

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Lake Frances Community Association,
Inc.,

Plaintiffs,

v.

Andrew G. Rice, Anne P. Rice and The
Ricechild Group, LLC,

Defendant(s).

(17934.47)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2015-CP-32-03574

ORDER

RECEIVED
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SC Court of Appeals

INTRODUCTION

The parties tried this disputed lake use deed restriction case May 18, 2017. Joel M. Deason, Esq. and Stephen D. Porter, Esq. represented Lake Frances Community Association, Inc. ("Plaintiff"), Lawrence M. Hershon, Esq. represented Andrew G. Rice, Anne P. Rice, and the Ricechild Group, LLC ("Defendants").

Prior to 2002, Laurel Hill Development ("LHD") acquired a large tract of land for development. It developed a portion and eventually sold the remainder to the parties or their predecessors in title. In 2002, LHD conveyed a parcel from the undeveloped portion of the tract to Andrew and Anne Rice subject to certain restrictions within the deed. The parcel extends into and is surrounded by the body of water known as Lake Frances. Although it is technically a peninsula, the parcel was referred to as the Island Property during the litigation. LHD gave Andrew and Anne Rice conditional permission or license to water ski on Lake

Frances; however, the terms of the Island deed plainly state that their ability to water ski on LHD's lake could be modified or even eliminated.

In 2006, LHD conveyed two parcels from its remaining undeveloped tract to Lake Frances Development Corporation ("LFD"). This conveyance included title to the body of water known as Lake Frances and other property that became Phase One of the Lake Frances Community. In 2007, LFD burdened the property it acquired from LHD with a recorded Declaration of Covenants (the "Declaration") and rules prohibiting skiing on Lake Frances. The covenants were amended in 2008 to incorporate Lake Regulations that prohibited skiing and other activities where people are pulled or towed by a boat.

Andrew and Anne Rice were notified by LFD that skiing would not be allowed on the Lake; however, Defendants continued to ski on the lake despite having received notification of the new owner's disapproval. LHD assigned its rights to modify the Rice island deed to LFD and LFD modified the restrictions in Rices' island deed. The modification included provisions that subjected Defendants' use of the lake to Plaintiff's Lake Regulations that prohibit skiing and other activities pulling or towing persons by a boat. LFD conveyed the lake property and other common areas to Plaintiff in December of 2008.

LFD conveyed Lot 55 to The Ricechild Group, LLC in August of 2011 and later conveyed an Access Parcel between Lots 55 and 56 to Andrew Rice in August of 2014.

Plaintiff sued to enjoin Defendants from skiing on its lake and brought claims for Breach of Contract, Enforcement of Restrictive Covenants, and Specific Performance. Plaintiff also asked for Declaratory Judgments that Plaintiff had the right to unilaterally amend the provisions in the March 14, 2002 Island Deed and that it may levy fines which are a lien on upon Defendants' property that can be foreclosed for non-payment. Defendants answered and asserted counterclaims alleging Breach of Contract, Abuse of Process, and Implied Easement. Defendants did not plead nor argue, nor has the court considered, any rights to use the waters of Lake Frances based on riparian, littoral, navigable, non-navigable or adjoining landowner to body of water rights.

All of Plaintiff's claims were referred to the Master in Equity together with Defendant's claim of Implied Easement. Defendants' remaining claims were stayed pending the resolution of the matters referred. The parties filed cross motions for summary judgment and this court granted Plaintiff's motion to deny Defendants' claim for an implied easement to use the lake and granted Defendants' motion for judgment on Plaintiff's claim for damages to the shoreline of Lake Frances.

The Court rules that the Plaintiff properly amended the Rice's deed restrictions to prohibit certain lake activities and terminate the license or rights to use the lake as described in the deed. The parties agree that the island property owned by the Rices is not a part of the subdivision restrictions since it was conveyed prior to restrictions and since the Rices have declined to make the island a part of the subdivision. The Court denies Plaintiff's request to levy fines, attorney fees or costs against Rice or Ricechild LLC.

FINDINGS OF FACT

1. The subject property is real property in the County of Lexington, State of South Carolina.
2. This Court obtained jurisdiction by Order of Reference on January 18, 2017.
3. The Association is a non-profit corporation organized and existing under the laws of the State of South Carolina.
4. The Rices are residents of Lexington County and the State of South Carolina and reside at a property (the "Island Property"), which is situated within a lake known as Lake Frances (the "Lake"). The Island Property is located at 255 Lake Frances Drive in Lexington County, South Carolina.
5. Ricechild is a limited liability company organized and existing under the laws of the State of South Carolina. Ricechild owns property ("Lot 55") neighboring the Island Property. Lot 55 is located at 259 Lake Frances Drive in Lexington County, South Carolina.

These events and dates are undisputed and relevant to analysis:

- a. 03/13/2002: LHD conveyed Island Property subject to conditions and restrictions to Andrew G. Rice and Anne P. Rice.
- b. The Lake Frances dam failed in 2006. The lake drained and the lake bed was discovered to be littered with stumps and other hazardous conditions.
- c. 04/13/2006: Laurel Hill conveyed to Lake Frances Development, Inc. ("Lake Frances Development") approximately 93.39 acres which consisted of the Lake and land surrounding the Rices' Island Property, which became part of the Lake Frances subdivision. (Pl.'s Ex. 3.)
- d. 05/11/2006: Kevin Steelman, on behalf of Lake Frances Development as its President, formed the Lake Frances Community Association ("Association").

(Trial Tr. page 19; Steelman Aff. ¶ 5.)

- e. 08/20/2006: Andrew G. Rice conveyed his interest in the Island Property to Anne P. Rice with the exact same restrictions and conditions in their 3/13/2002 deed. (Pl.'s Ex. 2) 01/26/2007: LFD records the Declaration of Covenants, Conditions and Restrictions for Lake Frances Community Association, Inc. subjecting the property obtained from LHD (including the lake) to the covenants and restrictions. The Rules and Regulations place various restrictions and covenants upon the property purchased by Lake Frances Development. Specifically, Paragraph 34 of the Association's Rules and Regulations states: "34. Water Skiing. Water skiing and other water activity involving a Person being pulled or towed by a boat on Lake Frances are forbidden." (Pl.'s Ex. 4.)
- f. 05/07/2007: Laurel Hill conveyed the remaining property that became part of the Lake Frances subdivision to Lake Frances Development.
- g. 05/31/2007: Kevin Steelman, on behalf of Lake Frances Development, sent Andrew Rice a letter requesting that he sign a document entitled "Supplemental Declaration of Covenants." (Pl.'s Ex. 11.) The Supplemental Declaration attempted to incorporate the Island Property into the Association and subject it to the covenants and restrictions that applied to the Lake Frances subdivision. (Pl.'s Ex. 11.) The Rices never executed the Supplemental Declaration. (Trial Tr. p. 24, l. 23.)
- h. 07/07/2007: Andrew Rice sent a responsive letter to Kevin Steelman. (Pl.'s Ex. 12.)
- i. 07/31/2007: Lake Frances Development's counsel sent the Rices a letter

informing them of Lake France Development's intention to unilaterally modify the Rices' Deed to subject the owners of the Island Property to the terms, conditions, covenants and restrictions contained in the Association's Rules and Regulations. (Pl.'s Ex. 13.)

- j. 08/31/2007: Andrew Rice responded to the July 31, 2007, letter. In his response, Andrew Rice stated that any unauthorized deed modification affecting the Island Property would be invalid. (Pl.'s Ex. 14.)
- k. 05/12/2008: LHD assigns its right to modify the Rice Island Property deed restrictions to LFD.
- l. 05/14/2008: Lake Frances Development executed a Modification of Restrictions ("Modification"). (Pl.'s Ex. 7.) The Modification stated that Paragraph 20 of the Deed was to be deleted in its entirety and replaced with the following paragraph:

20. The use by Grantees (Rice), their heirs, successors, assigns, tenants, guests, occupants and invitees, of the adjacent body of water known as Lake Frances shall be subject to and governed by the rules and regulations promulgated and published by the Board of Directors of the Lake Frances Community Association, Inc. (the "Association") concerning the use of the Lake (the "Lake Regulations"), as revised by the Board of Directors from time to time; provided, however, that said Lake Regulations as incorporated into these Deed Restrictions and made applicable to the use of the Lake by Grantees, may be modified by Lake Frances Development, Inc., its successors and assigns, with the consent of the Board of Directors of the Association, as Lake Frances Development, Inc. deems necessary or desirable due to the unique situation and nature of the Island Property. Grantees, their heirs, successors, assigns, tenants, guests, and invitees shall be bound by, and the property herein conveyed shall be subject to, the Lake Regulations attached hereto as Exhibit "A" and incorporated herein by reference.....
- m. 06/03/2008: LFD records a modification to the restrictions contained in the Rices' 03/13/2002 Island Property deed. The modification includes provisions that subject the Rices' use of the lake to the Plaintiff's Lake Regulations.

- n. 12/29/2008: LFD conveyed Common Areas to Plaintiff. This conveyance includes the Lake property.
- o. 07/11/2011: Lake Frances Development and Ricechild signed an agreement for Ricechild's purchase of Lot 55. Attached to the agreement was a document entitled "Addendum to Agreement of Sale."
- p. 08/31/2011: LFD conveyed Lot 55 to The Ricechild Group, LLC.
- q. 07/24/2014: Kevin Steelman informed a resident of the Lake Frances subdivision, in response to an inquiry about Andrew Rice's use of the lake for water skiing, that "[u]ntil recently, we had received no complaints about [Andrew Rice's] use of the lake, and therefore, could not reasonably justify the cost to the Association of pursuing such litigation." (Def.'s Ex. 22.)
- r. 08/04/2014: LFD conveyed Access Parcel between Lots 55 and 56 to Andrew G. Rice.
- s. 08/08/2014: Association's counsel sent the Rices a letter demanding that they cease from prohibited activities on the Lake. (Pl.'s Ex. 15.)
- t. 05/28/2015 & 07/15/2015: Association's manager, Rhonda Bossert, sent Ricechild letters regarding water skiing on the Lake and notice of fines. (Pl.'s Exs. 18 & 21.)
- u. 06/18/2015 & 07/09/2015: Association's counsel sent Ricechild and the Rices a letter demanding that they cease from water skiing on the Lake. (Pl.'s Exs. 19 & 20.)
- v. 01/21/2016: Association's Resident Transaction Report showed that Ricechild owed the Association \$16,949.16. The majority of the balance was due to fines

- assessed for water skiing and other prohibited activities. (Def.'s Ex. 19.)
- w. None of the Defendants have ever held title to Lake Frances. When Andrew and Anne Rice purchased the Island Property in 2002 they were represented by an attorney and both signed a document acknowledging the restrictions contained in the deed; Andrew was a licensed real estate broker in charge; Anne was a licensed real estate agent.
 - x. Andrew and Anne Rice admit that their family and guests regularly ski and participate in other activities involving a person being pulled or towed by a boat on Lake Frances.
 - y. No other individuals are known to ski on Lake Frances other than the Rice and their guests since the dam was restored in 2007. (Tr. at 29:25 – 30:2).
 - z. Defendants received notice of the Plaintiff's rules and regulations prohibiting skiing on the Lake.
 - aa. Defendants admit that Lot 55 was burdened by the Declaration when Ricechild took title. Similarly, the Declaration was of record when Rice took title to the access lot.
 - bb. Island Property owners Andrew and Anne Rice were invited to become members of the Plaintiff association according to Paragraph 20 of the 2002 deed, but refused.
 - cc. Defendants Andrew and Anne Rice were notified that LFD intended to modify the restrictions in the Island Property deed.
 - dd. Defendants Andrew and Anne Rice knew LFD recorded a modification to their deed in 2008 that incorporated lake rules that prohibit skiing and other activities

involving a person being pulled or towed by a boat on Lake Frances.

- ee. Defendants filed a title insurance claim regarding the deed modification that was denied by their carrier.
- ff. Defendant The Ricechild Group, LLC, is a member of the Plaintiff association by its ownership of Lot 55.
- gg. Defendant The Ricechild Group, LLC is a single member LLC owned and controlled by Andrew G. Rice.
- hh. There is no persuasive evidence that since 2011 The Ricechild Group, LLC has claimed a right to ski or has skied on the lake; nor does it own a boat or any ski equipment. No boat has ever been launched from LLC's property. Further, the LLC has never held a company function involving waterskiing or other prohibited actions. (Trial Tr. pp. 224–25 Plaintiff neither pled nor proved any causes of action such as alter ego or piercing the corporate veil.

ISSUES

1. Is this action legal or equitable?
2. What rights do the Rices have to water ski on the Lake?
3. Was the unilateral modification of the Deed proper?
4. Did the Association waive the right to prohibit water skiing?
5. Is Ricechild LLC liable for the individual actions of the Rices?
6. Does the Association have the right to levy fines, attorney's fees and costs against Defendant's properties?
7. Can Association enjoin Rice from water skiing on Lake Frances?

CONCLUSIONS OF LAW & DISCUSSION

1. **An Action for damages because of breach of Restrictive Covenants Contract is an action at law, while an action to enforce the covenants by way of injunction is an action in equity. Randolph R. Lowell, Robert L. Reibold & Shealy Boland Reibold, South Carolina Equity: A Practitioner's Guide, at 132 (2010).** While Plaintiff seeks damages by recovering fines, the court rejects this argument as described below. The main focus of this case is to enjoin Defendants ability to ski and operate motor boats on the lake. Therefore, the matter is equitable.

2. **After legal modification, Defendants have no rights to water ski or use the lake in violation of the restrictions governing Lake Frances usage since their deed restrictions prohibit such uses.**

While Defendants had a right to ski and use Lake Frances from 2002 until 2008, their rights to continue to ski was eliminated as allowed for in the 2002 deed.

Defendants' claims for an easement by prescription, easement by necessity and adverse possession were dismissed at the summary judgment stage. Nothing is contained in Defendants' pleadings or otherwise of record to indicate Defendants contest how the deed to the Island Property was amended. This court asked Defendants at the summary judgment hearing, "[a]re you all arguing that they did not follow the legal steps to modify something after they deeded it out" and Defendants' counsel not only replied "No," but affirmed it was "[n]ot part of the argument". (Hr'g Tr. 30, April 12, 2017). None of the Defendants own Lake Frances. Neither party pled, argued, nor did the Court consider, any water based rights—riparian, littoral, navigable or otherwise—to use the Lake. Therefore, the only basis for the right to water ski is grounded in (a) deed

construction and (b) waiver of rights under the deed construction claims.

It is critical to understand how the deed came into existence. Defendants testified at length about how water skiing was an important part of their family life. Further, when Defendants learned of the availability of this property on the lake, they hired an attorney and began a detailed offer and counter-offer process of negotiating the terms of the sale.

After this process, when LHD conveyed the Island Property to Defendants Andrew and Anne Rice the deed contained covenants and restrictions which, by their express terms, states that the conveyance would be “subject to conditions, restrictions, covenants and limitations, which **may be modified or amended** in the future.” (Pl.’s Ex. 1). The Island Property deed gave Andrew and Anne Rice the right of personal enjoyment concerning the lake; however, that right was conditional and expressly limited. Paragraph 20 of the 2002 Island deed states that:

Grantees and their heirs acknowledge that all rights granted in this paragraph are limited to their personal enjoyment unless specifically authorized by Developer or Developer’s nominee, and said rights are not assignable without express written consent of Developer or Developer’s nominee; that [the Rice’s] are bound by decisions made by any future lawfully-formed/homeowners’ association or lake management association, of which grantee would have the right to be a member, and that said decisions may lessen, eliminate or narrowly define any rights granted in this paragraph. (Pl.’s Ex. 1, ¶ 20).

Defendants’ right to ski on Lake Frances was not an interest in the lake Property itself. Their right to ski was like a license that is inherently revocable. *See* 51 Am. Jur. 2d *Licenses and Permits* §

56 (2017). The parties signed an arm's length transaction that unambiguously and intentionally gave LHD and its assigns the right to modify, lessen or eliminate the rights granted in the deed.

"The right to enter land is a license" *Prestwick Golf Club, Inc. v. Prestwick Limited Partnership*, 331 S.C. 385, 391 (Ct. App. 1998). "[A]n instrument that merely gives to another the right to use premises for a specific purpose, the owner of the premises retaining the possession and control of the premises, confers no interest in the land, and is . . . a mere license." *McClellan v. Taylor*, 54 S.C. 430, 32 S.E. 527 (1899). [A license] conveys only the temporary privilege of being on the land for some agreed purpose. *See, Henson v. Airways Service, Inc.*, 220 Ga. 44, 136 S.E.2d 747 (1964). *Hilton Head Air Serv., Inc. v. Beaufort Cty.*, 308 S.C. 450, 457, 418 S.E.2d 849, 853 (Ct. App. 1992). A license does not vest in the licensee any estate or interest in the land. *See Hill v. Smith*, 51 N.C.App. 670, 277 S.E.2d 542, *review denied*, 303 N.C. 543, 281 S.E.2d 392 (1981). "In the absence of constitutional limitations, the ultimate authority from which a license to carry on a particular activity derives has inherent power to withdraw the license." 51 Am. Jur. 2d *Licenses and Permits* § 56 (2017). The record does not indicate that Andrew and Anne Rice had anything other than a temporary, revocable license to ski on Lake Frances.

The deed was a result of an arm's length transaction between two educated parties, both of whom had legal counsel and were under no financial or other compulsion to agree to the terms. As highly educated real estate professionals, they knew or should have known when they acquired the Island Property from LHD that their right to ski was a temporary privilege. Andrew Rice testified that he was a licensed real estate broker during the 2002 deed transfer, and had been for nearly a decade. (Tr. at 77:21 – 78:2.). Andrew Rice further admitted that he is "above average" in reading and

writing, and is highly educated. (Tr. at 82:4 – 17.). The Rices were represented by an attorney in the transaction. (Tr. at 78:23 – 79:2.); *see Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 790 S.E.2d 1 (2016) (“In determining whether a contract was tainted by an absence of meaningful choice, courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; whether both parties were represented by independent counsel; and the parties’ relative sophistication...” (internal quotation marks omitted); *see also Atkinson v. Belser*, 273 S.C. 296, 255 S.E.2d 852 (1979) (“[M]oreover, as a licensed real estate broker and dealer in antiques, she was no stranger to the business world.”). Further, the Rices actively participated in drafting the deed and there is no legal presumption that said deed should be construed against either party. It is well settled that any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the drafter. *See Ecclesiastes Production Ministries v. Outparcel Associates, LLC*, 374 S.C. 483, 499 – 500, 649 S.E.2d 494, 502 (Ct. App. 2007). Here, both parties were represented by attorneys and actively participated in the drafting of the deed; therefore, the legal presumption construing a contract against the drafter does not apply.

Water activities involving a person being pulled or towed by a boat can be a dangerous activity. Although LFD considered allowing these activities during the planning stages of the development, Kevin Steelman testified that changed when he discovered that the lake bed was littered with stumps when the dam failed. (Tr. at 34:1 – 6.). Andrew Rice admitted that it was physically impossible for anyone to engage in water activities involving a person being pulled or towed by a boat in the period between the dam failure and repair. (Tr. at 85:12 – 14.). Although it is uncertain if LFD communicated its intent to forbid these activities to Andrew and Anne Rice when it initially took possession of the lake, the record is clear that the Rices had notice of LFD’s intent to prohibit

the activities prior to the dam restoration in 2007 (Tr. at 29:25 – 31:18.). Plaintiff has consistently prohibited water activities involving a person being pulled or towed by a boat during its ownership of Lake Frances. Section 7 of the recorded Lake Regulations state, “tree stumps are present throughout the Lake except in the area designated for swimming by the Association. The water is also shallow in some areas. Persons on or in the Lake must be exceedingly careful at all times. Not only is skiing prohibited in an undesignated area, diving from boats . . . is strictly prohibited. **USERS OF THE LAKE DO SO AT THEIR OWN RISK.**” (Pl. Ex. 5). This was also acknowledged by the Rices and their July 7, 2007 letter to Kevin Steelman where they discuss liability due to the “excessive stumps”. (Pl. Ex. 12).

Kevin Steelman, and LFD, signed a Purchase Agreement for Lot 55 which Defendant Ricechild Group would come to own. (Def.’s Exhibit No. 9); (Tr. at 61:14 – 18.). Attached to the Agreement was an Addendum which, when read during trial, stated “[t]he purchase of this Lot shall not affect in any way the rights that the Rice family *has* in use of the lake currently known as Lake Frances as enumerated in its Deed from Laurel Hill Development, LLC, according to Book 7069, Page 8 in the Register of Deeds of the County of Lexington.” (Tr. at 62:10 – 16). However, according to Mr. Steelman, the version which he sent to Andrew Rice stated “...shall not affect in any way the rights the Rice family *may have* in use of the lake,” and Mr. Steelman further testified that his initials did not appear by the handwritten edits and that he had never seen the version of the Addendum, marked Defendant’s Exhibit Number 9, (Tr. at 62: 17 – 64:5.) that contained Andrew Rice’s initials and language that struck the language “may have in use of the lake,” and replaced with “has.”

“Real covenants have been defined as ‘agreement(s)... to do, or refrain from doing, certain things with respect to real property.’ *Queens Grant II Horizontal Property Regime v. Greenwood Development Corp.*, 368 S.C. 342, 361, 628 S.E.2d 902, 913 (Ct. App. 2006). The right to ski was not one of the agreements to do, or refrain from doing anything, that touches or concerns the Island property such as those set forth in Paragraphs 1-19 of Plaintiff’s Exhibit 1, rather it was merely a license to use the adjacent lake.

“Restrictive covenants differ from contracts in that they “run with the land,” meaning that they are enforceable by and against later grantees” *Queens Grant II Horiz. Prop. Regime v. Greenwood Development Corp.*, 368 S.C. 342, 361. 628 S.E.2d 902, 923 (Ct. App. 2006). The right to ski in the 2002 Island Deed is also not a covenant because it does not run with the land as the right to ski on Lake Frances was temporary and specifically limited to Andrew and Anne Rice. (“So long as Grantees and their children physically reside on the subject premises **they** may enjoy use of the adjacent lake for . . . water skiing . . . all rights granted in this paragraph are limited to their personal enjoyment . . . and said rights are not assignable . . .” (Pl.’s Ex. 1, ¶ 20)).

Therefore, after modification, the Defendants had no rights to ski on the lake.

3. THE DEED WAS PROPERLY MODIFIED.

Defendants did not plead issue of non-proper modification. Since Defendants waived this issue at the Summary Judgment Hearing and did not argue the issue at trial, the court finds the deed was properly modified.

The 2002 deed to the Island Property states throughout that Grantees rights concerning their use and enjoyment of Lake Frances is subject to any future association's decisions about the lake. The express language in the Island Property deed states the covenants and restrictions "may be revised, revoked, substituted, amended, modified or otherwise altered by **Developer or Developer's nominee.**" (Pl.'s Ex. 2) (emphasis added). By burdening the Island Property with such restrictions, the Developer expressed a clear intent to change Defendants' use of and conduct on the lake to changes that may occur in the future. The acknowledgement signed by Andrew and Anne contemporaneously with the deed of conveyance proves that the parties knew the covenants and restrictions were subject to modification. (See Pl.'s Ex. 1).¹ Therefore, due to the 2008 modification of the Island deed, Plaintiff's Lake Regulations apply to the Owners of the Island Property, Andrew and Anne Rice. Plaintiff may enforce its ski prohibition against Andrew and Anne Rice.

LHD assigned its right to modify the 2002 Island deed to LFD May 12, 2008 (Pl.'s Ex. 6). LFD recorded a modification to the Island deed restrictions June 3, 2008. The modification incorporated Plaintiff's recorded Lake Regulations, including Regulation 5.2 that states, "All water activity involving a person being pulled or towed by a boat is prohibited."

The most compelling evidence to support Plaintiff's ability to modify the Island Property deed is the signed Acknowledgement attached to it that states, "By acceptance of this deed, Grantees agree, acknowledge and attest as follows: (1) Grantees have read the foregoing restrictions, covenants and easements on the subject lot; (2) Grantees are bound by the restrictions, covenants

¹ Acknowledgment, ¶ 2: "Grantees are bound by the restrictions, covenants and easements contained herein and acknowledge that said restrictions, covenants and easements are modifiable as set for the hereinabove."

and easements contained herein and **acknowledge that said restrictions, covenants and easements are modifiable** as set forth hereinabove . . .” (Pl.’s Ex. 1).

Paragraph 21 contains additional limiting language, “[t]he following watercraft or water vehicles are prohibited on the lake...without the express written consent of Developer or Developer’s nominee... any watercraft or vehicle not properly permitted by any association that may be formed in the future by Developer... that is designed to regulate or uniformly apply rules and regulations for use of the lake in such a manner that is fair and reasonable to all adjoining property owners to the lake.” (Pl.’s Ex. 1, ¶ 21). Paragraph 26 plainly states that “[t]hese covenants and restrictions may be revised, revoked, substituted, amended, modified, or otherwise altered by Developer or Developer’s nominee.” (Id.) (emphasis added).

Defendants cite well known South Carolina subdivision restriction law that disfavors restrictions that limit a person’s use of his or her property. The rationale or basis for the free use of property rule is that it would be unfavorable to allow one who does not own land to control how those with land use their property. Here, Plaintiff is not trying to control or restrict Rice’s use of any of their own property; rather, the disputed use—water skiing—is conducted solely on Lake Frances which is Plaintiff’s property.

To enforce a restrictive covenant, “a party must show that the restriction applies to the property either by the covenant’s express language or by plain unmistakable implication... A restrictive covenant will be enforced if the covenant expresses the party’s intent or purpose... Courts shall enforce such covenants unless they are indefinite or contravene public policy.” *Sea Pines*

Plantation Co. v. Wells, 294 S.C. 266, 270-71, 363 S.E.2d 891, 894 (1987). “The right to enforce a restrictive covenant is not limited to mere preventative action, but will, in the proper case, extend to requiring a defendant, by mandatory injunction, to repair any injury already done, or to remove a structure already erected.” *Kneal*, at 268, 452 S.E.2d at 843.

“A covenant is enforceable against a subsequent grantee, even if not in the grantee’s deed, if the grantee has actual or constructive notice of the covenant.” *Harbison Cmty. Assoc., Inc. v. Mueller*, 319 S.C. 99, 103, 459 S.E.2d 860, 863 (Ct. App. 1995); see also *Queens Grant II Horiz. Prop. Regime*, at 370, 628 S.E.2d at 918. (“[B]ecause the Declaration of Covenants reserved to [Developer], and hence [Developer’s nominee] as successor, the right to amend the restrictive covenants, purchasers in the [units] accepted their respective deeds subject to [that] right.”). “A restriction on the use of the property must be created in express terms or by plain and unmistakable implications, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of the property.” *Hamilton v. CCM, Inc.*, 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980) (internal citation omitted). While this general proposition is correct, this Court finds it is not applicable here.

“Real covenants have been defined as ‘agreement(s)... to do, or refrain from doing, certain things with respect to real property.’ Therefore, covenants, ‘in a sense, are contractual in nature and bind the parties thereto in the same manner as would any other contract.’ Restrictive covenants are construed like contracts and may give rise to actions for breach of contract.” *Queens Grant II Horizontal Property Regime v. Greenwood Development Corp.*, 368 S.C. 342, 361, 628 S.E.2d 902, 913 (Ct. App. 2006). “A clear and explicit contract must be construed according to the terms

the parties have used, with the terms to be taken and understood in their plain, ordinary, and popular sense.” *Gilbert v. Miller*, 356 S.C. 25, 31, 586 S.E.2d 861, 864 (Ct. App. 2003). “The parties’ intention must, in the first instance, be derived from the language of the contract.” *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003). “To discover the intention of a contract, the court must first look to its language – if the language is perfectly plain and capable of legal construction, it alone determines the document’s force and effect.” *Superior Auto. Ins. Co. v. Maners*, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973). “Parties are governed by their outward expressions and the court is not at liberty to consider secret intentions.” *Blakely v. Rabon*, 266 S.C. 68, 73, 221 S.E.2d 767, 769 (1976).

An action for breach of contract must prove (1) the contract existed; (2) its breach; and (3) damages caused by such breach. *See Fuller v. Eastern Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). “Where an agreement is clear on its face and unambiguous, the court’s only function is to interpret its lawful meaning and the intent of the parties *as found within the agreement*.” *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 577, 762 S.E.2d 696, 700 (2014) (emphasis added). “Interpretation of a contract is governed by the *objective manifestation of the parties’ assent at the time the contract was made*, rather than the subjective, after-the-fact meaning one party assigns to it.” *Rodarte v. Univ. of South Carolina and Univ. of South Carolina Gamecock Club*, 799 S.E.2d 912, 917-18 (S.C. 2017).

Restrictions/Covenants Unambiguous

As described earlier, Plaintiffs testified at length about how much water skiing meant to them and their family. Other testimony revealed the process by which they found the property and negotiated

the terms and conditions contained in the recorded deed

These recorded restrictions or covenants control the analysis of this dispute; not what one party wanted or proposed in a contract, but what deed that was signed and accepted by the parties.

The Court finds that the 2002 deed is not ambiguous, but is plain and clear in meaning and effect. Contracts should be liberally construed to give them effect and carry out the intention of the parties. *See Cullen v. McNeal*, 390 S.C. 470, 483, 702 S.E.2d 378, 385 (Ct. App. 2010). The parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof. *Cullen*, at 483, 702 S.E.2d at 385. Construing the 2002 deed provisions allowing Defendants to ski on the lake and the limiting provisions cited above as mutually exclusive renders the limiting and restricting provisions meaningless because Defendants' ability to ski could never be restricted. *See Stevens Aviation, Inc. v. DynCorp Int'l LLC*, 407 S.C. 407, 417, 756 S.E.2d 148, 153 (2014) (“[A]n interpretation that gives meaning to all parts of the contract is preferable to one which renders provisions in the contract meaningless or superfluous.”) (quoting *Crown Laundry & Dry Cleaners, Inc. v. United States*, 29 Fed. Cl. 506, 515 (1993))

Andrew and Anne Rice were notified of the modification. (Pl.'s Ex.[s] 11, 13-14); (Tr. at 52:7-14); (Tr. at 93:8 -94:10). The 2002 Island Property deed specifically states that Andrew and Anne Rice's use of the lake would be subject to the rules and regulations promulgated by any future homeowners' association. The Lake is owned by the Plaintiff and Defendants have acknowledged Plaintiff's authority to regulate the use of its lake.

Andrew Rice's July 7, 2007 letter to Lake Frances developer, Kevin Steelman, "I agree with you that in two years, the HOA would be given the association and rights from you, and could then revisit the skiing restriction, and possibly approve it." (See Pl.'s Ex. 12). This statement proves Andrew Rice realized that his ability to ski on Lake Frances was subject to change. I find Andrew Rice's claim he understood that his right to ski to be perpetual lacks credibility.

As noted, there is explicit and clear limiting language throughout the 2002 deed; therefore, to allow Defendants Andrew and Anne Rice to now claim them as ambiguous would be tantamount to permitting a party to convert an unambiguous contract into an ambiguous one based on little more than "subjective, after-the-fact meaning one party assigns to it." *Rodarte*, at 918. ("A party cannot avoid the parol evidence rule simply by claiming he thought the contract he signed meant something other than what it said.").

Under Defendants' argument, construing Paragraph 20 above singularly, one could see that Rice could sell the property to a third party and then lease the property back to themselves to continue to reside in the home. Would the Rices still have the ability to ski as non-owners? The clause further states that as long as grantees and children physically reside, but does that then suggest that as soon as the eldest child is married or leaves home the ability to ski on the lake is divested from the other children and the family? As one can see, if Defendants' position were taken an entire agreement would conflict with each provision within it. Defendants' argument reduces the entire development history, negotiations between the parties, and the resulting deed thereafter, to a single paragraph, rather than

analyzing the entire deed. In doing so, Defendants would essentially give themselves an unfettered, perpetual right to ski, regardless of ownership or property rights. Therefore, the Court does not read Paragraph 20 and Paragraph 26 as contradictory or ambiguous, but, rather, as two logically, often used, separate restrictive conditions: (§ 20) the property can be used if you reside on the Island, and (§ 26) the property can be used unless deed is modified. (Pl.'s Ex. 1).

Even if the deed were ambiguous, the Court must then look to the intentions of the parties when the agreement was entered into. *Id.* at 917-18. During trial, Steelman testified that LHD assigned certain rights that it retained to LFD. (Tr. at 33:14 – 16.). This later conduct evidenced of Laurel Hill's intent to condition the Rice's ability to ski on Lake Frances upon further development, incorporating a homeowners' association, and the rules and regulations that may be promulgated by the Association or its Board of Directors. Defendants argue that the Rice family, essentially, by virtue of the 2002 deed, possess the unfettered right to ski and use Lake Frances as they see fit. However, the Court finds no merit to their contention because, had the 2002 deed purported to grant such a right, no limiting language would be present. Therefore, even if ambiguous, the intent of the parties at the time of the agreement is clear; Laurel Hill intended to condition the Rices' ability to ski upon the growth of the development and the rules and regulations of any future nominee or future association that may hold title to Lake Frances.

Although the Island Property is not subject to Plaintiff's Declaration, Andrew and Anne Rice's use and enjoyment of Lake Frances is conditioned upon the an association's regulations about use

and conduct on the Lake, as contemplated in Paragraph 20 of the 2002 Island deed.

Defendants Andrew and Anne Rice acknowledged and agreed to the terms and conditions contained in the 2002 Island deed. Therefore, both Andrew and Anne had notice that their right to enjoy and use Lake Frances may be subject to future modification and by continuing to violate Plaintiff's Lake Regulations they have breached the covenants set forth in the modified Island deed.

4. THE ASSOCIATION DID NOT WAIVE RIGHTS TO PROHIBIT SKIING

Defendants contend that from 2008 until the present, the Plaintiff or its predecessor knew that the Rices were water skiing on Lake Frances, and chose not to sue until October 13, 2015 to preclude the Defendants' water skiing. Defendants also claim that Plaintiff failed to equally and uniformly apply the Lake Frances Lake Regulations. Defendants' contentions are the basis for its waiver, laches, and estoppel defenses. This Court disagrees with the Defendants, and holds that the Plaintiff did not "intentionally" or "impliedly" waive its right to control or preclude water sports activities on Lake Frances.

"Intentional" waiver is the voluntary and intentional abandonment or relinquishment of a known right. *SPUR at Williams Brice Owners Ass'n, Inc. v. Lalla*, 781 S.E.2d 115, 125 (Ct. App. 2015), reh'g denied (Jan 21, 2016); *Provident Life and Accident Insurance Company v. Driver*; 451 S.E.2d 924 (Ct. App. 1994). If a party seeks to enforce a covenant, the defense of waiver may defeat the granting of relief. *Arceneaux v. Arrington*, 327 S.E.2d 357 (Ct. App. 1985). The party asserting waiver has the burden of proving waiver. *Id. Spur at Williams Brice Owners Ass'n, Inc.*

A waiver defense is inapplicable where a party does not know of the right and does not know the right is being abandoned. *Id. Spur at Williams Brice Owners Ass'n, Inc.*

Waiver can also be implied by the parties' conduct. In the context of a homeowner's association enforcing covenants and restrictions, "implied" waiver can occur by way of (1) a general neglect of subdivision restrictions, and/or (2) unequal or inconsistent enforcement of the covenants and restrictions. *See generally Archambault et al. v. Sprouse*, 55 S.E.2d 70 (1949). "Implied" waiver must also be voluntary and intentional. *Provident Life and Accident Insurance Company v. Driver*, 451 S.E.2d 924 (Ct. App. 1994).

To support their "intentional" waiver defense, Defendants rely on *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 415 S.E.2d 384 (1992). In *Janasik*, the Court concluded that the HOA waived its right to enforce prohibitions against a homeowner making aesthetic changes to common areas. In reaching its decision, the *Janasik* Court notes that "[t]he record reflects that **clearly visible changes** to the landscape were made over a period of several years beginning in 1985, that **Fairway and Island Management were aware of the changes**, and that Ms. Janasik had at least one discussion with Fairway's agent concerning installation of railroad ties prior to their placement." (emphasis added). The facts in this case differ remarkably.

It is clear from the record here that from the time of the Deed Modification on June 3, 2008 (Plfs. Ex. 7) until August 8, 2014 (Plfs. Ex. 15), the Plaintiff's Board did not directly know of whether the Defendants were water skiing on Lake Frances.² The Plaintiff's Board members during this

² The Defendants have testified that they skied on Lake Frances during this 2008 to 2010 timeframe. Other than the testimony of Andrew and Anne Rice, there is no evidence in the record that the Defendants skied during this time

timeframe were principals of the LFD. (Tr. at 37.5 – 39.24). The Board members did not reside on Lake Frances, and did not personally visit the community with any frequency. (Tr. at 37.5 – 39.24). Moreover, the Lake Frances Community was sparsely developed, with few houses existing on the lakefront itself. (Tr. at 37.5 – 39.24). Water skiing is an activity easily noticeable to anyone looking at Lake Frances while the activity was in progress. However, and by the Defendants’ own admission, water skiing is also a sport that occurs in short intervals, never daily, and only during warmer weather. (Tr. at 108.3-5; 264.18-19; *see also* testimony of Conrad Geiger, Tr. at 123.7-16).³ Skiing is by its very nature more difficult to detect than permanent changes to common area landscape.

Even if the Plaintiff’s Board knew or should have known of the Defendants’ activity on Lake Frances, the Defendants’ activities were without effect during the 2008 to 2014 timeframe. The uncontradicted testimony is that from 2008 to 2014, Lake Frances as a neighborhood was very much undeveloped. (Tr. at 37.5 – 38.10). Economic conditions prevented the aggressive sale of Lake Frances lots and constructing houses. (Tr. at 37.5 – 38.10). Few homes existed on or near the lakefront itself. (Tr. at 37.5 – 38.10). As such, there were no homeowners to complain about the Defendants’ activities- in essence there was no “damage” being done to the Plaintiff or its individual homeowners. As the Lake Frances subdivision began to populate in 2014, complaints to the Plaintiff regarding the Defendants’ activities accumulated. (Tr. at 37.5 – 38.24).

period.

³ The evidence shows that in 2008, the Lake Frances subdivision would have been very much undeveloped. The Plaintiff’s Board (made up of developers from 2008 to 2014) was undoubtedly the controlling management for the subdivision during the 2008 to 2014 timeframe. It was not until 2014, when Lake Frances was developed to the point that management was turned over, that property owners began taking an active role in the Plaintiff.

The Court finds persuasive the testimony of Kevin Steelman, President of LFD and President of the Plaintiff Board prior to that Board being turned over to the homeowners on November 6, 2014. (Tr. at 19.4- 23; Plfs. Ex. 16). Mr. Steelman testified that he was not aware the Defendants were skiing on Lake Frances after 2008, until complaints as to the skiing were received by Plaintiff in 2014. (Tr. at 37.5 – 39.24). In addition, Mr. Steelman testified that at no point during his time on the Plaintiff Board did the Plaintiff intend to waive its right to preclude the Defendants from skiing on Lake Frances. (Tr. at 41.1-16). Mr. Steelman testified that whether and when to pursue legal action was deferred until the Lake Frances residents took control of the Plaintiff, so the Board members could consider the expenses associated with enforcement, and harmony of the neighborhood in choosing how to go forward. (Tr. at 70.4- 21). The Plaintiff's considerations are recognized and protected by the business judgment rule, and are not evidence of a "voluntary and intentional waiver" of the Plaintiff's rights. *See generally, Fisher v. Shipyard Council of Co-Owners*, 760 S.E.2d 121 (Ct. App. 2014)("[i]n a dispute between the directors of a homeowners association and aggrieved homeowners, the conduct of the directors should be judged by the business judgment rule and absent a showing of bad faith, dishonesty, or incompetence, the judgment of the directors will not be set aside by judicial action."). There is no evidence in the record from which this Court, as a finder of fact, can determine that the Plaintiff's managing board would have known of the existence and frequency of the Defendants' activities on Lake Frances from June of 2008 to August of 2014. Further, even if the Plaintiff knew of the Defendants' alleged activities during the timeframe, there is no evidence those activities were problematic for the undeveloped Lake Frances neighborhood to support a finding of the "intentional" waiver of Plaintiff's right to enforce the Lake Regulations.

The Plaintiff's Board was turned over to the Lake Frances residents on November 6, 2014. (Plfs. Ex. 16). From August 8, 2014 to the time of filing this lawsuit on October 13, 2015, the record is unequivocal on the Plaintiff's pursuit of its right to stop the Defendants' skiing on Lake Frances. The uncontroverted testimony is that, by 2014, lakefront lots had been developed, and lakefront owners were making complaints to the Plaintiff regarding the Defendants' skiing activities. (Tr. at 37.5 – 38.24). During the 2014-2015 timeframe, Plaintiff directed Defendants to cease water skiing on Lake Frances on five (5) separate occasions, said efforts culminating in this lawsuit filed October 13, 2015. (Plfs. Ex. 15, 18, 19, 20, and 21). A sign was placed by the Plaintiff into the lake, advising that no water skiing is to take place on Lake Frances. (Tr. at 133.20- 134.11). Additionally, the Defendants were routinely present at Board meetings, and were informed that no skiing is allowed on Lake Frances. (Tr. at 134.16-22). As with the 2008 to 2014 time period, the Court finds that the Plaintiff did not "intentionally" waive its right to preclude water skiing on Lake Frances during the 2014 – 2015 time period.

Defendants would point out that Kevin Steelman knew the Defendants were skiing on Lake Frances in 2007, and Conrad Geiger knew the Defendants skied on Lake Frances in in 2010. Defendants view this as additional evidence the Plaintiff knew the Rices were skiing such as to constitute an "intentional" waiver of the Plaintiff's rights. This Court disagrees. Mr. Steelman testified that he was aware the Defendants skied in 2007. However, in 2007 the Defendants skied under the rights granted them in their deed, which rights had not been eliminated in 2007. (Tr. at 49.5 – 50.4). Mr. Geiger testified that he did at times view the Defendants skiing after moving to the neighborhood in 2010.⁴ Importantly, however, Mr. Geiger likewise testified that Mr. Rice

⁴ It should be noted that Mr. Geiger was new to the Lake Frances subdivision in 2010, and only a member of the HOA. Mr. Geiger did not become a Board member until the Board was turned over to the property owners in 2014.

informed him and other Plaintiff members that the Defendants were the exception to the skiing prohibition on Lake Frances- that the Rices were “grandfathered in.” (Tr. at 141.5- 142.9). It was not until 2014, as more lake front lots were developed, that Plaintiff and its membership researched the accuracy of Mr. Rice’s representation. (Tr. at 141.15- 23). It is axiomatic that a waiver must be both intentional and voluntary. *Id. SPUR at Williams Brice Owners Ass’n, Inc.* Plaintiff cannot be held to have “intentionally” waived a right that Plaintiff did not (in 2007), or did not know (in 2010) it had.

Besides a claim of “intentional” waiver related to skiing, the Defendants believe that the Plaintiff was neglectful in failing to uniformly apply the Lake Regulations, so the Plaintiff has now, by implication, waived its right to enforce the Lake Regulations. To support their argument, the Defendants have offered testimony that the Plaintiff learned of trespassers using Lake Frances without consequence, and that the Plaintiff failed to enforce boat decal requirements for Lake Frances. (Tr. at 169.24- 171.25). Plaintiff representatives testified that the trespasser violations reported to the Plaintiff were pursued, albeit the trespassers were never identified. (Tr. at 132.3- 133.3; 172.11- 173.12; 202.5 – 21; 204.22- 208.15; 218.19-23). Responding to complaints received by the homeowner’s association will preclude waiver of the right to enforce a violation, an association is not required to actively seek or pursue all violations. *SPUR at Williams Brice Owners Ass’n v. Lalla*, 781 S.E.2d 115 (Ct. App. 2015)(“The Lallas contend the Circuit Court ignored evidence in the record that the Association allowed other non-related students to live at the SPUR. However, we find that even if the Association previously failed to monitor the rental of units, the record reflects that, upon receiving a complaint, the Association took action to enforce the restrictive covenant prohibiting rentals to unrelated college students.”).

As identified by the Defendants, the Lake Frances Lake Regulations provide for boat decals on Lake Frances. (Plfs. Ex. 4 & 5). However, the testimony of the Plaintiff's representatives shows that boat decals have been regularly considered by the Plaintiff, and that a decision has been made by the Plaintiff to amend the boat decal registration rule for a rule that can be better managed by the Plaintiff. (Tr. at 170.2 – 15). The Plaintiff's decision regarding priority of enforcement actions falls within the business judgment rule. *Id. Fisher*. This Court finds against the Defendants on the asserted defense of a "implied" waiver. *See also, Archambault v. Sprouse*, 55 S.E.2d 70 (1949)("[o]ne who defies known rights arising out of restrictive covenants imposed in a deed, in absence of anything to mislead him or to indicate assent or abandonment of intent to impose on the part of others, cannot urge as a bar in an action for injunction, failure to take the most instant conceivable resort to the Courts.").

In an analysis akin to waiver, this Court likewise finds that Defendants' laches defense fails. Laches is the "neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do in law what should have been done." *Hallums v. Hallums*, 371 S.E.2d 525 (1988). Based upon the trial evidence, it cannot be said that the Plaintiff's delay in pursuing a lawsuit to enforce its rights is "neglect for an unreasonable and unexplained length of time." Here, the enforcement proceedings occurred in a matter consistent with the state of management and development within the Lake Frances Subdivision.

Defendants have likewise raised the defense of estoppel. To prove estoppel, the Defendants must show a (1) lack of knowledge and of the means of knowledge of the truth of the facts in question, (2) reliance upon the conduct of the party estopped, and (3) prejudicial change in position. *S. Dev.*

Land & Golf Co. v. S.C. Pub. Serv. Authority, 426 S.E.2d 748 (1993). This Court need not look beyond element (1) in reaching its conclusion as to the Defendants estoppel claim. The Defendants are educated, sophisticated business people, Andrew Rice holding a Professional Real Estate Broker's license at the time the "Island Property" was purchased. (Tr. at 78.15-17; 82.4- 17; 266.7-12). The language from the "Island Property" deed is clear, and the Defendants have known that their right to ski could be eliminated since they purchased the Island Property. (Plfs. Ex. 1; Tr. at 295.7- 296.14). Defendants' defense of estoppel fails, as the Defendants had both "knowledge of, and the means of knowledge of the truth of the facts in question." Having made this determination, the Court need not address whether the Defendants relied on the conduct of the Plaintiff, or prejudicially changed their position in reliance on the conduct of the Plaintiff.

5. RICECHILD IS NOT LIABLE FOR THE ACTS OF THE RICES.

Neither the facts of the case nor the legal matters pled support a finding that the LLC should be liable for the acts of the Rices. Factually, the skiing began and continued under the individual Rices claim of right to ski based on the language of the island deed. The Rice started skiing from their island years before the LLC owned any property. The Rices never pled nor claimed a right to ski based upon ownership of LLC property. Finally, Plaintiff never pled nor proved any alter ego or piercing the corporate veil type causes of action that would legally shift liability to the LLC.

A member of a limited liability company is only an agent of the company for the purposes of the company's business. S.C. CODE ANN. § 33-44-301(a)(1). Accordingly, a limited liability company is only liable for the acts of a member "acting in the ordinary course of business of the company or with authority of the company." S.C. CODE ANN. § 33-44-302.

The Association argues that Ricechild is responsible for the fines assessed by the Association for water skiing violations committed by the Rices. To support this theory, the Association highlights the undisputed evidence that the Rices used the Association's amenities as guests of Ricechild. However, the record is void of any evidence showing that Andy Rice (nor any of his family members) was acting as an agent of Ricechild when he and his family water skied or that water skiing was within the ordinary course of Ricechild's business. Instead, the evidence produced by the Rices shows that, at all times while water skiing, the Rices were neither acting as an agent of Ricechild nor were any of them acting in the ordinary course of Ricechild's business.

The testimony provided by Andy Rice shows that Ricechild has never skied on the lake; Ricechild does not own a boat or any ski equipment; no boat has ever been launched from Ricechild's Lot 55 property; and Ricechild has never held a company function involving waterskiing. (Trial Tr. pp. 224–25.) Because Ricechild is not liable for the acts of its sole member or others when the acts were neither authorized nor in the ordinary course of Ricechild's business, Ricechild is not liable for the fines assessed to it by the Association.

6. THE ASSOCIATION DOES NOT HAVE THE RIGHT TO LEVY FINES AGAINST ALL OF THE DEFENDANTS' PROPERTIES AND IS NOT ENTITLED TO RECOVER ATTORNEYS' FEES AND COSTS.

Plaintiff also seeks a Declaratory Judgment finding it may levy fines against all of Defendants' properties. The Association also seeks to recover attorneys' fees and costs from Defendants. The Court denies both of the Association's requests.

Although the Court finds that Ricechild's Lot 55 is burdened by the Declaration, the Association failed to present any evidence other than that of common ownership interest in the parcels that Ricechild has committed a skiing violation. The Association also failed to present any evidence of a violation committed by another person that would be attributable to Ricechild. Therefore, the Association has no basis for levying fines against Lot 55 or for recovering attorneys' fees and costs from Ricechild.

Plaintiff concedes that the Island property is not subject to the Plaintiff's declarations. Therefore, when Plaintiff eliminated the Rice's island deed based license or right to ski, the Rices had not right to ski on Lake Frances. This ski right elimination did not act to subject the island to the Plaintiff's declaration. That choice was discretionary and the Rices declined to join. Therefore, the Plaintiff has no right to obtain a money judgment of fines, assessment and or attorney fees against the Rices based upon their island ownership.

Nor is Plaintiff argument that these same fees, fines and attorney fees be assessed against the LLC or Rice as owner of Lot 55 or access parcel persuasive. The court again stresses the finding of fact that the skiing done on Lake Frances has always been done by Rice under claim of right based upon the 2002 island deed language—Defendant never pled nor claimed that had any right to ski based upon ownership of Lot 55 or the access parcel.

7. THE ASSOCIATION IS ENTITLED TO INJUNCTIVE RELIEF

Plaintiff is entitled to a permanent injunction prohibiting the defendants from water skiing on Lake

Frances because they pled a proper cause of action to enforce the restrictions and requested injunction as a proper equitable remedy.

Further, the court, recognizing that injunction is a drastic remedy and should be applied with caution, is persuaded that Plaintiff has proven irreparable harm and lacks an adequate remedy at law. (Lowell et al., *supra* pp 90-99.)

While there is no formulaic balancing test, the courts have consistently held that courts should consider equitable doctrines when determining whether to enforce a restrictive covenant and enjoin a landowner from using their land in a manner that violates the covenant. *See Buffington v. T.O.E. Enterprises*, 383 S.C. 388, 680 S.E.2d 289, 291 (2009). Where one is on notice of such covenants, it would be inequitable to consider financial loss in purchasing and improving the land since the purchaser would be on notice of the covenants when they purchased the property. *See Id. at 393*, 680 S.E.2d at 291 (“it would be inequitable to consider Petitioners’ financial loss in purchasing and improving the land since they were on notice of the covenants when they purchased the property.”)

It would be entirely inequitable to allow the Rices, who have declined to subject the island to the subdivision restrictions, the unilateral right to water ski on Lake Frances while none of the other subdivision owners have that right. The Rices knew the ski conditions could be modified or eliminated when they bought the property. Their family love of skiing, while understandable, does not dictate ignoring the clear terms of the contract, which would result in the Rices and the Rices alone, skiing on the Lake while not members of the subdivision, and the subdivision members

could not ski.

As discussed above, the island is not subject to the restrictions and the Rices or LLC have not violated any restrictions by their use of Lot 55 or the access parcel so the Association has no ability under these facts to collect a monetary damage against the Defendants.

Further, the Association Board after viewing the lake after it was emptied and viewing the topography and scattered tree stumps, believes there are significant safety hazards connected to operating a motor boat pulling a skier.

Finally, Lake Frances is not an over large lake. Operating a ski boat, pulling skiers can often be dangerous or at least incompatible with the rights of the other subdivision owner to canoe or kayak.

CONCLUSION:

Wherefore, it is so Ordered and adjudged, that:

1. The license given to Andrew and Anne Rice to ski on Lake Frances in the 2002 Island Deed was lawfully revoked;
2. All Defendants and their agents, guests and invitees are permanently enjoined from skiing and engaging in activities where people are pulled or towed by a boat on Lake Frances;
3. Plaintiff's Lis Pendens is terminated.

IT IS SO ORDERED.

Judge James O. Spence

_____, 2017
Lexington, South Carolina



Lexington Common Pleas

Case Caption: Lake Frances Community Association Inc VS Andrew G Rice ,
defendant, et al
Case Number: 2015CP3203574
Type: Master/Order/Other

AND IT IS SO ORDERED.

S/JUDGE JAMES O. SPENCE-3068

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