchaser's rights. Plaintiffs allege that

they purchased timeshare interests from Defendants as the result of Defendants' offering timeshare interests to them in violation of the Timeshare Act by not possessing a valid timeshare registration at the time of sale. Plaintiffs allege that following such legally-deficient timeshare sales transactions the Real Estate Commission then improperly and retroactively granted Defendants timeshare plan registrations. As such, Plaintiffs were deprived thereby of the "significant and unique consumer protections not available to purchasers of other forms of real property" as described in Section 405(E) and otherwise provided for within the Timeshare Act. This factual scenario illustrates the real impact that timeshare plan registration determinations can have on timeshare purchasers' rights.

Regarding Defendants' analogy as to public nuisance offered in support of its assertion that Real Estate Commission determinations concerning timeshare plan registrations do not concern private rights of timeshare purchasers, Plaintiffs assert that this analogy is simply inapplicable to these cases insofar as (1) Plaintiffs' Timeshare Act claims are statutory and not based upon common law, and (2) Plaintiffs are actual purchasers for value of the subject timeshare interests at issue in these cases, unlike a typical litigant in a public nuisance case who has usually suffered no direct economic loss.

It is undisputed that the sale of timeshare interests in South Carolina is governed by the Timeshare Act, as well as that Plaintiffs provided Defendants with valuable consideration in exchange for ownership of the subject timeshare interests alleged to have been sold in violation of the Timeshare Act. These undisputed points render Defendants' public nuisance analogy wholly inapplicable.

5. That the Court misapprehends the distinction between the terms “enforce” and “prosecute” in Section 130 due to its interpretation of same in isolation from the remainder of the Timeshare Act, resulting in an erroneous interpretation of Section 130, which should be construed to limit the private right of action to enforcing final decisions of the Real Estate Commission only.

Defendants assert that the Court misapprehends the distinction between the terms "enforce" and "prosecute" used in Section 130 due to interpreting same in isolation rather than in conjunction with the remainder of the Timeshare Act, resulting in an erroneous interpretation of Section 130. Defendants assert that Section 130 only allows timeshare purchasers to bring an action to enforce previously-adjudicated Real Estate Commission decisions of violations regarding timeshare sales only (and not determinations regarding timeshare plan registrations). In support of this assertion Defendants quote Black's Law Dictionary's definitions of both "enforce" and "prosecute."

In response, Plaintiffs assert that the Court does not consider the third sentence in Section 130 in isolation, as is indicated in its Opinion at Section II.A., wherein the Court, citing *Beaufort County v. S.C. State Election Commission*, states that:

[I]t is well settled that statutes dealing with with same subject matter are *in para materia* and must be construed together, if possible, to produce a single, harmonious result.

Accordingly, Plaintiffs assert that the Court did not fail to understand the terms enforce and prosecute, as is indicated in its Opinion at Section II.B, which states:

To perform its duties, the REC is empowered to conduct investigations, issue subpoenas and cease-and-desist orders, and seek court orders compelling compliance with the REC's requests.... The REC can revoke a registration for a variety of reasons, including failing to comply with a cease-and-desist order or concealing a material fact in an application... As part of its "responsib[ility] for the enforcement and

implementation of" the Timeshare Act, the REC can also direct the Department of Licensing, Labor and Regulation to prosecute violations of the Act... Critically for purposes of the certified questions before the Court, this authority "do[es] not limit the right of a purchaser or lessee to bring a private action to enforce the provisions of [the Timeshare Act."

Further, Plaintiffs assert that no reference to Black's Law dictionary is necessary to illuminate the Court as to the definitions of these commonly-used legal terms of art.

6. That the Court misapprehends that the private right of action described in Section 130 of the Timeshare Act is restricted to timeshare purchasers bringing only certain types of actions codified elsewhere in the Timeshare Act, rather than actions claiming violations of the Timeshare Act.

Defendants assert that the Court misapprehends that the private right of action provision of Section 130 of the Timeshare Act is restricted to timeshare purchasers bringing only certain actions codified elsewhere in the Timeshare Act, including (1) Unfair Trade Practices Act claims, (2) claims concerning disputed escrow funds, or (3) claims for recovery under the Vacation Recovery Fund, rather than private actions claiming violations of the Timeshare Act.

In response, Plaintiffs assert that the Court carefully examined the language of Section 130 and disagreed with the interpretation Defendants offer, as is indicated in its Opinion in Section III.A.:

Plaintiffs contend they have a clear statutory right to bring an action in the courts to seek redress for violations of the Timeshare Act. Defendants discount the clear language in section 27-32-130 and would have us declare the statute ambiguous, thereby allowing us to consider their argument that the state's public policy - as evidenced by the extensive regulatory framework created by the Timeshare Act - requires the REC's jurisdiction to be exclusive.

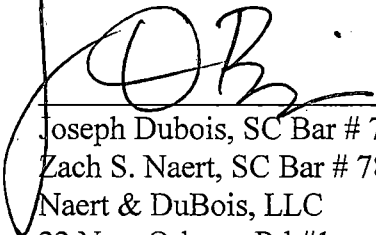
Further, at Section III.A.1:

As Plaintiffs point out, the statute [Section 130] that gives the REC authority to enforce the Timeshare Act makes it clear that grant of authority does not interfere with their ability to bring a private right of action to do the same... Given this unambiguous language, we would exceed our judicial role were we to allow Defendants' policy arguments to override the policy expressed by the General Assembly in section 27-32-130.

Conclusion

As set forth above, Defendants' assertions that the Court misapprehends South Carolina timeshare law as to the six points presented is simply an attempt to re-litigate these issues once more following an unfavorable result. Plaintiffs assert that such attempt is outside of the purview of Rule 221 of the South Carolina Appellate Court Rules, and, accordingly, Plaintiffs respectfully request that Defendants' Petition for Rehearing be denied.

Respectfully submitted,



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Hilton Head Island
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Defendants.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date indicated he served counsel for the Defendants with a copy of the Plaintiffs' Return in Opposition to Defendants' Petition for Rehearing by mailing copies of the same by United States Mail with first class postage prepaid to the following addresses:

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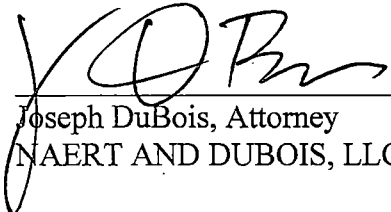
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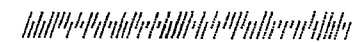
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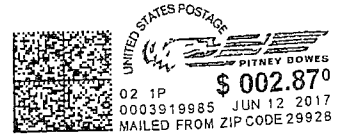
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