THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

RECEIVED
APR 12 2018
S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY

IN THE COURT OF COMMON PLEAS

HON. MARVIN H. DUKES, III
MASTER IN EQUITY AND SPECIAL CIRCUIT JUDGE

RECEIVED
APR 20 2018
SC Court of Appeals

Case Number 2014-CP-07-1435
Appellate Case No.: 2016-000637

CATWALK, LLC; MOONDOG, LLC; LET, LLC; LOST PARROT LLC;
VACATION INN, LLC; SBM, LLC; and
SOUTH BEACH SWIMMING POOL, INC., ... Petitioner,

v.

SEA PINES SOUTH BEACH OWNERS
ASSOCIATION, INC., ... Respondent.

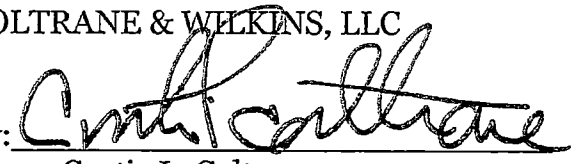
PETITION FOR WRIT OF CERTIORARI

COLTRANE & WILKINS, LLC
Curtis L. Coltrane
South Carolina Bar Number 1344
Post Office Box 6808
Hilton Head Island, SC 29938
(843) 785-5551
(843) 785-5552 (Fax)
curtis@coltraneandwilkins.com
Attorneys for Catwalk, LLC; Moondog, LLC; LET, LLC; Lost Parrot, LLC; Vacation Inn, LLC; SBM, LLC; and South Beach Swimming Pool, Inc.

CERTIFICATION REQUIRED BY RULE 242(d)(1), SCACR

The undersigned certifies that a Petition for Rehearing was filed with respect to Court of Appeals' Opinion 2018-UP-069, and was denied by the South Carolina Court of Appeals by Order filed on March 22, 2018. *See:* Appendix p. 1.

COLTRANE & WILKINS, LLC

By: 

Curtis L. Coltrane
South Carolina Bar Number: 1344
Post Office Box 6808
Hilton Head Island, SC 29938
(843) 785-5551
(843) 785-5552
curtis@coltraneandwilkins.com

Hilton Head Island, South Carolina

This 9th day of April, 2018.

QUESTIONS PRESENTED

1. Is it error for the Court of Appeals to conclude that S. C. Code Ann. § 15-3-380 (Supp. 2015), does not bar a suit claiming that a recorded declaration of covenants encumbers real property, when the party making the claim did not take any action to enforce the declaration of covenants or make any claim that the declaration of covenants encumbered the real property for a period of more than forty years?

2. When the text of a recorded declaration of covenants encumbering commercial property is that it is the "sole applicable covenants restricting and affecting commercial properties" to the exclusion of "restrictions and covenants previously recorded," is it error for the Court of Appeals to conclude that a previously recorded declaration of residential covenants also encumbers the commercial property?

3. Is it error for the Court of Appeals to affirm a summary judgment by disregarding the evidence or weighing conflicting evidence and inferences in favor of the party making the motion, when the record reveals more than a scintilla of evidence in opposition to the motion?

STATEMENT OF THE CASE AND FACTS

This case was commenced by Catwalk, LLC; Moondog, LLC; LET, LLC; Lost Parrot LLC; Vacation Inn, LLC; SBM, LLC; and South Beach Swimming Pool, Inc. (hereinafter, collectively referred to as "Catwalk, *et al.*"), against the Sea Pines South Beach Owners Association, Inc. (hereinafter, the "Association"), seeking a declaratory judgment that a recorded document titled "Declaration of Covenants and Restrictions for Sea Pines South Beach, Hilton Head Island, South Carolina" (hereinafter, the "1970 Covenants"), do not encumber their commercial property, for two reasons.

First, the Association did not make any claim that the 1970 Covenants encumbered the commercial property of Catwalk, *et al.*, or its predecessors in title, for a period of more than forty years following the recording of the 1970 Covenants. Second, the text of a later recorded "Declaration of Rights, Restrictions, Affirmative Obligations, Conditions, Etc., which Constitute Covenants Running with certain Commercial Lands of Lighthouse Beach Company" (hereinafter, the "1973 Commercial Covenants"), is that the 1973 Commercial Covenants are the "sole applicable covenants" affecting commercial property.

The Association counterclaimed seeking a declaratory judgment that the 1970 Covenants do encumber the property of Catwalk, *et al.*

The following facts are undisputed:

1. Catwalk, LLC, *et al.*, are the owners of multiple parcels of real property in a commercial tract in Sea Pines on Hilton Head Island that is known as "South Beach Marina

Village."[1]

2. Lighthouse Beach Company established the Association as a residential home owners' association in the 1970 Covenants.[2]

3. Lighthouse Beach Company recorded the 1970 Covenants in the Office of the Register of Deeds for Beaufort County, South Carolina, on August 18, 1970, in Official Record Book 176 at Page 203.[3]

4. The 1970 Covenants refer to a recorded plat as the land encumbered by the 1970 Covenants. The land that is the commercial property known as South Beach Marina Village is included in the boundaries of the property shown on the plat.[4]

5. On February 15, 1973, Lighthouse Beach Company recorded a document entitled "Declaration of Rights, Restrictions, Affirmative Obligations, Conditions, Etc., which Constitute Covenants Running with certain Commercial Lands of Lighthouse Beach Company."[5]

6. Lighthouse Beach Company recorded the 1973 Commercial Covenants on February

---

[1] Complaint, paragraphs 10-16, Appendix, pp. 49-53; Affidavit of Robert A. Gossett, paragraphs 3-9, Appendix, pp. 287-294; Affidavit of Charles A. Scarminach, paragraphs 9-10, Appendix, p. 240.

[2] Complaint, paragraph 17, Appendix, p. 53; Answer and Counterclaim, paragraph 5, Appendix, p. 61.

[3] Complaint, Paragraph 18, Appendix, p. 53; Answer and Counterclaim, paragraph 5, Appendix, p.61; Affidavit of Charles A. Scarminach, paragraph 5, Appendix, p. 238.

[4] January 22, 2016, Order of Hon. Marvin H. Dukes, III, Appendix, p. 43.

[5] Complaint, paragraph 19, Appendix, p. 53; Answer and Counterclaim, paragraph 5, Appendix, p. 61; Affidavit of Charles A. Scarminach, paragraph 6, Appendix, p. 239.

15, 1973, in the Office of The Register of Deeds for Beaufort County, South Carolina, in Official Record Book 206 at Page 1143.[6]

7. The 1973 Commercial Covenants apply to commercial property, which is described as property used or to be used for all retail commercial uses.[7]

8. The properties owned by Catwalk, *et al.*, that lie within South Beach Marina Village are "commercial properties" as the same are defined in the 1973 Commercial Covenants.[8]

9. The 1973 Commercial Covenants read, in relevant part:

> IT BEING THE TRUE INTENT AND PURPOSE of this Declaration that the commercial land use covenants contained herein shall be the sole applicable covenants restricting and affecting commercial properties conveyed by LIGHTHOUSE BEACH COMPANY subsequent to the recording of this Declaration, and such other property as may be deeded subject to the covenants herein by specific reference in individual deeds, or by subsequent declarations; and further, it is the true intent and purpose of LIGHTHOUSE BEACH COMPANY that to the extent that there is a conflict between those restrictions and covenants previously recorded, as set forth above, and those of the instant Declaration, the provisions of the instant declaration shall govern and restrict commercial properties hereafter conveyed in deeds making reference to this Declaration.[9]

10. Between August 18, 1970, and July of 2013, the Association never:

---

[6] Complaint, paragraph 20, Appendix, p. 54; Answer and Counterclaim, paragraph 5, Appendix, p. 61; Affidavit of Charles A. Scarminach, paragraph 6, Appendix, p. 239.

[7] 1973 Commercial Covenants, paragraph 2, Appendix, p. 258.

[8] Complaint, paragraph 24, Appendix, p. 54; The Trial Judge found that the Catwalk, *et al.*, properties are commercial properties as described in the 1973 Commercial Covenants. *See:* January 22, 2016, Order, paragraphs 5 & 6, Appendix, p. 39-40.

[9] Affidavit of Charles A. Scarminach, paragraph 8, Appendix, p. 239; Exhibit B to Affidavit of Charles A. Scarminach, Appendix p. 258. The language appears twice in the 1973 Commercial Covenants. For the second instance, see Exhibit B, Affidavit of Charles A. Scarminach, Appendix, p. 273.

(a) claimed that the commercial properties owned by Catwalk, *et al.*, or their predecessors in title to the commercial property in South Beach Marina Village were encumbered by the 1970 Covenants;[10]

(b) claimed that Catwalk, *et al.*, or their predecessors in title to the commercial property in South Beach Marina Village were obliged to pay assessments to the Association arising under the 1970 Covenants;[11]

(c) claimed that Catwalk, *et al.*, or their predecessors in title to the commercial property in South Beach Marina Village were members of the Association.[12]

(d) took any legal or other action to enforce the 1970 Covenants against Catwalk, *et al.*, in relation the commercial property owned by Catwalk, *et al.*, or their predecessors in South Beach Marina Village.[13]

---

[10] *See:* Affidavit of Charles A. Scarminach, Jr., paragraph 11, Appendix, pp. 240-241; Affidavit of Ned E. Gilleland, Sr., paragraph 6, Appendix, p. 284; Affidavit of Richard T. Sonberg, paragraph 4, Appendix, p. 276; Affidavit of Robert A. Gossett, Jr., paragraph 10, Appendix, p. 294.

[11] *See:* Affidavit of Charles A. Scarminach, Jr., paragraphs 11(c) and 12, Appendix, p. 241; Affidavit of Ned E. Gilleland, Sr., paragraphs 8-9, Appendix, p. 284-285; Affidavit of Richard T. Sonberg, paragraph 8-9, Appendix, p. 276; Affidavit of Robert A. Gossett, Jr., paragraphs 12-13, Appendix, p. 294-295.

[12] Affidavit of Charles A. Scarminach, Jr., paragraph 11(b), Appendix, p. 240-241; Affidavit of Ned E. Gilleland, Sr., paragraph 7, Appendix, p. 284; Affidavit of Richard T. Sonberg, paragraph 7, Appendix, p. 276; Affidavit of Robert A. Gossett, Jr., paragraph 11, Appendix, p. 294.

[13] The Association filed its Answer and Counterclaim in this case on or about August 25, 2014. Appendix, pp. 61-67. That was the first time the Association took any legal action to enforce its claimed rights under the 1970 Covenants against the commercial property in South Beach Marina owned by Catwalk, *et al.*, and their predecessors in title.

11. From and after the recording of the 1970 Covenants on August 18, 1970:

(a) neither Catwalk, *et al.*, nor their predecessors in title to the commercial property in South Beach Marina Village ever paid a regular or special assessment to the Association related to the commercial property owned by them in South Beach Marina Village.[14]

(b) neither Catwalk, *et al.*, nor their predecessors in title to the commercial property in South Beach Marina Village attended any regular or special meeting of the Association in relation to the commercial property owned by them in South Beach Marina Village.[15]

(c) neither Catwalk, *et al.*, nor their predecessors in title to the commercial property in South Beach Marina Village asserted that they had any rights under the 1970 Covenants, related to any of the commercial property owned by them in South Beach Marina Village.[16]

(d) neither Catwalk, *et al.*, nor their predecessors in title to the commercial property in South Beach Marina Village made any use of Common Property owned

---

[14] Affidavit of Charles A. Scarminach, paragraph 12, Appendix, p. 241; Affidavit of Ned E. Gilleland, Sr., paragraph 9, Appendix, p. 285; Affidavit of Richard T. Sonberg, paragraph 9, Appendix, p. 276-277; Affidavit of Robert A. Gossett, Jr., paragraph 13, Appendix, p. 295.

[15] Affidavit of Ned E. Gilleland, Sr., paragraph 10, Appendix, p. 285; Affidavit of Richard T. Sonberg, paragraph 10, Appendix, p. 277; Affidavit of Robert A. Gossett, Jr., paragraph 14, Appendix, p. 295.

[16] Affidavit of Charles A. Scarminach, paragraph 13, Appendix, p. 241-242; Affidavit of Ned E. Gilleland, Sr., paragraph 11, Appendix, p. 285; Affidavit of Richard T. Sonberg, paragraph 11, Appendix, p. 277; Affidavit of Robert A. Gossett, Jr., paragraph 15, Appendix, p. 295.

by the Association in any way related to commercial property owned by them in South Beach Marina Village.[17]

12. In July of 2013, the Association claimed, for the first time, that the commercial property of Catwalk, *et al.*, was subject to the 1970 Covenants. The Association did not file its counterclaim in this case until August 25, 2014. Both dates are more than forty years after the recording of the 1970 Covenants.[18]

---

[17] Affidavit of Ned E. Gilleland, Sr., paragraph 12, Appendix, p. 285; Affidavit of Richard T. Sonberg, paragraph 12, Appendix, p.277; Affidavit of Robert A. Gossett, Jr., paragraph 16, Appendix, p. 295-296.

[18] Affidavit of George W. Williams, Jr., paragraph 7, Appendix, p. 198; Exhibit to Affidavit of George W. Williams, Jr., Appendix, p. 204; note 13, *supra*.

QUESTION PRESENTED NUMBER 1

This case presents a novel issue of law in South Carolina.[19] The Association asserts a claim that the 1970 Covenants encumber the commercial property of Catwalk, *et al.* The only evidence in the record, though, is:

(a) the Association did not claim that the 1970 Covenants encumbered the commercial property of Catwalk, *et al.*, or any of their predecessors in title, for more than forty years after the recording of the 1970 Covenants; and,

(b) the Association took no legal action to enforce the 1970 Covenants against the commercial property of Catwalk, *et al.*, or any of their predecessors in title, for more than forty years after the recording of the 1970 Covenants.

S. C. Code Ann. § 15-3-380 (Supp. 2017), reads:

> No action shall be commenced in any case for the recovery of real property *or for any interest therein* against a person in possession under claim of title by virtue of a written instrument unless the person claiming, his ancestor or grantor, was actually in the possession of the same or a part thereof within forty years from the commencement of such action. And the possession of a defendant, sole or connected, pursuant to the provisions of this section shall be deemed valid against the world after the lapse of such a period. (Our emphasis.)

In its Opinion, the Court of Appeals finds that the Association's claim that the 1970 Covenants encumber the commercial property of Catwalk, *et al.*, is not a claim of an "interest" in real property as described in S.C. Code Ann. § 15-3-380 (Supp, 2017).[20] The

---

[19] Rule 242(a)(1), SCACR, states that cases presenting novel questions of law are of the character of cases for which Certiorari to the Court of Appeals will be granted.

[20] By making this argument, Catwalk, *et al.*, do not concede that the 1970 Covenants encumber their property. The argument is made to demonstrate that the rights claimed by the Association are an "interest" in real property, and that S. C. Code Ann. § 15-3-380 (Supp. 2017), bars its claim due to the Association's inaction for more than forty

Court of Appeals also states that this is a novel issue.

The text from the Court of Appeals' Opinion is:

> Appellants further argue section 15-3-380 of the South Carolina Code (2005) applies to this case. They maintain the Association is, for the first time in more than forty years, asserting an "interest" in their properties by claiming it is subject to the 1970 Covenants. (footnote omitted) We disagree.
>
> No South Carolina Case suggests an "interest" in property includes the type of claim at issue in this case, and we decline to extend the statute thusly.[21]

This holding is contrary to the language of S. C. Code Ann. § 15-3-380 (Supp. 2017), and the 1970 Covenants.

First, S. C. Code Ann. § 15-3-380 (Supp. 2017), bars a claim to assert "any interest" in real property after a lapse of forty years. There is no limitation on the type or types of interests in real property barred by the forty year lapse, it applies to any interest in real property, which is a broad term encompassing any claim of any right.[22] The statute could

---

years following the recording of the 1970 Covenants.

[21] Court of Appeals' Opinion 18-UP-069, Appendix, pp. 29-30. The Trial Judge also found that the Association's claim was not barred by S. C. Code Ann. 15-3-380 (Supp. 2017), but for a different reason. The Trial Judge found: "Section 380 is the limitations period for an action for possession of real property. An action for possession is brought pursuant to S. C. Code Ann. § 15-67-10. No such action or claim was plead by Defendant [the Association]. That issue is denied." Appendix, p. 44. The Trial Judge's holding is also wrong, as the plain language of S. C. Code Ann. 15-3-380 (Supp. 2017), does not limit the application of it to actions for possession of real property.

[22] *Blacks Law Dictionary, Sixth Edition*, in which "interest" is defined as follows:

> The most general term that can be employed to denote a right, claim, title or legal share in something.... More particularly, it means a right to have the advantage accruing to anything; any right in the nature of property but less than title.

not be more plain.[23]

Second, the text of the 1970 Covenants, in unmistakable language, makes clear that the 1970 Covenants create an interest in real property. The 1970 Covenants read, in relevant part:

> "Section 1. Duration and Amendments. The covenants and restrictions of this Declaration shall run with and bind the land, and shall inure to the benefit of and be enforceable by the Association, the Developer of any land subject to this Declaration, their respective legal representatives, heirs, successors and assigns . . ."[24]

The 1970 Covenants impose an obligation to pay assessments to the Association for the maintenance of common elements.[25] Covenants of this sort have been held to run with land and to touch and concern the land.[26]

The 1970 Covenants state that the obligation to pay assessments *creates a continuing lien* upon any property subject to the 1970 Covenants. The 1970 Covenants

---

[23] When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning. In interpreting a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation. Further, the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect. As with other statutes, statutes of limitation are to be given their plain, obvious and rational meaning, rather than a curious or strained construction. *Scovill v. Johnson*, 190 S. C. 457, 3 S. E. 2d 543 (1939).

[24] Appendix, p. 106. The language of the 1970 Covenants removes any doubt that Lighthouse Beach Company intended that the 1970 Covenants would run with the land. *See: West v. Newberry Electric Co-op.*, 357 S.C. 537, 593 S.E.2d 500 (Ct.App. 2004).

[25] 1970 Covenants, Article V, Section 1 and Section 2. Appendix, p. 103-104.

[26] *Harbison Community Association, Inc. v. Mueller*, 319 S.C. 99, 459 S.E.2d 860 (Ct.App. 1995); *Queen's Grant II Horizontal Property Regime v. Greenwood Development Corporation*, 368 S.C. 342, 628 S.E.2d 902 (Ct.App. 2006).

read:

> The Annual and Special Assessments together with such interest thereon and the costs of collection therefore as herein provided, shall be a charge and continuing lien upon the land and all the improvements thereon against which each such assessment is made.[27]

The 1970 Covenants also state that enforcement of the continuing lien is "against the land."[28]

S. C. Code Ann. § 15-3-380 (Supp. 2017), bars a suit to assert "any interest" in real property after a lapse of 40 years.

The Association claims rights that run with the land, touch and concern the land, impose a continuing lien upon the real property of Catwalk, *et al.*, and provide for enforcement of the lien by resort to the land. All of these fall within the category of things covered by the phrase "any interest" in real property. A right that runs with the land and touches and concerns the land is an "interest." A continuing lien on real property that can be enforced by resort to the land is an "interest."[29]

The rights claimed by the Association are an "interest" in real property. Because the Association did not enforce the claimed rights for more than forty years, it now barred from doing so by S. C. Code Ann. § 15-3-380 (Supp. 2017).

The Court of Appeals also held that the following language in the 1970 Covenants precludes application of S.C. Code Ann. § 15-3-380 (Supp. 2017) to the Association's claim:

". . . failure by the Association or any Owner or the Company to enforce any

---

[27] 1970 Covenants, Article V, Section 1. Appendix. p. 103.

[28] 1970 Covenants, Article VIII, Section 3. Appendix, p. 107.

[29] *See:* n. 22, *supra.*

> covenant or restriction herein contained for any period of time shall in no event be deemed a waiver or estoppel of the right to enforce the same thereafter."[30]

While a statute of limitations defense can be waived, the text from the 1970 Covenants relied on by the Court of Appeals does not include any such waiver. Further, application of the bar is not dependent on any a state of facts demonstrating waiver or estoppel by or against the Association. Rather, S. C. Code Ann. § 15-3-380 (Supp. 2017), imposes a legal bar to the bringing of a suit making a claim of any interest in real property after forty years of inaction.

---

[30] Court of Appeals' Opinion 2018-UP-069, Appendix, p. 30.

QUESTION PRESENTED NUMBER 2

As shown in statement of fact number 8 on page 5 above, the properties of Catwalk, *et al.*, in South Beach Marina Village are "commercial properties" as the same are defined in the 1973 Commercial Covenants. The 1973Commercial Covenants include the following language:

> IT BEING THE TRUE INTENT AND PURPOSE of this Declaration that the commercial land use covenants contained herein shall be the sole applicable covenants restricting and affecting commercial properties conveyed by LIGHTHOUSE BEACH COMPANY subsequent to the recording of this Declaration, and such other property as may be deeded subject to the covenants herein by specific reference in individual deeds, or by subsequent declarations; and further, it is the true intent and purpose of LIGHTHOUSE BEACH COMPANY that to the extent that there is a conflict between those restrictions and covenants previously recorded, as set forth above, and those of the instant Declaration, the provisions of the instant declaration shall govern and restrict commercial properties hereafter conveyed in deeds making reference to this Declaration.

The Court of Appeals found the above language to contemplate the "possible applicability of other covenants," and found that the 1970 Covenants encumber the commercial properties of Catwalk, *et al.* The Court of Appeal's reading ignores the plain language which is that the 1973 Commercial Covenants are the: ". . . sole applicable covenants restricting and affecting commercial properties conveyed by LIGHTHOUSE BEACH COMPANY subsequent to the recording of this Declaration."[31]

---

[31] When a contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary, and popular sense. *Sifonios v. Town of Surfside Beach*, 414 S.C. 269, 777 S.E.2d 425 (Ct.App. 2015). The contract and the language used must be considered as a whole. *Madden v. Bent Palm Investments, LLC*, 386 S.C. 459, 688 S.E.2d 597 (Ct. App. 2010). Words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed. *State Accident Fund v. South Carolina Second Injury Fund*, 388 S.C. 67, 76, 693 S.E.2d 441, 445 (Ct. App. 2010). Every term contained in a contract must be considered and given effect if possible. *Valley Public Service Authority v. Beech Island*

The subsequent text regarding conflicts with "covenants previously recorded" simply reinforces the text that the 1973 Commercial Covenants govern commercial property, irrespective of the existence of any other previously recorded declaration of covenants. That is because any previously recorded declaration purporting to encumber commercial property is in direct conflict with the plain text of the 1973 Commercial Covenants stating that the 1973 Commercial Covenants are the "sole applicable covenants restricting and affecting commercial properties." Any other reading renders the "sole applicable covenants restricting and affecting commercial properties" language meaningless.[32]

Further, the Court' of Appeals' ruling relies on a perceived ambiguity ("...in light of these seemingly inconsistent provisions within the document...") and then misapplies the governing law related to such.[33] The governing law where an ambiguity is found is this: "...courts interpret restrictive covenants strictly and resolve any doubt or ambiguity in the covenants in favor of the free and unrestricted use of land."[34]

Thus, in this case, to the extent that the Court of Appeals found that the text of the

---

Rural Community Water District, 319 S.C. 488, 494, 462 S.E.2d 296, 299 (Ct. App. 1995). Courts interpret restrictive covenants strictly and resolve any doubt or ambiguity in the covenants in favor of the free and unrestricted use of land." *Hyer v. McRee*, 306 S.C. 210, 212, 410 S.E.2d 604, 605 (Ct.App. 1990).

[32] The law in South Carolina is that one part of the contract should not be interpreted so as to annul another provision of the same contract. *Richland-Lexington Airport District v. American Airlines, Inc.*, 306 F. Supp. 2d 548 (D.S.C. 2002), aff'd, 61 F. Appx. 67 (4th Cir. 2003). The Court of Appeals' holding does exactly that, and renders the "sole applicable covenants" language meaningless.

[33] Catwalk, *et al.*, do not argue that the 1973 Commercial Covenants are ambiguous. The text stating that the 1973 Commercial Covenants are the "sole applicable covenants" affecting commercial property could not be more plain.

[34] *Hyer v. McRee*, 306 S.C. 210, 212, 410 S.E.2d 604, 605 (Ct.App. 1990).

1973 Commercial Covenants creates any inconsistency or ambiguity, it was bound to resolve inconsistency or ambiguity in favor of the free use of property, and in favor of Catwalk, *et al.* The imposition of the encumbrance of the 1970 Covenants based on a perceived inconsistency is the opposite of what the law requires.

The unambiguous text of the 1973 Commercial Covenants is that the 1973 Commercial Covenants are the "sole applicable covenants" governing commercial property. The Court of Appeal's reading of the 1973 Commercial Covenants renders the language of them meaningless, and the Court of Appeal's reading utilizes a perceived ambiguity to impose the 1970 Covenants on the property of Catwalk, *et al.*

This result is contrary to the law of South Carolina which obliges courts to enforce unambiguous contracts according to the plain language used in them, and, where any ambiguity is found, to resolve them in favor of the free use of real property.

QUESTION PRESENTED NUMBER 3

In the face of undisputed facts set out on pages 3-7, above, the Court of Appeals found that summary judgment in favor of the Association was proper because deeds for the commercial propertyowned by Catwalk, *et al.*, recorded in 1984 and 1987, listed the 1970 Covenants and the 1973 Commercial Covenants as encumbrances. As a result, the Court of Appeals found that the only reasonable inference is that the 1970 Covenants bind the commercial property of Catwalk, *et al.*[35]

While the text in the two deeds reads as it does, the mere listing of the documents in the deeds does not undo or change the language of them, and one must still read the documents to determine the effect of them, if any.

The 1973 Commercial Covenants continue to read, in relevant part:

> IT BEING THE TRUE INTENT AND PURPOSE of this Declaration that the commercial land use covenants contained herein shall be the sole applicable covenants restricting and affecting commercial properties conveyed by LIGHTHOUSE BEACH COMPANY subsequent to the recording of this Declaration, and such other property as may be deeded subject to the covenants herein by specific reference in individual deeds, or by subsequent declarations; and further, it is the true intent and purpose of LIGHTHOUSE BEACH COMPANY that to the extent that there is a conflict between those restrictions and covenants previously recorded, as set forth above, and those of the instant Declaration, the provisions of the instant declaration shall govern and restrict commercial properties hereafter conveyed in deeds making reference to this Declaration.[36]

The conveyance of the properties described in the two deeds are still commercial properties conveyed subsequent to the recording of the 1973 Commercial Covenants. The

---

[35] Court of Appeals's Opinion 2018-UP-069, Appendix, p. 30.

[36] Appendix, p. 258. The only evidence is that the properties of Catwalk, *et al.*, are commercial properties that were conveyed subsequent to the recording of the 1973 Commercial Covenants. See Also: Appendix, p. 273.

1970 Covenants are still "restrictions and covenants previously recorded," to the recording of the 1973 Commercial Covenants. Under these facts and the plain text of the 1973 Commercial Covenants, the only reasonable conclusion is that 1973 Commercial Covenants are the "the sole applicable covenants restricting and affecting commercial properties," to the exclusion of the 1970 Covenants.

The Court of Appeals' conclusion renders the language of the 1973 Commercial Covenants meaningless, which is contrary to the text of the document and contrary to the law of South Carolina.

At a minimum, the text of 1973 Commercial Covenants and the Association's failure to enforce the 1970 Covenants for more than forty years, alone or in combination, qualify as a "mere scintilla" of evidence sufficient to overcome the Association's Motion for Summary Judgment.[37]

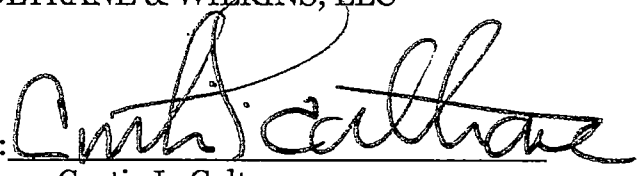
---

[37] Rule 56, SCRCP; *Hancock v. Mid-South Management. Company*, 381 S.C. 326, 673 S.E.2d 801 (2009).

CONCLUSION

For the reasons stated in the foregoing arguments, Catwalk, *et al.*, urge the Court to grant this Petition for Writ of Certiorari, to reverse Court of Appeals' Opinion 2018-UP-069, and to enter judgment in favor of Catwalk, *et al.*

COLTRANE & WILKINS, LLC

By: 

Curtis L. Coltrane
South Carolina Bar Number: 1344
Post Office Box 6808
Hilton Head Island, SC 29938
(843) 785-5551
(843) 785-5552
curtis@coltraneandwilkins.com

Hilton Head Island, South Carolina

This 9th day of April, 2018.

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY

Court of Common Pleas

HON. MARVIN H. DUKES, III
MASTER IN EQUITY AND SPECIAL CIRCUIT JUDGE

RECEIVED
APR 20 2018
SC Court of Appeals

Case No. 2014-CP-07-1435

CATWALK, LLC; MOONDOG, LLC; LET, LLC; LOST PARROT LLC;
VACATION INN, LLC; SBM, LLC; and
SOUTH BEACH SWIMMING POOL, INC., ... Appellants,

v.

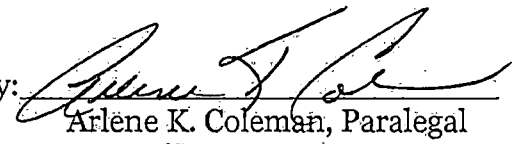
SEA PINES SOUTH BEACH PROPERTY OWNERS'
ASSOCIATION, INC., ... Respondent.

CERTIFICATE OF SERVICE

I, Arlene K. Coleman, paralegal at Coltrane & Wilkins, LLC, certify that on this date, I served a copy of the Petition for Writ of Certiorari and the Appendix, by depositing a copy of the same copy of the same in the United States Mail, with first-class postage affixed, addressed as follows:

J. Michael Jordan, Esq.
Kirsten E. Small, Esq.
NEXSEN PRUET, LLC
Post Office Box 10648
Greenville, SC 29603

COLTRANE & WILKINS, LLC

By: 

Arlene K. Coleman, Paralegal
Post Office Box 6808
Hilton Head Island, SC 29938
(843) 785-5551

Hilton Head Island, South Carolina

This 9th Day of April, 2018.

COLTRANE & WILKINS, LLC

Attorneys at Law
2 Park Lane, Suite 200
Hilton Head Island, SC 29928
Post Office Box 6808
Hilton Head Island, SC 29938
Telephone (843) 785-5551
Facsimile (843) 785-5552

AMANDA C. DUBOSE - PARALEGAL
EMAIL: AMANDA@COLTRANEANDWILKINS.COM
(NOT FOR CONFIDENTIAL COMMUNICATIONS)

CURTIS L. COLTRANE[+]
JOHN W. WILKINS
[+]Also member Virginia Bar & Certified Circuit Court Mediator & Arbitrator

April 18, 2018

RECEIVED
APR 20 2018
SC Court of Appeals

The Hon. Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
P.O. Box 11629
Columbia, SC 29911

IN RE: Catwalk, LLC, et al. v. Sea Pines South Beach Owners' Association, Inc.
Civil Action Number 2014-CP-07-1435
Appellate Case No. 2016-000637

Dear Ms. Kitchings:

Enclosed please find an a copy of the Petition for Writ of Certiorari and Proof of Service in the above captioned matter.

Thank you very much. Should you have any questions or need additional information, please do not hesitate to contact me.

Sincerely,
COLTRANE & WILKINS, LLC

Amanda C. DuBose
Paralegal

Enclosures
Cc: J. Michael Jordan, Esq.
Kristen E. Small, Esq.

neopost
04/18/2018
US POSTAGE

FIRST-CLASS MA
$01.84

ZIP 29928
041L10230424

COLTRANE & WILKINS, LLC
Attorneys at Law
P.O. Box 6808
Hilton Head Island, SC 29938

TO:

The Hon. Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
P.O. Box 11629
Columbia, SC 29911

RECEIVED
APR 20 2018
SC Court of Appeals