THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Roger Young, Circuit Court Judge

Case No. 2016-CP-07-00265
Appellate Case No.: 2017-002395

Alexander Burns ..... Appellant,

vs.

Brays Island Plantation Colony, Inc. and Brays Island Realty, LLC., ... Respondents.

INITIAL BRIEF OF RESPONDENT BRAYS ISLAND PLANTATION COLONY, INC.

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STATEMENT OF THE CASE

The Appellant, Alexander Burns, filed his Complaint on February 15, 2017 in the Court of Common Pleas in Beaufort County, South Carolina. The Defendants are Brays Island Plantation Colony, Inc., which is the Respondent, and Brays Island Realty, LLC. The Complaint set forth three causes of action. The First Cause of Action was identified in the Complaint as Violation of Uniform Statutory Rule Against Perpetuities as to Defendant Brays. It was directed to the Respondent. The Second Cause of Action was identified in the Complaint as Civil Conspiracy as to Both Defendants. The Third Cause of Action was identified in the Complaint as Violation of South Carolina Consumer Protection Code as to Defendant Brays. It was directed to the Respondent.

This appeal involves cross motions for summary judgment by the Appellant and the Respondent. The Defendant Brays Island Realty, LLC is not involved in this appeal.

The Respondent moved to dismiss on March 15, 2017. In his memorandum on the motion prior to the hearing, the Appellant voluntarily withdrew his Third Cause of Action. The motion to dismiss was denied on April 17, 2017.

The Respondent answered and counterclaimed on April 25, 2017. The Answer contained a denial and defenses of failure to state a claim, laches, waiver and acceptance. The Counterclaim was a verified action on an account for $32,135.50, with leave to increase. The Appellant replied on May 12, 2017 with a denial and defenses of ripeness, failure to allege facts, fraud in the inducement, no meeting of the minds, unclean hands, illegality, unjust enrichment, lack of consideration and reservation and non-waiver.

On June 26, 2017, the Appellant moved for summary judgment on his First Cause of Action. On July 27, 2017, the Respondent moved for summary judgment on both remaining causes of action and its counterclaim. The hearing was on August 22, 2017. The lower court granted the Respondent's motion and denied the Appellant's motion on September 21, 2017. Judgment against the Appellant was entered in the amount of $31,135.50 on September 25, 2017. Leave to apply for increase was ordered. The Appellant moved for reconsideration on September 28, 2017. The lower court denied that motion on October 24, 2017. The Appellant filed Notice of Appeal on November 13, 2017.

STATEMENT OF FACTS

The Appellant's lawsuit is a baseless preemptive *pro se* attempt by a delinquent property owner to avoid paying legitimate owner fees and other amounts that he owes for his enjoyment of the amenities at Brays Island Plantation. This appears from the Complaint itself, from his argument at the hearing on the motions for summary judgment, and from his Plaintiff's Notice and Motion for Reconsideration of Final Order and Stay Judgment or in the Alternative Vacate Judgment. The Appellant is a property owner at Brays Island Plantation, which covers thousands of acres in Beaufort County and provides its owners and their guests an attractive array of sporting and other activities. His obligations arise under a binding Declaration of

Covenants, Conditions and Restrictions dated as of November 11, 1988, as amended, (the "Covenants") filed in the Beaufort County real estate records, that govern the plantation. He was given a copy of the Covenants before he purchased his lot there and was represented at closing by counsel. Complaint, Transcript, p. 25, ll. 10-15, PNMRFOSJAVJ, pp. 1-2, Affidavits of Kevin Rhatigan, F. Douglas P. Evans, and Paul Burton, and Verification of Counterclaim by William Fabian.

He has presented no evidence in support of his claims or in defense of the Respondent's counterclaim.

Nor does he understand the law.

He does not have a case.

His lawsuit and this appeal are for the purpose of delay.

The order of the lower court should be affirmed.

ARGUMENT

A. DID THE TRIAL COURT ERR IN FAILING TO CONSIDER THE EVIDENCE SET FORTH BY THE APPELLANT, PRO SE, IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT?

The Appellant presented no evidence. The Appellant attended law school and informed the lower court in his Plaintiff's Memorandum in Opposition of Motion of Summary Judgment that he had received the highest grade in his civil procedure class. PMOMSJ, p. 8. He is a sophisticated businessman who has been involved in multi-million dollar transactions. Affidavit of Kevin Rhatigan, Exhibit 2. He knows that he was required to present evidence. Rule 56(e), SCRCP. He chose not to do so, even after the hearing or with his motion for reconsideration. He has no evidence.

The Appellant claims to have verified certain of his filings. Counsel for the Respondent is aware of no such verification.

The Appellant asserts that he is excused from the requirements of law concerning opposition to a motion for summary judgment because he is proceeding *pro se*. He cites no law in support of that proposition. "[A]n issue is deemed abandoned and thus not presented for appellate review if argued in a short, conclusory statement without supporting authority." *Joubert v. S. C. Dept. Social Services*, 341 S.C. 176, 534 S.E.2d 1 (Ct. App. 2000) citing *Fields v. Melrose Ltd. Partnership*, 312 S.C. 102, 439 S.E.2d 28 (Ct. App. 1993). Given the Appellant's legal education, such an exception, even if it existed, should not apply to him anyway.

Even so, the lower court gave the Appellant a full opportunity to present his case. None of his legal arguments or factual allegations were sufficient. The lower court's order sets forth the reasons for granting summary judgment to the Respondent. Order Granting Defendant Bray's Island's Motion for Summary Judgment and Denying Plaintiff's Motion for Partial Summary Judgment, pp. 1-7. It should be affirmed.

The lower court had before it the affidavits from F. Douglas P. Evans, Kevin Rhatigan and Paul Burton and the verification from William Fabian establishing that there is no genuine issue of material fact and that the Respondent was entitled to judgment as a matter of law. Record, ___. They were dispositive. Rule 56(e), SCRCP.

B. DID THE TRIAL COURT ERR IN FAILING TO RULE ON BOTH THE STATUTORY AND THE COMMON LAW UNENFORCABILITY OF THE COVENANTS WHEN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ON ITS COUNTERCLAIM?

The Appellant's Complaint did not broadly allege that the Covenants were unenforceable under both the statutory and common law. The First Cause of Action, concerning enforceability, was limited strictly to the South Carolina Uniform Statutory Rule Against Perpetuities. S.C. Code 27-6-10 through 80. Its limitation was set forth in the title to the cause of action and throughout the ensuing paragraphs. Complaint pp. 4-7, paragraphs

19-30. Likewise, the Appellant's Counterclaim Answer does not "state in short and plain terms the facts" constituting such a defense. Counterclaim Answer, pp. 1-3. Rule 8(b) SCRCP.

A litigant is required to state his or her claims and defenses in the proper pleading. Rules 7 and 8, SCRCP. The Appellant is trained as a lawyer and knows what is required. The law does not allow him to go beyond his pleadings. On the issue of enforceability of the Covenants he is limited to the South Carolina Uniform Statutory Rule Against Perpetuities.

At oral argument he abandoned reliance on that statute and thus abandoned his enforceability cause of action

> "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." Transcript p.27, ll. 15-21.

The Appellant cannot fall back on the common law rule against perpetuities, however, because in his Complaint he alleged that the statute "supersedes common law rule against perpetuities." Complaint, p.5, paragraph 20, and p.7, paragraph 29.

The lower court did not decide on the basis of abandonment. It is an additional ground for affirmance which the Respondent presents to this Court for its consideration. Rules 208(b)(2) and 220(c), SCACR.

Presumably, the Appellant abandoned the South Carolina Uniform Statutory Rule Against Perpetuities because he realized that his argument under it would fail. The principal reasons are set forth in the lower court's order. Order Granting Defendant Bray's Island's Motion for Summary Judgment and Denying Plaintiff's Motion for Partial Summary Judgment, pp. 2-4.

South Carolina's rule against perpetuities originated at common law. In 1987 it was codified as a uniform law at S.C. Code 27-6-10 et seq. The Covenants at issue were adopted a year later. The rule does not apply to the Covenants.

> Defendants incorrectly contend the deed restrictions are a restraint on the alienation of property or transferability of realty with no time limit and, therefore, are void as a violation the rule against perpetuities. To the contrary, the rule against perpetuities does not pertain to covenants restricting the land to certain uses. *Gibson v. Huffman*, 246 Ga. App. 218, 540 S.E.2d 222 (2000) citing *McKinnon v. Neugent*, 225 Ga. 215, 167 S.E. 593 (1969) and *Reeves v. Comfort*, 172 Ga. 331, 157 S.E.2d 629 (1931).
>
> * * *
>
> "[T]he rule against perpetuities deals with estates in land and the vesting of estates, and does not relate to covenants restricting the land to certain uses." McKinnon, supra.

Under the common law the rule did not apply to covenants. That exclusion is preserved in Section 27-6-50(7) of the South Carolina statute, which provides that it does not apply to "a property interest ... that was not subject to the common law rule against perpetuities."

The rule applies only to contingent interests that are not vested. S. C. Code 27-6-20(A) Neither the interest of the Appellant nor that of the Respondent was ever contingent. The interest of the Respondent under the Covenants vested immediately at the time that the Covenants were created. The interest of the Appellant was not created under the Covenants; it was created under his deed and likewise vested immediately at the time of creation. By design and operation the Covenants do not provide for contingent interests; they cause immediate vesting upon purchase by a property owner of a lot at Brays Island Plantation.

Even if the Appellant could clear these hurdles, the statute would not apply because Section 27-6-50(1) specifically excludes non-vested property interests arising out of a "non-donative transfer." The Appellant himself alleges that he purchased his property interest. It was not a donation. The fees at issue under the Covenants are not donations, either. The Appellant alleges a "non-donative" matter that is outside the rule.

If the rule did apply, the Covenants are in compliance. Under the South Carolina statute there are two ways that this can occur. The first is under the "life in being" sub-

section. S.C. Code 27-6-20(A)(1) The second is under the "90 year" subsection. S.C. Code 27-6-20(A)(2) Either is sufficient.

The "life in being" sub-section does not require that a specific person be named. It refers only to "an individual then alive."

> The measuring life need not be specified or even mentioned in the distribution. The donor need not intend any particular person to be the measuring life. The measuring life need not be a relative of any taker, or the holder of a previous estate or of any interest in the distribution. *Understanding the Measuring Life in the Rule Against Perpetuities*, 1974 Wash. U. L. Q. 265 (1974) (citations omitted)

It is a common practice to select a prominent family in order to come within the rule's "life in being" safe harbor and thereby avoid any possible argument of violation. That was done for the Covenants, which identified the Kennedy family. Covenants, p. 525.

Also, vesting has occurred within 90 years after creation of the interest. That is also compliance. The Covenants were created in 1989; the Appellant bought his property and became subject to them in 2014.

His challenges beyond his Complaint – though not allowable -- are also without merit. The Covenants are not perpetual, either on face or as applied to the Appellant. They attach to the land and, like any other owner, he can remove himself from future protections and obligations by selling his lot on the plantation. They can be amended by a 2/3 vote of the owners. Covenants, pp. 523-524. The management of the plantation is vested in a board of directors elected by the owners. Covenants, pp. 505-507. Together the board and owners determine the assessments. Covenants, pp. 507-512. Nothing is permanent.

Covenants such as those at issue are well recognized and accepted by the courts. "Restrictive covenants differ from contracts in that they 'run with the land,' meaning that they are enforceable by and against later grantees." *Queen's Grant II v. Greenwood Development*, 368 S.C. 342, 628 S.E.2d 902 (Ct. App. 2006), citing 17 S.C. Jur. Covenants §18 (2005). The

Covenants are valid and enforceable. Covenants, as amended, Exhibit 1 to Affidavit of Kevin Rhatigan. The Appellant is bound by them.

They apply to over 5,000 acres of land, the vast amount of which is enjoyed in common by no more than 325 owners. Covenants, pp. 488-489 and 529. The Covenants were put into place for the common good. In page after page they "touch and concern" the land. They bear the hand at their creation 30 years ago of one of South Carolina's then leading lawyers, Augustine T. Smythe. Covenants, p. 527. They have been independently reviewed and approved by an experienced South Carolina real estate lawyer who has expertise in such matters. Affidavit of F. Douglas P. Evans.

The Covenants were presented to the Appellant before he purchased his lot on the plantation. Complaint, p. 3, paragraph 7. He chose to complete the purchase and was represented at closing by a lawyer. Affidavit of Paul Burton. Accordingly, he accepted the Covenants, waived the right to challenge them, and is estopped. These are additional grounds upon which the Court may affirm.

The Appellant never challenged the Covenants before filing this lawsuit. Affidavit of Kevin Rhatigan. The only reason that he challenges them now is that he fell behind in paying his assessments and realized that a collection lawsuit was on the horizon. This is set forth in the Complaint and in the Appellant's motion for reconsideration. Complaint, pp. 1-4 and Plaintiff's Notice and Motion for Reconsideration of Final Order and Stay of Judgment or in the Alternative Vacate Judgment, pp. 1-2. His challenge to the Covenants is purely for delay.

The law that the Appellant cites is not applicable. For example, he incorrectly cited to *Ward v. West Oil Co., Inc.*, 379 S.C. 225, 666 S.E.2d 618 (Ct. App. 2008). That case was overturned by the South Carolina Supreme Court. *Ward v. West Oil Co., Inc.*, 387 S.C. 268, 692

S.E.2d 516(2010). Also, it involved an illegal gambling contract. The subject matter of the Covenants is not gambling, nor otherwise illegal.

In a final attempt to escape, the Appellant argues, "This is obviously a factual issue." Appellant's Brief, p. 19. This is a new argument. He told the lower court, "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." Transcript, p. 20. The Appellant also was the first one to move for summary judgment on his First Cause of Action. In his motion, he specifically wrote, "there is no genuine issue as to any material fact." Plaintiff's Motion for Summary Judgment on the First Cause of Action Against Brays Island Colony, Inc., p. 1. Not only is his appellate argument about the facts a new one, it is also the opposite of his position in the lower court. This is not allowed. "For an issue to be properly preserved it has to be raised and ruled on by the trial court." *State v. Stahlnecker*, 386 S.C. 609, 690 S.E.2d 565 (2010). "An issue not properly preserved cannot be raised for the first time on appeal. *State v. Hoffman*, 312 S.C. 386, 440 S.E.2d 869 (1994).

C. DID THE TRIAL COURT ERR IN GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ON THE SECOND CAUSE OF ACTION WITHOUT AFFORDING THE APPELLANT DISCOVERY ON THE CIVIL CONSPIRACY CLAIM?

The Appellant filed his Complaint on February 15, 2017. The hearing on the parties' motions for summary judgment was August 22, 2017. During that six month interval, the Appellant did not engage in any discovery. Even after the hearing and before the lower court ruled on September 21, 2017, he engaged in no discovery. Nor did he engage in any discovery before the lower court ruled on his motion for reconsideration on October 24, 2017. He did not submit his own affidavit under Rule 56(f), SCRCP "that he cannot for reasons stated

present by affidavit facts essential to justify his opposition"; nor did he otherwise specify what discovery he needed and why. The Appellant had a "full and fair opportunity to complete discovery." *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999). He chose not to.

In his Complaint, the Appellant based his civil conspiracy claim upon the allegation that the Defendants "conspired to induce Plaintiff into entering into the purchase of the Property." Complaint, p. 8, paragraph 32. He dropped that at oral argument.

> "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..." Transcript, p. 25, ll. 18-22.

By dropping that argument, he abandoned his civil conspiracy cause of action. This is an additional ground for affirmance. Rules 208(b)(2) and 220(c), SCACR.

When the Appellant realized at oral argument that he could not base his civil conspiracy claim on his purchase of his lot, he then attempted to shift it to his effort to sell the property. That attempt fails, also. First, he did not plead this. Second, the argument applies across the board to other owners; it is not specific to him. He told the lower court:

> "...defendant Brays and defendant Brays Realty have concocted this method to lock out any other real estate agents and force people to stay in..." Transcript, p. 27, ll. 9-11

Third, it is completely illogical. The last thing that the Respondent wants is for the Appellant to remain a property owner on the plantation. The Respondent wants him replaced as fast as possible with a dues paying owner.

The other claims of civil conspiracy, both in the Complaint and at oral argument are also not specific to the Appellant and, therefore, as a matter of law cannot support a civil conspiracy claim. Complaint, pp. 8-9, paragraphs 33-39, referring, for example, to "others similarly situated", "these properties and their owners", and "Owners." Continuing the description of his civil conspiracy claim at oral argument, the Appellant said,

"...it was the use of the Covenants and the effective disenfranchisement of this captive real estate company... Transcript, p.25, ll. 22-24.

The Appellant's arguments are about matters of general application to others and for that reason cannot support a claim for civil conspiracy against him .

The "essential consideration" in civil conspiracy" is "whether the primary purpose or object of the combination is to injure the plaintiff." *Pye v. Fox*, 369 S.C. 555, 567, 633 S.E. 2d, 505 (2006). The Appellant's Complaint and his argument to the lower court make clear that his lawsuit is based on general matters applicable to all property owners at Brays Island Plantation. It is upon the "primary purpose" ground that the South Carolina Supreme Court affirmed the circuit judge's grant of summary judgment in Pye. "There was absolutely no evidence submitted at the summary judgment stage supporting an agreement between Hill and Richard Fox to injure the Pyes." Pye, supra, 369 S.C. 568.

As in Pye, the Appellant has offered no proof of the required elements of this cause of action. "The elements of civil conspiracy in South Carolina are (1) the combination of two or more people, (2) for the purpose of injuring the plaintiff, (3) which causes special damages. ... It is essential that the plaintiff prove all of these elements in order to recover." Pye, supra, 369 S.C. 567.

The Appellant wanted property at Brays Island, so he bought it from another owner. He did not buy it from the Respondent. He knew about the Covenants. He used the amenities at the plantation and now he does not want to pay for them. Buyer's remorse and reluctance to pay for one's chosen lifestyle and investment are not grounds for civil conspiracy.

CONCLUSION

The Honorable Roger Young correctly ruled on the two summary judgment motions before him. He denied the motion of the Appellant and granted the motion of the

Respondent. His order provided leave for the Respondent to apply to the lower court for an increase in its judgment against the Appellant to account for such things as attorneys' fees, collection costs, expenses, interest and future unpaid assessments. The Respondent respectfully requests the appellate court to affirm Judge Young's order, including this proviso, and the judgment in the amount of $32,135.50 owed as of April 25, 2017.

Respectfully submitted,

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March 30, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
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The Honorable Roger Young, Circuit Court Judge

Case No. 2016-CP-07-00265
Appellate Case No.: 2017-002395

Alexander Burns ..... Appellant,

vs.

Brays Island Plantation Colony, Inc. and Brays Island Realty, LLC., ... Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below he served copies of the Initial Brief of Respondent Brays Island Plantation Colony, Inc. and Designation of Matter To Be Included In The Record on Appeal with Certificate of Counsel on Appellant by mailing a copy of the same via First Class, U.S. Mail, postage prepaid to him at:

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March 30, 2018

VIA FEDERAL EXPRESS
The Honorable Jenny Abott Kitchings, Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: Alexander Burns, Appellant, vs. Brays Island Plantation Colony, Inc. and Brays Island Realty, LLC, Respondents
Case No.: 2017-002395

Dear Ms. Kitchings:

Enclosed please find the original unbound and one copy of Respondent's Brief in the above matter, along with the original unbound and one copy of the Designation of Matters. By copy of this letter I herewith serve these documents on the Appellant.

Very truly yours,

Carl F. Muller

CFM:dph
c: Mr. Alexander Burns
934 Richter Way
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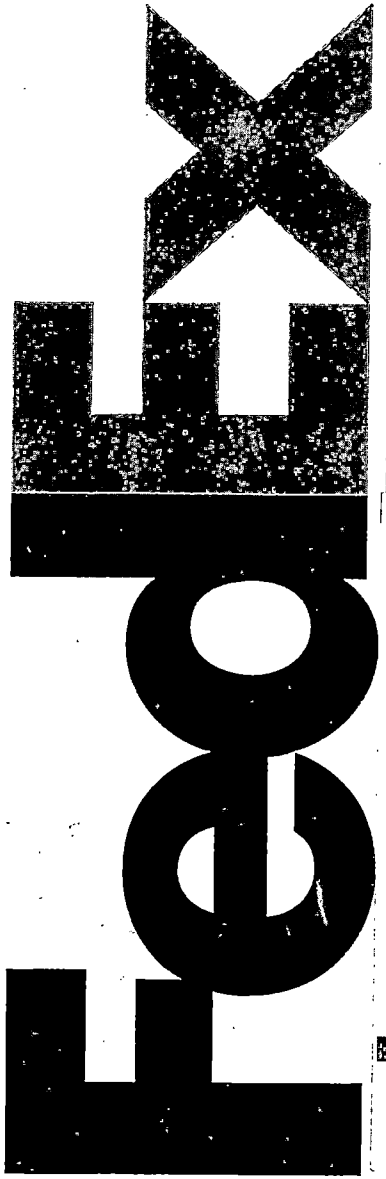
Enclosures



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