STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS

COUNTY OF CHARLESTON 2017-CP-07-00265

ALEXANDER C. BURNS,

Plaintiff,

-vs-

BRAYS ISLAND PLANTATION COLONY INC., et al.,

Defendants.

TRANSCRIPT OF RECORD

August 22, 2017

Beaufort, South Carolina

B E F O R E:

The Honorable Roger M. Young, Sr., Judge.

A P P E A R A N C E S:

Alexander Burns, Pro Se

Carl Muller, Esquire
Attorney for Defendant Brays Island

Kevin Dukes, Esquire
Attorney for Defendant Brays Island Realty

Amanda K. Haffenden, RPR, CRR
Circuit Court Reporter

(August 22, 2017.)

THE COURT: All right. Burns versus Brays Island.

MR. BURNS: Good morning, Your Honor.

THE COURT: You're pro se. You're Mr. Dukes?

MR. MULLER: I'm Carl Muller.

THE COURT: Okay. All right.

MR. MULLER: Mr. Dukes is also here representing Bray's Realty who is not a party to this motion.

THE COURT: And whose motion for summary judgment is this?

MR. DUKES: This is mine, Your Honor.

MR. MULLER: And I have filed a motion on behalf of Bray's Island as well.

THE COURT: Okay. So we got competing summary judgment motions. All right. Well, you filed yours first?

MR. BURNS: I did, Your Honor.

THE COURT: Go ahead.

MR. BURNS: Thank you, Your Honor. Good morning. This motion for summary judgment was filed after Judge Mullen denied the defendant's motion to dismiss. We're filing solely on the first cause of action, which is a declaratory judgment that we've asked

the Court to deem the covenant conditions, restrictions from 1988 to be invalid as a matter of South Carolina law. Primarily, our issue is with the perpetual nature of the covenants as written under South Carolina common law.

There was a prior issue related to the uniform statutory rule against perpetuities. The defendant has pled that that's inapplicable, which actually comes into play as an estoppel issue, and, secondarily, the individual assessments don't run with the land and they're personal covenants and not real covenants and so we've asked the Court to rule that they can't be enforced against the property as real covenants as they are personal and not real.

So, getting into it, obviously, it's summary judgment under the standard issues of the fact and law. Our issue for the perpetual nature is -- starts with South Carolina Cable Network v. Alert Cable laying out the perpetual agreements are obviously disfavored in South Carolina because they are perpetual, and once you get in, you can never get out.

In this case, the duration of the covenants is governed by a 30-year term that automatically renews for a successive ten-year term but for a subsequent determination by other property owners at a 90 percent

threshold. It specifically says that it cannot be terminated what, when, why, how for any other reason you cannot disclaim it, you cannot get rid of it. Once you are in, you are stuck.

We believe that this violates the spirit of South Carolina's common law insofar as you can't have an agreement that neither parties at interest to the agreement can walk out of under any circumstances but for other third parties who may be adverse to either of the parties at interest in termination.

Similarly, we run through that issue. South Carolina Cable was a perpetual lease that had an automatic renewal in favor of one party that was at all not cancellable. The Court found that the lack of contract term was a fatal defect because if they could just continue to renew forever, then the agreement exists forever. We believe that Brays was aware of the potential issue here as in their covenants they actually have a section, 1406, where they say if any covenant, condition, or provision of this declaration shall be unlawful, void, or voidable per violation of the rule against perpetuities. Such provision shall continue only until 21 years after the death of the last reminding descendent -- I can provide the text -- of Rose Fitzgerald Kennedy. On that basis, we suggested that

that covenant -- that term was improperly constructed.

The defendant has argued that term is inapplicable, so we would ask that they be estopped from subsequently reasserting that the covenant they suggested doesn't apply cannot now be used to reform the contract, and so we're left with a perpetual agreement. If it was perpetual but for not being perpetual by use of this artifice and they're arguing that the artifice is inapplicable, then we're only left with a perpetual contract.

Similarly, going into it, we find that the standards for covenants are much higher --

THE COURT: Are you a lawyer?

MR. BURNS: I went to law school, Your Honor. I did not complete it.

THE COURT: Okay. I've had one rule against perpetuities question in 22 years of being a judge, and it was my first year, and I was hoping I would get through however long I did this without getting another one, but I saw it was marked you were pro se, and how many people know about the law of perpetuities, much less understand it.

MR. BURNS: Well, Your Honor, we'll see if we understand it.

THE COURT: I'm still not sure that I do, but

go ahead.

MR. BURNS: Thank you, Your Honor.

So the issue here is that covenants have a very high standard, and their standard is substantially higher than contracts. Obviously, in South Carolina common law, ambiguities in covenants are deemed strictly to be resolved in favor -- against the party seeking to assert them. As such, any ambiguities related to perpetuities would be enforced against them.

Now, obviously, Queens Grant and other cases have said just because things are ambiguous doesn't mean you can't use them, but Queen's Grant actually resolves some matters for us here fairly elegantly. For example, Queen's Grant talks about the idea that covenants must touch and concern the land in order to be a real property covenant. There's also an extensive discussion of the idea of affirmative covenants requiring someone to do something, like pay an assessment, has a much stricter standard than the standard of a negative covenant prohibiting someone from doing something, and the obvious reason there being if you must continue to do something, you are being deprived of a right, and therefore there's a narrower scope that you can be deprived of.

Queens Grant talks about cases from North Carolina. That actually is where the touching and

concerning of land comes from. The case is Raintree v. Rowe, which is quite applicable in this matter. Raintree v. Rowe has basically the same set of circumstances. Here, the individual assessments that we're complaining of are assessments that subsidize recreational activities like quail hunting in a golf course, et cetera, and are divorced from just sort of your run-of-the-mill road maintenance, what you have, which are covered under capital assessments.

Additionally, there's a real assessment, which is an obligation to continue paying to fund a capital project for the building of the golf course's growth. Obviously, those things have nothing to do with the property itself. Brays has effectively created a country club inside of an HOA and seeks to take the best of both worlds and apply the country club membership rules. It actually -- covenants extensively refer to members and talk about recreational amenities of members, but then they try to slam it through as a real property covenant.

The way you can sort of easily distinguish how the individual assessments versus capital assessments are personal property covenants versus real property covenants is that the capital assessments are $4,000 a year based on -- you own a property of land, you pay

$4,000, great. We all understand how that works. The individual assessments are actually calculated based upon the number of members that are designated by the owner, so the owner can designate up to three members: If it designates one member, it pays a 100 percent share; two, 150 percent share; three, a 200 percent share.

So if the calculation for the individual assessment has nothing to do with the property itself but has to do with people who are being designated by the owner as being able to go quail hunting, go play golf, stay at the inn, eat at the restaurants, those are clearly personal covenants, not real covenants.

Raintree v. Rowe was an issue where they said as part of the covenants, you have to be a member of our affiliated country club. And the North Carolina appeals Court said no, you don't, but if you are here for a personal covenant, the personal covenant can only be agreed to by one person to another, and an assignee, such as when I bought the land from another seller, it does not pass on to me and attach to me. I would have to enter into a separate agreement to be bound. I'm arguing to the extent there is an effective agreement, that agreement has the opportunity to be terminated upon reasonable notice, which is the South Carolina Alert Cable standard.

So from there, we get to this idea that covenants as created -- and I apologize for dragging you into perpetuities and covenants from 200 years ago, but the idea is that they must benefit and burden the land. That's been the law in South Carolina for two centuries. As Queen's Grant says, covenants that have a beneficial effect on the value of the property touch and concern the land and are therefore real property covenants.

Well, the individual assessments that we're discussing have effectively a negative carry rate, or sort of a negative interest on the property, of about 16 percent a year, which means that if you own the property, irrespective of real estate taxes, mortgages, anything else, your property would go from the purchase price to zero in about six years. Now, property prices all over Beaufort County over the last few years have overwhelmingly been increasing, but the testimony provided here shows that these properties may not sell for years and are likely to sell for less than the purchase price.

So if the covenants are strangling the ability to sell the property, and if you can sell the property, you're going to sell it for less, and if while you're waiting for the privilege of selling the property as the only way to escape these perpetual covenants, you

have to pay 15 percent of the property value, come what may, it cannot be seen as having a beneficial effect on the property. It's inherently a deleterious effect on the property.

So, in totality, given the very high standard for covenants, the entire standard for affirmative covenants, the requirements that covenants have beneficial effects on properties and that those beneficial effects be manifest, we run into a bit of difficulty with these covenants. Raintree v. Rowe sets out a three-part test specifically for determining whether a covenant is a real property covenant or a personal property covenant.

One of them is that the intent of the parties can be determined from instruments of record; two, the covenant must be so closely connected to the real property that it touches and concerns the land; and, three, there must be privity of the state between the parties to the covenant. And in dealing with the first issue, express intent of the parties can prohibit a covenant from running with the land, but it cannot make personal covenants run with the land.

In this case, they actually had -- in the covenants, it said these are real property covenants, and the Court said in Raintree, We don't care. Despite the

fact you say they are real property covenants, you can't just decide that they are. The Court specifically said the declaration of covenants, conditions, and restrictions contains the recitals that the covenants are to be construed to run with the land. There is no doubt that the developer intended the covenant to run. This recital is not controlling.

So even if they say, well, you know, you wanted this to run because it was in here, that's not controlling. To touch and concern the land, the object must be annexed to it, inherent in it, or connected with the land or real property granted or devised. In this case, the property that I purchased is a one-acre circle. It's inside of a larger development, but not connected inherently to the golf course or quail hunting or the inn or any of the other recreational activities, per se, any more than the YMCA is connected to the residents of a given town.

The fact that we happen to be in an annexed larger community does not actually create physical connection when there are all of the other mitigating factors, such as the calculation of the individual assessments and issues on that basis. So given the incredibly high hurdle that is set for proving these covenants and void, absence of any argument that has been

made to date as to how these specific covenants meet those standards, given the glaring evidence, we move for summary judgment on the basis that the covenants, particularly the individual assessments, are invalid and unenforceable in South Carolina law, and, moreover, are perpetual.

Thank you.

THE COURT: All right. You got anything you want to argue in opposition?

MR. MULLER: Your Honor, my name is Carl Muller. I represent Brays Island. I filed a motion for summary judgment to require Mr. Burns to pay his fees that he's required to pay under the longstanding declaration of covenants that govern Brays Island Plantation and the lots owned and the homes owned by the 325 property owners there of whom he is one.

On Thursday, I filed a five-page memorandum that sets out the law, and I would ask the Court to look at that because I've been very careful in setting out the law and describing the rule against perpetuities.

As a preliminary matter, I would like to point out two fundamental reasons that Mr. Burns should not prevail on his motion and we should prevail upon ours. First of all, Mr. Burns did not allege in his complaint what he now argues about touching and

concerning the land.

His first cause of action is only a challenge to the rule against perpetuities. His claim that the covenants do not concern and touch the land is a Johnny come lately effort after he received my memorandum in order to cobble together some sort of argument to let him survive and avoid paying his legitimate dues and fees that he has incurred for using the amenities at Brays Island.

The two cases that he cited have nothing to do with this case. Raintree vs. Rowe, which he cited, is a North Carolina case, and it was decided on the basis that the plaintiff was not the real party in interest. That's what the trial Court decided, and that's how that case was affirmed. Furthermore, in dicta in that case the Court said that the country club dues at issue in that case didn't have anything to do because the country club facilities were not connected with or attached to the defendant's land in any way.

Here what we have, Your Honor, with Brays Island is a 5,500 acre plantation on which there are 325 lots which can use the plantation. Mr. Burns has one of the lots, and his land is a part of the overall plantation, so he is totally different from the Raintree case. The South Carolina case that he mentioned,

Carolina Cable Network, is a cable TV case. It does not involve the rule against perpetuities, and it does not involve touching and concerning the land.

Furthermore, that contract did not have any term of duration, and the Court said that that contract was completely devoid of term of duration and the Court said that perpetual contracts are upheld in South Carolina under certain circumstances.

So for those sort of first-tier reasons, Mr. Burns is totally off base. He also can't prevail for another reason: He has submitted no proof. He has submitted no affidavits. We have submitted the affidavits of a lawyer in South Carolina who's an expert in real estate who says that the covenants are valid covenants. They completely comply with the South Carolina law. In fact, they were drafted in part by one of the leading lawyers in South Carolina, Austin Smythe from Moore, Smythe & McGee, so the covenants are completely valid, and he's presented no affidavits nor any law in contradiction to that.

Furthermore, we have an affidavit from Kevin Rhatigan, who is the general manager of Brays Island, who says that Mr. Burns bought his lot at Brays Island, and he just hasn't paid his money. And he knew that we were going to come after him for his money, and what he did is

he filed a peremptory challenge, thinking of everything he could hoping to negotiate himself a better deal or hoping that we would go away or that somehow he might get a Court to give him more time so that he wouldn't have to do what everybody else has to do and pay what he owes.

We also have a verification to the complaint -- to the counterclaim that we filed by Bill Fabian, who is the director of finance, and he goes through what Mr. Burns owes and why he owes the money, and Mr. Burns has never even himself filed an affidavit saying that he doesn't owe the money. He hasn't even done that.

In addition, Mr. Dukes has filed an affidavit on behalf of his client, Paul Burton, who says Mr. Burns voluntarily bought his land here a couple of years ago. He was represented at the closing by a lawyer. He got a copy of the covenants from Mr. Burton.

In fact, Mr. Burns said in his own complaint he got a copy of the covenants from Mr. Burton at the time. He said he had the highest grade in civil procedure. He's trained as a lawyer. He knows what these covenants mean, and what he's trying to do is to somehow find himself some string so that he can have a little bit more time, or maybe escape altogether.

The rule against perpetuities does not apply

for the reasons that I set out in my memorandum. First of all, the rule against perpetuities only applies to vesting of interests. There are no interests that Mr. Burns has that did not vest under the covenants. There are no interests that Brays Island has that did not vest under the covenants. Mr. Burns didn't even get any interest until he got his deed, so his interest doesn't arise -- his interest arose under the deed.

Brays Island interest arose under the covenants, and we can clearly impose those covenants upon him under the case that I cited and that he cited too, frankly, which is Queen's Grant versus Greenwood. I mean, there's nothing unusual about these covenants. They are garden variety covenants that impose obligations. They're almost 40 pages long.

I've attached them to Kevin Rhatigan's affidavit, and they detail obligations on the part of homeowners about how they can use the property, how they can use the amenities, what they have to do, and, likewise, their obligations on Brays Island about what it has to do, and the whole reason for that is this is a unified plan development to benefit everybody, and if everybody gets outside of the lines and doesn't do what they're supposed to do, including paying for the running of the plantation, then it hurts everybody.

So there's 40 pages of obligations and benefits. The problem that Mr. Burns has is that he bought his land and thought he was going to flip it. He says in his complaint that he paid 170,000 for his property. It's lot number 29 on Gun Club Drive according to the deed. He's now got it advertised for $220,000, $50,000 more than he paid for it two years ago, so he's just mad because he hasn't been able to make as much money as he wants to.

That's what's going on here. So I can go on and on and on in the detail of the South Carolina rule against perpetuities, but it's pretty cleanly set out in the five-page memo that I put together, and what do is I trace through the statute and the specific provisions of the statute that say this doesn't apply.

It doesn't apply, first of all, because the interest vested for Brays Island when the covenants were filed. The interest vested for Mr. Burns when he bought his property. The interest vested for the property owners when they became subject to the deed. Also, there's a savings clause in the covenants, even if the rule against perpetuities did apply, that says that it's tied to the life of the last to survive of Rose Kennedy's grandchildren, who were then living when the covenants were filed. That's a common way to have the rule against

the rule against perpetuities protected in a safe harbor, and that was done at the very tail end of the covenants if by some conceivable view they did apply.

Also, under the South Carolina statute, there is an additional way that the covenants can be protected, which is that the interest vests within 90 years after its creation. Well, Mr. Burns's interest vested when he bought the property, and the covenants were created in 1987, so his interest vested within 90 years after the covenants were created. All the covenants with respect to Brays Island vested when the covenants were filed. We're within 90 years of when the covenants were filed, so everything that's happening right now is vested. It's done.

Also, the covenants don't apply to a non-donated transfer. Mr. Burns was not given anything. He didn't inherit anything under a will, so he -- what he obtained is a non-donated transfer. That's another reason that the covenants don't apply. There's a Georgia case that says the rule against perpetuities doesn't even apply to covenants, period. There's no South Carolina case that says that one way or the other, but that's the common law, and that was the rule that applied in South Carolina before the rule of perpetuities was codified in a statute.

The statute that South Carolina adopted said that there is an exclusion in common law. It continues, so even that means that the covenants are not subject to Mr. Burns's rule against perpetuities, but the easy thing for the Court, the clearest path, is that Mr. Burns has filed no proof. He's got no affidavits. He's not challenged anything that we have filed, and under Rule 56(e), he can't rest on his pleadings. Once we come forward, he can't rest on his pleadings, and if he doesn't file an affidavit or something to show the Court he's got facts, then he's out, and he's out right now.

Finally, Your Honor, if Mr. Burns were to argue that he's entitled to do discovery, that would ring hollow. He's never filed the first speck of discovery. He's filed no interrogatories. He's filed no request for production. He's filed no notices of deposition. All he'll be doing --

THE COURT: Are you planning on doing any discovery?

MR. BURNS: May I, Your Honor?

THE COURT: Yeah.

MR. MULLER: All he's doing is asking for more time.

THE COURT: Well, I'll shut it down real quick. If you're saying, I don't plan to do any

discovery, then I'll hear a motion for summary judgment, but it's pretty basic law that I can't entertain a summary judgment motion until all discovery has been done.

MR. BURNS: Your Honor, if I may: My motion for summary judgment was filed solely on the first cause of action, which is a DJ. I don't plan to take any discovery on just the DJ.

The second cause of action with regard to civil conspiracy I absolutely plan to seek discovery on. The DJ action does not require discovery insofar as it's all contained in the covenants, so on that basis, I believe summary judgment was appropriate, only in the first cause of action in which the DJ is what's being sought.

In the second cause of action where I allege civil conspiracy, that is ripe for discovery, and as a matter of judicial economy, I put the motion for summary judgment for the first cause before the discovery plan for the second, and seeing no objection from either of the counsels in the past six months have found it to be appropriate.

If I may address some of opposing counsel's points, as he made great reference to motivation, and I feel fairly confident --

THE COURT: Let him finish. I wanted to hear that point. I'm sorry I interrupted you, but I wanted to cut to the chase on that point.

MR. MULLER: On the issue of discovery, Your Honor that does note trump Rule 56(e). He can't just come in here and say, I'm going to do some discovery. He's got to show specific facts, and he's got to show somehow that he's entitled to something.

THE COURT: He's saying he's not going to do any discovery on the issue of the first cause of action and therefore it's proper to hear it based, presumably, solely on the pleadings.

MR. MULLER: And I'm fine with that. The first cause of action. I'm talking about now the second --

THE COURT: So we're just talking about the rule against perpetuities invalidating the restrictive covenants.

MR. MULLER: What I'm talking about is -- just so we understand, I'm talking about denying his motion on the summary judgment on the first cause of action and granting me summary judgment on the first cause of action, which is the rule against perpetuities.

THE COURT: Have you filed anything in support of your motion?

MR. MULLER: Yes.

THE COURT: Okay.

MR. MULLER: And I filed affidavits in support of my motion.

THE COURT: You filed it under the e-filing thing?

MR. MULLER: Yes, I did.

THE COURT: Look, I wasn't planning on doing this, so I didn't look on all of that and get it, and as of yesterday morning even, I'm driving to Allendale, not sure if I'm holding court there, so I'm not up-to-date. That's all I'm asking, about what got filed and what didn't get filed.

MR. MULLER: Let me tell you what got filed. Let me tell you what got filed. He filed a motion for summary judgment on the first cause of action, which is the rule against perpetuities.

THE COURT: Okay.

MR. MULLER: I filed a motion for summary judgment on everything.

THE COURT: Okay.

MR. MULLER: I filed a motion for summary judgment on the rule of perpetuities, on his claim for civil conspiracy, and on my counterclaim to pay me the dues, pay me what he owes, and I supported that with an

affidavit from a real estate lawyer in South Carolina who says, I've been through all the covenants, and the covenants are totally valid, and what he has to say about the covenants is wrong, and what I have to say about the covenants is right.

THE COURT: Okay.

MR. MULLER: Covers both causes of action, I mean, both motions for summary judgment on the first cause of action.

I also filed an affidavit from the general manager of Brays Island, a gentleman named Kevin Rhatigan, who says Mr. Burns owes us the money, and I've looked at the counterclaim that you have filed, Mr. Muller, and it's right.

And as far as this civil conspiracy allegation goes, he alleges -- just so we're clear about this, on the civil conspiracy, he alleges that Brays Island, which runs the plantation, conspired with the real estate company to sell Mr. Burns the property from another owner, not from Brays Island. Brays Island didn't own this property. He bought it from another owner through a real estate broker using a lawyer.

So we filed an affidavit on his so-called civil conspiracy claim, and then Mr. Dukes, who represents the real estate company, says Mr. Burns filed

it. He bought the property. He knew what he was doing, and that's what he did, and we gave him a copy of the covenants and he had himself a lawyer in the transaction, so don't bother us about a civil conspiracy claim, so we move for summary judgment on the civil conspiracy claim, and that is completely unopposed by Mr. Burns, by any affidavit, which means that under Rule 56(e), he now should have judgment for that tendered against him by the Court.

He does not oppose that motion for summary judgment by anything. We also filed a motion for summary judgment that said pay us the money. This is a liquidated account. You owe us the money. It's time to pay up, and so that's where we are.

THE COURT: All right. You're just here for the show today? You're not arguing anything?

MR. DUKES: Yes, Your Honor. I have no pending motions.

THE COURT: You want to respond?

MR. BURNS: Yes, Your Honor. First and foremost, on the issue of things that I may or may not have filed in opposition, I filed an answer which I signed and verified myself. As a pro se filer, the answer was signed and filed by me in which I denied the allegations. That is sufficient as a pro se filer. That

is a sufficient filing in my defense. There's no need for a supplemental affidavit as it was drafted by me, signed by me, and attested to under Rule 11.

Second, just in case we're unclear as to my opposition, I filed and signed a memorandum in opposition, separate and apart from my memorandum in support. I filed a separate memorandum in opposition to defendant Brays's motion, so to suggest that I've been silent on the issue is just not found in the record.

Further, there are issues of my motivation and characterization of what I'm seeking. When I reached an impasse with Brays discussing my interest in terminating the membership portion, which they said other people tried to do and we don't allow it, I filed the declaratory judgment. As under the rules I had to bring all mandatory claims at that time. I added the civil conspiracy claim.

My civil conspiracy claim as pled, the sufficiency of which was tested by Judge Mullen in defendant Brays's motion to dismiss or deny, is not on the basis that the conspiracy was when I purchased the property, it was the use of the covenants and the effective disenfranchisement of this captive real estate company that can now charge whatever commissions it wants, doesn't have to actually list the property, and

can steer offers one way or the other so that people are forced to maintain and stay in on the property if they want to sell, which is the only way to alleviate the covenants.

It has nothing to do with when I bought the property, which, by the way, all properties in South Carolina have to be acquired with an attorney, that notwithstanding, the issue here is -- nowhere in the covenants does it provide for the real estate company. Brays has chosen to create this cottage industry of putting a guy in business who is Brays Island Realty who just represents those properties.

I mean, you can tell in the name, Brays Island Realty. That's what he does. He maintains the listing. He is the dual agent on the properties. I can't list a property and sell it with another agent because the covenants require that anyone visiting my property must do so while I'm present, but if I list the property with defendant Brays Realty, Mr. Burton, the broker-in-charge who is not a member of Brays Island and has no official standing, is free to walk around the property and show it to anyone that he so pleases in his capacity as a real estate agent.

So the issue is, I can't even hire my own real estate broker and have them show the property

without me being there, which I'm arguing is at my special injury. Defendant Brays Realty has a commission of 10 percent on resales, which is higher than above market, particularly in an instance where they're likely to be receiving a dual agency commission. They're basically getting two times 5 percent, where they might otherwise get two times 2 percent or 3 percent in a competitive market, and since defendant Brays and defendant Brays Realty have concocted this method to lock out any other real estate agents and force people to stay in, it is at my special injury, and that is what I have pled as my civil conspiracy claim.

Moreover, my first cause of action is a declaratory judgment deeming the covenants invalid. While Mr. Muller has given extensive testimony on the basis of the statutory rule against perpetuities, my argument rests in the common law rule against perpetuities as advanced through South Carolina Cable and other cases.

So we're fine consenting that the uniform statutory rule may be inapplicable. That actually serves to make the covenants at common law almost certainly perpetual, because if you don't violate the statutory rule, then you have to find a means by which you don't violate the common law rule, so it actually creates --

it's more of a help than an hindrance to us, frankly.

Our argument is the covenants are a cause of action as a declaratory judgment that the covenants are invalid. That's what we brought before Judge Mullen on the dismissal. That's what we're here on now. We believe that the thrust of our argument rests on the fact that it's perpetual. It also rests on the fact that the individual assessments are personal covenants. We bring that up now on the basis of the counterclaim, but that's inherently where we are.

Additionally, there are statements with absolutely no evidentiary support such as my motivation to flip the property. I listed the property for sale a year ago with Paul Burton. When I asked him as the real estate expert to give me an appropriate listing price, he suggested $220,000, which, by the way, would actually not be a profit, given all of the fees and assessments that I've paid to date and his 10 percent commission, so a $220,000 sale price would actually leave me with less money than when I started.

Obviously, there's no ability to flip the property. I have no interest in it. Frankly, I'm seeking to have the covenants declared invalid so I can walk away from this and, you know, to that vein, defendant Brays Realty has offered no showings of my

property. I've received no offers. I've received no indication that it's ever been listed or shown, and I believe that discovery on the matter of civil conspiracy will show that properties are being adversely selected in the nature of their relationship.

MR. MULLER: Just briefly, may I point out just two things? There is a leading South Carolina case on civil conspiracy. It's Pye, P-y-e, and I've cited it in my brief. What it says -- it says in order for civil conspiracy to survive, the damages alleged must go beyond the damages alleged in the other causes of action. The damages that Mr. Burns is alleging in civil conspiracy are exactly the same damages he's alleging in his first cause of action. There's no difference.

The second thing that the case says is it says that the essential consideration in civil conspiracy is whether the primary purpose or object of the combination is to injure the plaintiff. Mr. Burns has said nothing at all about anything that Brays Island or Brays Realty have done that is directed to intentionally injure him. He's complained about general things. He's complained about general covenants, and he's complained about generally an arrangement between Brays Island and Brays Island Realty, nothing about a civil conspiracy, so for that reason as well, Your Honor, his civil conspiracy

claim should not have another moment of life.

And he doesn't understand the law. When he says that the common law rule against perpetuities survives in South Carolina, that's the clearest indication that he doesn't understand it. It's been superceded by the uniform rule against perpetuities. That's the whole point of uniform law, is to supercede the common law.

So what we've got here, Your Honor, is a young man who bought something that now has seller's remorse over, and he's trying to wiggle out of it, and I would like you, if you don't mind, to take a look at the specific facts I've got and the specific law that I've got in my five-page brief.

THE COURT: I will. I'm going to take it under advisement, obviously, and read what you guys have filed, and I'll let you know what I have decided.

MR. MULLER: Thank you very much, Your Honor.

MR. BURNS: If I may address one final point?

THE COURT: What?

MR. BURNS: The issues of damages, the damages pled in the declaratory judgment are simply to be alleviated from the covenants. The special damages under the civil conspiracy, while somewhat related, are different sums of money in different pockets.

To the extent that the civil conspiracy has damaged me by having to maintain property taxes and a mortgage on the property and loss of enjoyment of the funds that I'm unable to recover from it, those are completely separate and apart from the sums otherwise payable under the declaratory judgment. Those are just two completely divorced areas of damages.

THE COURT: All right.

MR. BURNS: Thank you, Your Honor.

THE COURT: I'll let you know what I decide.

- - -

(Whereupon, the proceedings were concluded.)

- - -

I, the undersigned, Amanda Kelly Haffenden, RPR, CRR, Circuit Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court for Beaufort County, South Carolina, on the 22nd of August 2017.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

February 4, 2018

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Circuit Court Reporter

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Roger Young, Circuit Court Judge

Case No. 2017-002395

Brays Island Plantation Colony, Inc., Respondent

and

Brays Island Realty, LLC, Respondent,

v.

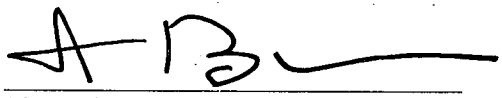
Alexander Burns, Appellant.

PROOF OF SERVICE

I certify that I have this 6th day of March, 2018, served the Appellants Initial Brief, Designation of Matter To Be Included In The Record On Appeal, and a copy of the Transcript, on the Respondent's counsel via regular U.S. first class mail, properly addressed and proper postage prepaid to the following:

Kevin E. Dukes, Esq. P.O. Drawer 1107, Beaufort, SC 29901-1107

March 6th, 2018



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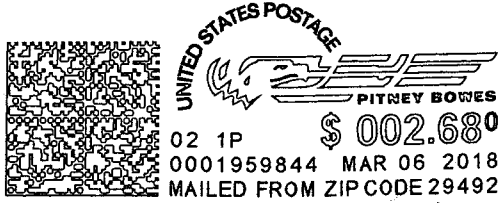

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