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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeal

Appeal from Charleston County
Court of Common Pleas

R. Markley Dennis, Circuit Court Judge

CASE NO.: 2010-CP-10-00482
APPELLATE CASE NO.: 2016-000281

Anchorage Plantation Homeowners Association Respondent,

v.

John B. Walpole and Theodora W. Walpole Appellants

APPELLANTS' FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in finding that Respondent had proper standing to bring suit?
2. Did the trial court err in finding the Easement Agreement invalid?
3. Did the trial court err in its failure to apply the statute of limitations to bar the relief requested by Respondent?
4. Did the trial court err in its failure to apply the equitable defenses of waiver, laches, and estoppel to bar the relief requested by Respondent?
5. Did the trial court err in failing to consider Appellants' affirmative defense of unjust enrichment?

STANDARD OF REVIEW

The matter before this Court arises from a declaratory judgment action relating to the validity and enforceability of an easement and is, therefore, neither solely legal nor equitable. The standard of review depends upon the nature of the underlying issues. Judy v. Martin, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009). The case was tried before a judge without a jury; this Court's scope of review is limited to correction of errors of law, and factual findings are reviewed for any evidence which supports the trial court's finding. See Townes Associates, Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976) ("In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings."); Myers v. Nat'l Sales Ins. Co., 362 S.C. 41, 44, 606 S.E.2d 486, 488 (Ct. App. 2004); Osterneck v. Osterneck, 374 S.C. 573, 577, 649 S.E.2d 127, 129 (Ct. App. 2007) ("In a law case tried by the judge without a jury the standard of appellate review is limited to a correction of errors of law and a determination if there is any evidence to support the factual findings of the trial judge."). In equitable actions, an appellate court may find facts in accordance with its own view of the preponderance of the evidence. Denman v. City of Columbia, 387 S.C. 131, 140, 691 S.E.2d 465,

470 (2010). "When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal."

Kiriakides v. Atlas Food Sys. & Servs., Inc., 338 S.C. 572, 580, 527 S.E.2d 371, 375

(Ct.App.2000) (citing Corley v. Ott, 326 S.C. 89, 92, n. 1, 485 S.E.2d 97, 99, n. 1 (1997)).

STATEMENT OF THE CASE

On January 20, 2010, Respondent Anchorage Plantation Homeowners Association (hereinafter Respondent or HOA) brought suit for a declaratory judgment and injunction with regard to certain easements granted to Appellants John B. Walpole and Theodora W. Walpole (hereinafter Appellants or Walpoles). (R. pp. 40-146). The easement at issue in this matter is that certain Easement Agreement granted to the Walpoles by Southern Lifestyles VIII, LLC, recorded November 8, 2001, in Book K387 at Page 751 in the RMC Office for Charleston County, as amended by that certain Amended Easement Agreement recorded June 17, 2002, in Book K409 at page 481 in the RMC Office for Charleston County. Said easements are collectively referenced herein as the "Easement." (R. pp. 684-692). Appellants filed their answer, asserting several affirmative defenses, on April 27, 2010. (R. pp. 147-153). By consent of the parties and Order entered February 15, 2013, J. William Edings Walpole, Jr., was appointed Guardian ad Litem for John B. Walpole for purposes of litigation, and substituted as the real party in interest.

The trial of this matter commenced on February 26, 2013, before the Honorable Kristi L. Harrington sitting as the trier of fact. (R. pp. 197-359). At the conclusion of the Respondent's case in chief, the trial was recessed in order for the parties to voluntarily pursue settlement of the claims. When the negotiations proved unsuccessful, Judge Harrington reconvened trial on June 21, 2013. (R. pp. 360-415). During the testimony of one of Appellants' witnesses, the trial was

recessed. Judge Harrington then directed the parties to conduct formal mediation in an effort to resolve the dispute. When mediation again proved unsuccessful, the parties consented to the remainder of the trial be heard by this Court, pursuant to Rule 63, SCRPC, as Judge Harrington was unable to schedule the trial to conclusion. The Honorable R. Markley Dennis reviewed the prior trial transcripts and concluded trial on August 21, 2015. (R. pp. 416-496).

The trial court entered its Order in favor of Respondent on November 3, 2015. (R. pp. 1-38). On November 10, 2015, Appellants filed their Motion for Reconsideration, which was denied by Order entered February 8, 2016. (R. pp. 497-499; R. p. 39). Appellants filed the Notice of Appeal on February 17, 2016. (R. pp. 154-196).

FACTS

The history of the ownership and development of Anchorage Plantation was undisputed by the parties and supported by public record. In 1980, the Walpoles purchased over One Thousand Acres of real property located on Wadmalaw Island, South Carolina, known as Anchorage Plantation. (R. pp. 500-503). The property is situated between Maybank Highway and Bohicket Creek. In 1997, the Walpoles recorded a final Plat for Phase I of Anchorage Plantation, which included a roadway from Maybank Highway and across Anchorage Plantation known as Anchor Watch Drive. (R. pp. 504-505). The Walpoles further recorded an initial Declaration of Covenants, Conditions, and Restrictions applicable to Phase I. (R. pp. 506-524).

On January 11, 2000, the Walpoles entered into a Purchase Agreement for Real Estate with Southern Lifestyles VIII, LLC (hereinafter “Developer”) for the sale of Phase I and an additional 278 acres, known as Phase II. (R., pp. 545-558). The contract includes an option for Southern Lifestyles to purchase what is referred to as the “Option Property,” which is the

remaining roughly 779 acres of the Walpole Property (“Phase III”). (R. p. 550). The contract further provides an explicit reservation of an easement to the Walpoles for access over the roadways and to the boat ramp and dock, which reservation survived the sale consummation:

Purchaser agrees to provide Seller access to Bohicket Creek over the community boat ramp and courtesy dock located in Phase II until such time as Purchaser closes on the purchase of the Option Property. Seller shall have the right to use any road within the Property and the Option Property for the purposes of ingress and egress to properties owned or leased by Seller.

(R. p. 552).

On June 16, 2000, Phase II, including 69 home site parcels and the community dock and boat ramp, was made subject to the Declaration of Covenants. The parcels comprising Phases I and II were also conveyed to Developer by deed recorded on June 16, 2000. (R. pp. 565-569). In July 2000, the Developer recorded a Second Amended Declarations of Covenants, Conditions, and Restrictions and organized Anchorage Plantation Homeowners Association, Inc. (R. pp. 576-652). In December 2000, the Walpoles and the Developer entered into a contract for the purchase of Phase III. The December 2000 contract explicitly incorporated the earlier easement into its terms. (R. pp. 661-671). The intent of Developer and the Walpoles was for Developer to develop the entirety of Anchorage Plantation, with all lots having access to the streets and amenities in Phases I and II, however, Developer did not complete the development of Phase III. The purchasers from the Walpoles would have the intended access and use of the streets and amenities, however, Developer was unable to consummate the purchase of Phase III. As a result of negotiations between the Walpoles and Developer, the parties recorded an Easement Agreement setting forth the rights of access reserved in the purchase agreements. (R. pp. 688-

692). Said Easement Agreement, recorded on November 8, 2001, gave the Walpoles and their heirs and assigns (hereinafter “Walpoles”) the right to access and use the private roads, community dock, and community boat landing located within Phases I and II. (R. pp. 688-692). The easement was later amended by Amended Easement Agreement recorded June 17, 2002. (R. pp. 693-697). At the time of the recording of the Easement to the Walpoles, Developer was the owner of record of the roadways and the community dock parcel.

At the time of the sales of Phase I and Phase II to third parties from Developer, Anchor Watch Drive spanned across Phase I and Phase II, terminating in a cul de sac situated on the adjoining Walpole property. (R. pp. 698-703). There also existed Anchor Line Drive, an additional roadway turning off of Anchor Watch Drive toward the Walpole property. (R. pp. 709-716). Anchor Line Drive is paved until its abrupt terminus at the Walpole property line. (R. pp. 709-716). The community boat ramp, originally constructed by the Walpoles, was also in place at that time. (R. pp. 698-703).

In December 2002, the HOA was turned over to the individual homeowners from Developer, and the roadway parcel was conveyed by deed from Developer to the HOA on January 13, 2003. (R. pp. 704-708). The boat ramp and dock parcel was conveyed (along with any remaining common areas) by deed from Developer to the HOA on July 29, 2003. (R. pp. 717-721). Both deeds were made “subject to all easements of record.” (R. pp. 704-708).

During this same period, the Walpoles submitted an application for a Planned Unit Development for Phase III based on Developer’s plans for the property. On February 5, 2004, Thomas L. Harper, Jr., as counsel for the POA, sent correspondence to the Walpoles’ attorney, inquiring as to certain issues relating to the proposed Phase III development, including the use of

the roadways in Phases I and II. (R. pp. 771-772). In response, the Walpoles' counsel provided Harper with copies of the recorded easements on or about February 13, 2004. (R. p. 773). The planned development district was approved by Charleston County and County Council, which approval was appealed by Respondent and an adjoining landowner on March 18, 2004. No allegation was made with regard to the Walpoles' intent to utilize the roadways situated in Phase I and II. (R. pp. 774-776). Eventually the proposed development was overturned by the South Carolina Supreme Court on procedural grounds unrelated to the proposed use of the roadways. The case at bar was filed one (1) day prior to oral argument before the South Carolina Supreme Court relating to the planned development district.

The Walpoles submitted a subdivision application for six (6) lots known as Phase III, which received final approval after the required public notice. At all times relevant to the underlying suit, Phase III consisted of the said six (6) lots, situated on either side of Anchor Watch Drive with access to the parcels through and along Anchor Watch Drive.

ARGUMENTS

I. RESPONDENT DID NOT HAVE STANDING TO BRING AND MAINTAIN THE LAWSUIT, AS RESPONDENT BOARD MEMBERS DID NOT HAVE PROPER AUTHORITY TO BRING SUIT.

As a necessary preliminary matter, the trial court failed to address and rule on the matter of standing of the Respondent to bring the suit below. In order to achieve proper standing to bring the suit, the Respondent Board of Directors must have had the requisite authority to act. The powers of the Respondent and its Board are controlled by the Declaration, pursuant to the S.C. Non-Profit Corporation Act. The Covenants and By-Laws explicitly set forth the procedure necessary for certain legal action. (R. pp. 621-622). Respondent proffered testimony in the trial

court below as to damages ultimately sustained by individual homeowners, and not the POA, such as increased assessments and a lack of notice in the chain of individual lots.

The Respondent President admitted at trial that no vote of the homeowners was taken to authorize the institution and prosecution of the suit below. (R. p. 349; pp. 352-353). The Board agreed that approval of the individual members would be necessary, but such approval ultimately was not sought (R. pp. 751-758). There is no evidence of any meeting of the homeowners in which the institution of this litigation was approved, nor of any motion made at any meeting relating to the lawsuit. The HOA Board informally discussed, via electronic mail, approval of the final Complaint, but no meeting minutes exist approving or discussing the commencement of litigation. On the other hand, Respondents requested enough days recess to discuss settlement in order to hold a special meeting of the individual members. (R. pp. 346-347). That the Board knew it required approval of the membership prior to resolving the litigation belies its position at trial that the suit could be brought and maintained without such approval. Because the Board failed to seek and obtain the approval of the membership to act, the Board lacks the proper authority and standing to bring the underlying suit. Moreover, Respondent complained at trial of damages allegedly suffered by the individual homeowners, such as increased assessments, for which Respondent had no authority to claim on behalf of the individuals. (R. p. 341).

II. THE EASEMENT AGREEMENT IS VALID AND ENFORCEABLE.

“[T]he determination of the existence of an easement is a question of fact in a law action.” Smith v. Commissioners of Pub. Works of City of Charleston, 312 S.C. 460, 465, 441 S.E.2d 331, 334 (Ct. App. 1994) (citing Jowers v. Hornsby, 292 S.C. 549, 551, 357 S.E.2d 710, 711 (1987)). “The scope of an easement is an equitable matter The language of an easement

determines its extent. ‘Clear and unambiguous language in grants of easement must be construed according to terms which parties have used, taken, and understood in [the] plain, ordinary, and popular sense.’ Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn, 348 S.C. 58, 67, 558 S.E.2d 902, 906-07 (Ct. App. 2001) (citations omitted). “Thus, this court must construe unambiguous language in the grant of an easement according to the terms the parties have used. ‘The general rule is that the character of an express easement is determined by the nature of the right and the intention of the parties creating it.’” Plott v. Justin Enterprises, 374 S.C. 504, 513-14, 649 S.E.2d 92, 96 (Ct. App. 2007) (internal footnotes omitted); Binkley v. Rabon Creek Watershed Conserv'n Dist., 348 S.C. 58, 67, 558 S.E.2d 902, 906-07 (Ct.App.2001); S.C. Pub. Serv. Auth. v. Ocean Forest, Inc., 275 S.C. 552, 554, 273 S.E.2d 773, 774 (1981); Smith v. Comm'rs of Pub. Works of City of Charleston, 312 S.C. 460, 467, 441 S.E.2d 331, 336 (Ct.App.1994).

In the instant case, Appellants explicitly reserved the rights to access the roadways and boat ramp parcel within the January 2000 contract to sell the property to Developer. Section 10 of said contract states:Purchaser agrees to provide Seller access to Bohicket Creek over the community boat ramp and courtesy dock located in Phase II until such time as Purchaser closes on the purchase of the Option Property. Seller shall have the right to use any road within the Property and the Option Property for the purposes of ingress and egress to properties owned or leased by Seller.

By the terms of the January 2000 contract, this provision survived closing of Phases I and II. In addition, this reservation of right was explicitly incorporated in the December 2000 contract to purchase Phase III. The contracts created a valid and binding obligation on the part of Developer to grant access to Appellants (Seller above) until such time as Developer consummated the purchase of Phase III. Said purchase never occurred. As Developer and Appellants continued to

negotiate the purchase of Phase III, and as a term and condition of said negotiation, Developer and Appellants entered into an Easement Agreement, which Easement was recorded on November 8, 2001, in the RMC Office for Charleston County, South Carolina. Thereafter, Developer and Appellants entered into an Amended Easement Agreement, which Easement was recorded on June 17, 2002.

The Easement expressly provides for an “easement over the roads and streets [in Phases I and II] for the purposes of ingress and egress . . .” and “to use the community boat ramp and courtesy dock located [in Phase II] for the purpose of access to Bohicket Creek.” The Easement references the contractual obligations to provide access set forth in the purchase and sale agreements. Furthermore, the Easement explicitly states that “the Grantor is aware that Grantee may subdivide their property located adjacent to the property owned by the Grantor and that the purchasers of the Grantee’s property or any portion thereof shall have the rights granted herein.” The Amended Easement Agreement adds explicitly that “[t]he rights granted hereunder are appurtenant to the land, shall run with the land and are for the benefit of Grantees, their heirs and assigns.”

Developer was the legal owner of record of the roadways and boat ramp parcel at all times relevant to the granting of the Easement. The Burdened and Benefitted Properties are clearly set out in the Easement, the rights and purposes for the same are explicitly delineated, and even the intention of the parties is explicitly set forth therein. The clear and unambiguous language of the Easement must therefore be construed to allow Appellants access over the roadways in Phases I and II, and to the boat ramp and dock. A duly recorded easement valid and regular on its face is presumed valid. See, e.g., Davis v. Monteith, 289 S.C. 176, 182, 345 S.E.2d

724, 727 (1986); Avant v. Johnson, 231 S.C. 119, 123, 97 S.E. 2d 396, 397 (1957).

Respondent, nevertheless, contends that the granting of the Easement by Developer was in breach of the terms of the Second Amended Declaration of Covenants (hereinafter “Covenants”), filed of record at the time of the granting of the Easement. Respondent asserts that this breach should render the Easement and rights granted thereunder void or voidable.

[C]ovenants have been defined as “agreement[s] ... to do, or refrain from doing, certain things with respect to real property.” 20 Am.Jur.2d Covenants, Conditions, and Restrictions § 1 (2005). Therefore, covenants, “in a sense are contractual in nature and bind the parties thereto in the same manner as would any other contract.” Id. (citing Seabrook Island Prop. Owners Assoc. v. Pelzer, 292 S.C. 343, 356 S.E.2d 411 (Ct.App.1987)). Restrictive covenants are construed like contracts and may give rise to actions for breach of contract. 17 S.C. Jur. Covenants § 2 (2005) (citing Hoffman v. Cohen, 262 S.C. 71, 202 S.E.2d 363 (1974) and Manning v. City of Columbia, 297 S.C. 451, 377 S.E.2d 335 (1989)). Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 361, 628 S.E.2d 902, 913 (Ct. App. 2006). “Restrictive covenants are to be strictly construed, with doubts resolved in favor of a free use of property.” Butler v. Sea Pines Plantation Co., 282 S.C. 113, 120, 317 S.E.2d 464, 468 (Ct. App. 1984) (*citations omitted*). Moreover, in interpreting restrictive covenants, ambiguities must be strictly construed against the party seeking to enforce them. Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891, 893–94 (1987); Seabrook Island Prop. Owners Assoc. v. Marshland Trust, Inc., 358 S.C. 655, 662, 596 S.E.2d 380, 383 (Ct.App.2004). “A restriction on the use of property must be created in express terms or by plain and unmistakable implication” Taylor v. Lindsey, 332 S.C. 1, 5, 498 S.E.2d 862, 864 (1998); see also Kinard v. Richardson, 407 S.C.

247, 257-58, 754 S.E.2d 888, 894 (2014).

Respondent proffered testimony from Elizabeth Settle, who was designated as an expert witness without objection. Ms. Settle testified, and her notes reflected, that the wording of the Covenants contained “bad language,” was “ambiguous at best,” and raised questions relating to the powers of Developer to grant access to the common areas. (R. pp. 242-243; pp. 279-285). It was only later, after reviewing the Covenants multiple times and discussing the issue of Respondent’s preferred construction of the Covenants again with Respondent’s counsel, that she came to the conclusion Developer did not have the right to convey the Easement. She further testified that the rights of ownership and access to the common areas set forth in Section 2.3 of the Covenants were neither clear nor unambiguous. It is, however, within the trial court’s purview to review the four corners of the Covenants. The Covenants provide each individual homeowner non-exclusive access to the roadways and boat ramps in Section 6.2, subject to additional terms in the Covenants, including Section 2.3. There is no evidence that the grant of the Easement to the Walpoles is exclusive to them, nor that the HOA and individual homeowners do not have access to the roadways and boat ramp parcel. The Covenants do not explicitly prohibit Developer from the conveyance of the Easement, and Respondent’s interpretation of the Covenants merely evinces an ambiguity in the wording, which ambiguity necessarily must be construed against Respondent. Moreover, ample evidence was presented from both Respondent and Appellants that the intent of Developer was to further develop Phase III, which development would have had access to the roadways and boat ramp.

The deeds transferring legal title to the HOA of the roadways and boat ramp parcel were recorded January 13, 2003 and July 29, 2003, respectively. Each deed made the conveyance

subject to matters of record. There is no dispute that the Easement Agreement and Amended Easement Agreement were recorded several months prior, and were in the chain of title as to the common area parcels.

Because the Covenants do not clearly and unambiguously prohibit the transfer of the easement rights of access to the Appellants, the Covenants do not invalidate the Easement.

III. THE STATUTE OF LIMITATIONS BARS THE RELIEF SOUGHT BY RESPONDENT AND GRANTED BY THE TRIAL COURT.

Respondent's claims are barred by the applicable statute of limitations. Restrictive covenants are agreements defining rights and obligations with regard to real property. 20 Am.Jur.2d Covenants, Conditions, and Restrictions § 1 (2005). Covenants are therefore contractual in nature and binding upon the parties to it as any other contract. Respondent's position is based upon the allegation that Developer breached its obligations under the Covenants by granting the Easement. Developer has never been sued by Respondent for breach of contract, breach of fiduciary duty, or any other cause of action. S.C. Code § 15-5-530 states that "an action upon a contract, obligation, or liability, express or implied" or "an action for trespass upon or damage to real property" must be brought within three years. See, e.g., Webb v. Reames, 326 S.C. 444, 447, 485 S.E.2d 384, 385 (Ct.App. 1997). Respondent itself adopted this position in an unrelated matter brought by a homeowner against the HOA and pending concurrently with the instant matter in the court below. Respondent asserted that the homeowner's claims are barred by the three-year statute of limitations. In that case, the homeowner alleges that certain assessments are being charged without proper authority under the Covenants, alleging the invalidity of an amendment to the Covenant, and alleging the Board is acting in contravention of

its rights under the Covenants. Defendant's Memorandum in Support of Motion for Summary Judgment at pp. 3-4 (June 15, 2015) (Trex Corporation Profit Sharing Plan and Trust v. Anchorage Plantation Homeowners Association, CA No. 2014-CP-10-05056).

The limitations period commences when the aggrieved party knew or should have known that a cause of action has arisen. See Martin v. Companion Healthcare Corp., 357 S.C. 570, 575-76, 593 S.E. 2d 624, 627 (Ct.App. 2004). The Easement Agreement was duly recorded November 8, 2001, in Book K387 at Page 751 in the RMC Office for Charleston County. The Amended Easement Agreement was duly recorded on June 17, 2002, in Book K409 at page 481 in the RMC Office for Charleston County. Thereafter, legal title to the roadway and boat ramp parcels was conveyed to the HOA by Developer. Property owners are charged with constructive notice of instruments recorded in their chain of title. Carolina Land Co. v. Bland, 265 S.C. 98, 107, 217 S.E.2d 16, 20, (1975); Harbison Cnty. Ass'n v. Mueller, 319 S.C. 99, 103, 459 S.E.2d 860, 863 (Ct.App.1995); Fuller-Ahrens P'ship v. South Carolina Dep't of Highways and Pub. Transp., 311 S.C. 177, 183, 427 S.E.2d 920, 923-24 (Ct.App.1993). In Fuller-Ahrens, Respondent contended that the statute of limitations set forth in S.C. Code § 15-5-530 did not bar its claim because it did not have constructive or actual knowledge of a pipe and related easement installed by the South Carolina Highway Department. The court found Respondent's argument unmeritorious because "Fuller-Ahrens had constructive notice of the pipe's existence because of a 1956 deed in Fuller-Ahrens' chain of title." Fuller-Ahrens P'ship at 179, 427 S.E.2d at 921. "The law imputes to a purchaser who proposes to acquire title to real estate notice of the recitals contained in any properly recorded instrument of writing which forms a link in a chain of title to the property proposed to be acquired." Carolina Land Co. v. Bland, 265 S.C. 98, 107, 217 S.E.2d

16, 20 (1975) (citing Moyle v. Campbell, 126 S.C. 180, 119 S.E. 186 (1923), and National Bank of Newberry v. Livingston, 155 S.C. 264, 152 S.E. 410 (1930)).

In this case, there is no dispute that the Easement was recorded prior to the conveyance of legal title from Developer to the HOA. The deeds of conveyance to the HOA were made subject to matters of record. The HOA had been turned over to the individual homeowners prior to the recordation of the deeds. The HOA, thus, had constructive knowledge of the Easement no later than July 2003. The evidence shows that the HOA had actual knowledge of the Easement no later than February 2004. Counsel for the HOA and counsel for the Appellants exchanged a series of letters related specifically to the Easement, and counsel for the HOA was provided with copies of the recorded Easement. Correspondence from the HOA counsel in fact threatened litigation relating to the Easement in 2004. This suit was brought in January 2010. The discovery rule provides the limitations period runs from when the Respondent knew or should have known about the easement. In this case, whether the constructive notice given by recording of the easement and the deed for the common areas in 2001, the notice in the deed to the common areas in 2003, or the actual knowledge based on the correspondence with Respondent's then counsel in 2004, the suit was filed more than three (3) years after Respondent had knowledge, and is therefore barred by the Status of Limitations.

IV. THE RELIEF SOUGHT BY AND GRANTED TO RESPONDENT IS BARRED BY THE EQUITABLE DOCTRINES OF WAIVER, LACHES, AND ESTOPPEL.

Respondent's claims in equity are barred by the doctrines of laches and estoppel.

If there has been unreasonable delay in asserting claims, or if, knowing his rights, a party does not seasonably avail himself of means at hand for their enforcement, but suffers his adversary to

incur expenses or enter into obligations or otherwise change his position, or in any way by inaction lulls suspicion of his demands to the harm of the other, or if there has been actual or passive acquiescence in the performance of the act complained of, then equity will ordinarily refuse her aid for the establishment of an admitted right, especially if an injunction is asked.

Rabon v. Mali, 289 S.C. 37, 40, 344 S.E.2d 608, 610 (1986) (quoting Archambault v. Sprouse, 215 S.C. 336, 55 S.E.2d 70, 12 A.L.R.3d 388 (1949). See also Arceneaux v. Arrington, 284 S.C. 500, 327 S.E.2d 357 (S.C.App.1985). Whether a Respondent is barred by laches is to be determined in light of the circumstances in each particular case. Ramantanin v. Poulos, 240 S.C. 13, 124 S.E.2d 611 (1962); Arceneaux, *supra*. “[I]t is a well-established principle in South Carolina that estoppel by silence arises when one party observes another dealing with his property in a manner inconsistent with his rights and makes no objection while the other party changes his position based on the party's silence.” Queens Grant II at 358, 628 S.E.2d at 911; Seabrook Island Property Owners Association v. Pelzer, 292 S.C. 343, 356 S.E.2d 411 (Ct.App.1987). See also Janasik v. Fairway Oaks Villas Horizontal Prop. Regime, 307 S.C. 339, 344-45, 415 S.E.2d 384, 388 (1992). (Association estopped from forcing homeowners to restore landscape when action brought four years after commencement of changes to landscaping.)

Respondent knew the intent was to develop Phase III with usage of the roadways. HOA President Steve Brusthoff testified as to his own knowledge of the intended development of Phase III. The evidence unequivocally showed that additional lots and amenities were to be developed in Phase III. (R. pp. 237-238; pp. 688-692). Moreover, the physical layout of the roadways and their respective termini clearly indicated both Anchor Watch Drive and Anchor Line Drive were to be extended onto the neighboring property. Appellants expended substantial costs in the application process for both the planned development (which ordinance has been

stricken) and the subdivision into six (6) lots (which subdivision was duly approved).

Respondent was aware the planned development application and the subdivision approval were based, in part, on Appellants' use of the roadways for access to Phase III. Respondent remained silent with regard to its objection to the Easement during the pendency of its appeal relating to the PUD. There was no appeal of the subdivision approval based on the use of the roadways or any other reason. Plainly, Respondent could have raised the issues it has now brought before this Court about the use of the roadways for the Phase III subdivision, but did not. (R. pp. 397-398). Respondent waited to file the instant action until one (1) day prior to the oral arguments in the appeal.

V. THE TRIAL COURT ERRED IN FAILING TO CONSIDER APPELLANTS' AFFIRMATIVE DEFENSE OF UNJUST ENRICHMENT.

Testimony at trial was admitted that the loss of the Easement would unjustly enrich Respondent at the expense of Appellants. No countervailing testimony was proffered by Respondent. With regard to the common areas, Respondent is the successor in interest and title to Developer. Appellants conferred a non-gratuitous benefit to Respondent, Respondent has realized value, and it would be inequitable for Respondent to retain the benefit without payment of its value. Niggel Assoc., Inc. v. Polo's of North Myrtle Beach, Inc., 296 S.C. 530, 374 S.E.2d 507 (Ct. App. 1988). Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891 (1989).

The Easement was originally retained by the Appellants through contract with Developer. When Developer could not fulfill its obligations pursuant to the contract for the purchase of Phase III, the Easement was recorded within the context of resolving the dispute with Developer. It is interesting to note that the Developer failed to pay Appellants any monetary consideration

for the breach of the consummation of the purchase of Phase III, but was able to pay Respondent in excess of Three Hundred Thousand Dollars (\$300,000.00) for its breach to provide certain amenities. (R. p. 335). The contractual relationship with Developer for Phases I and II was based, in part, on the value of development of the whole parcel. (R. pp. 384-385).

Respondent maintains a single gate to police access onto Anchor Watch Drive.

Respondent testified that the Walpoles maintain the gates and control access at the terminus of Anchor Watch Drive, along the fences separating the Phase III lots from Respondent, and at the terminus of Anchor Line Drive. This benefit further inures to Respondent without any consideration to Appellants in the event that the Easement rights are invalidated.

The loss of the Easement comes at substantial cost to Appellants. Testimony at trial, uncontradicted by Respondent, was the sale of Phases I and II would not have been completed without the sale of Phase III or substantial protections as to the use and future development. Moreover, Appellants have no access to Lot 1 of the subdivided lots, and the trial court's ruling ultimately negates access to additional lots as well. Because the subdivision into six (6) lots was approved by Charleston County based, in part, on the access through Anchor Watch Drive (with no formal objection or appeal from Respondent), Appellants have been further damaged by the lack of access to and the marketability of their property.

At trial, Respondent complained predominately of the financial burden placed upon the Association by the easement. (R. p. 341).¹ While it is true the Easement set forth the conditions


¹ It is of merit to note that the lengthy diatribe of Respondent's witness as to the burdens and costs of the POA with regard to the roadways and community dock contained not a single issue which could be attributable to the Appellants or the rights afforded pursuant to the Easement. Moreover, of the more than seventy (70) lots sold in Phases I and II, at the time of the trial only twelve (12) homes had been constructed in those Phases.

upon which payment would be made to the Association, the trial court failed to consider the equities of amending the scope of the Easement and its obligations to more appropriately balance the equities between the parties. Because the trial court failed to so rule, it is appropriate for this Court to remand this matter to consider the unjust enrichment claims of both parties to the underlying suit, and to enter further rulings based upon the financial burdens placed on each, determined by this Court's final ruling as to the validity of the Easement.

CONCLUSION

The trial court below erred in invalidating the Easement and in failing to consider the equities between the parties. The testimony of all the witness and the documentary evidence clearly showed, without contradiction, the known intent of Developer, Appellants and Respondent at all times relevant to the matters below. A proper balancing of the equities necessarily would have placed the parties in the position most closely aligned with this intent, and the ruling below improperly rewards Respondent at the cost of Appellants. For the reasons stated, this Court should reverse the judgment of the circuit court, and remand this matter to the trial court for further proceedings as appropriate.

Respectfully submitted,



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October 4, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeal

Appeal from Charleston County
Court of Common Pleas

R. Markley Dennis, Circuit Court Judge

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OCT 11 2016

SC Court of Appeals

CASE NO.: 2010-CP-10-00482
APPELLATE CASE NO.: 2016-000281

John B. Walpole and Theodora W. Walpole Appellants,

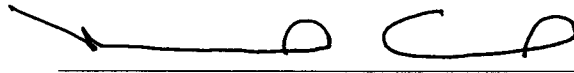
v.

Anchorage Plantation Homeowners Association Respondent

Certificate of Counsel

The undersigned hereby certifies that the Final Briefs comply with Rule 211(b).

October 4, 2016



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