THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Circuit Court Judge

Case No. 2017-CP-10-3672

Christie MacConnell,

Appellant,

v.

Frances C. Welch, Respondent.

INITIAL BRIEF OF APPELLANT

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TABLE OF AUTHORITIES

CASES

RULES

STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT IN THAT WHEN THE EVIDENCE OF THE CASE IS TAKEN IN THE LIGHT MOST FAVORABLE TO THE NON-MOVING PARTY, THERE IS A GENUINE DISPUTE OF MATERIAL FACT?

2. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT WHEN IT CONSIDERED THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE MOVING PARTY RATHER THAN THE NON-MOVING PARTY?

3. DID THE TRIAL COURT ERR IN DRAWING AN INFERENCE FROM THE FACT THAT THE DEED FROM THE MAIERS TO APPELLANT OMITS REFERENCE TO SPACE 38?

4. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT BECAUSE THE MOVING PARTY FAILED TO SHOW THAT BASED ON THE EVIDENCE THAT SHE WAS ENTITLED TO JUDGEMENT AS A MATTER OF LAW?

5. DID THE COURT ERR AS A MATTER OF LAW IN HOLDING THAT THE ASSOCIATION WAS REQUIRED TO ALTER THE MASTER DEED"

STATEMENT OF THE CASE

Appellant filed this action on 19 July 2017. The nature of the action was to quiet title to a parking space in a condominium regime in Charleston, South Carolina. On 18 September 2017, Defendant answered and counterclaimed also seeking to quiet title of the parking space in her name. On 3 October and 5 October respectively, Appellant and Respondent filed cross summary judgment motions.

The motions were heard by the Hon. R. Markley Dennis on 11 January 2018. The court issued an order denying summary judgment to Appellant and granting summary judgment to Respondent. Appellant filed a timely motion for reconsideration and alteration or amendment to the order. The trail court granted the motion in part by order of 30 March 2018 but did not amend the grant of summary judgment to Respondent. Appellant filed and served a timely notice of appeal.

STANDARD OF REVIEW

When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law.

FACTS

Appellant and Respondent both own condominiums within the Albemarle Horizontal Property Regime in Charleston, South Carolina. (Deed of Appellant. See also Affidavit of Frances Welch). Appellant owns unit 405 and Respondent owns unit 404. (*Id.*).

A dispute arose over the ownership of a parking space in the Albemarle Horizontal Property Regime between Appellant and Respondent.

Pursuant to the Master Deed of Covenants and Restrictions, a parking space can be designated as a General Common Element or a Limited Common Element.

Each one-bedroom and two-bedroom unit comes with one parking space designated as a Limited Common Element, and each three-bedroom unit comes with two parking spaces designated at Limited Common Elements. (Master Deed, para. 24).

In addition to the parking spaces that come with the units, residents the Albemarle Horizontal Property Regime were allowed to purchase additional parking spaces. At the time of the purchase, the space in question was either granted as a Limited Common Element or a General Common Element parking space. (*Id.*).

While Limited Common Element parking spaces are inseparable from the unit to which they are assigned, General Common Element spaces are wholly separable from the unit to which it is assigned. (Master Deed, para. 24).

The Master deed states that

> A GCE [General Common Element] / Assignable Space is a space that is a General Common Element that has been initially assigned or is to be assigned by Developer to a specific Owner for his/her exclusive use and is in addition to the parking space(s) designated as Limited Common Elements for specific Residences. Such space may be assigned by the Owner thereof to any other Owner of a Residence upon providing the Association with written notice of such assignment. In the event that the Assignee of a

> GCE/Assignable has not assigned such space to another Owner of a Residence at the time such Owner transfers his interest in his Residence, then such space shall no longer be a GCE / Assignable Space and shall revert to being a non-assignable General Common Element space controlled by the Association. (Master Deed, para 24).

The critical distinction between the two is that a General Common Element grant is separable from the title to the Unit and a Limited Common Element is not.

William Maier and Ann M. Maier purchased unit 405 in the Albemarle Horizontal Property Regime from Riverview Condominium Associates (the Developers). (Deed to Wm. and Ann M. Maiers).

The deed from Riverview Condominium Associates LLC to William Maier and Ann M. Maier was recorded in the Office of the Charleston County Register of Mesne Conveyances at Book F542 at Page 791 on 1 February 2005. (*Id.*).

At the time that William and Ann M. Maier purchased unit 405, they also purchased an additional parking space. The grant of the additional space is as follows:

> TOGETHER WITH THE EXCLUSIVE RIGHTS OF the Grantee the use of an additional parking space designated as space number 38 which shall run with the title to the said Unit Number 405 in the Albemarle Horizontal Property Regime, and shall inure to the benefit of Grantee his heirs and assigns and shall be binding on Riverview Condominium Associates, LLC, its successors and assigns. (Deed to Wm. and Ann M. Maiers)

William Maier and Ann M. Maier, having fee simple title to unit 405, sold the Condo to Appellant. (Deed to Appellant).

That on 30 November 2012, on the same day on which William Maier and Ann M. Maier transferred unit 405 to the Appellant, they assigned the parking space designated as 38 to the Respondent by "Assignment of GCE/Assignable Space" dated 30 November 2012. (Deed to Respondent).

Both Plaintiff and Defendant now claim legal ownership over the parking space.

ARGUMENTS

1. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN THAT WHEN THE EVIDENCE OF THE CASE IS TAKEN IN THE LIGHT MOST FAVORABLE TO THE NON-MOVING PARTY, THERE IS A GENUINE DISPUTE OF MATERIAL FACT.

When a court is presented with a motion for summary judgment, the Court should grant summary judgment when there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. SCRCP 56. To determine whether an issue of fact exists, the court must view the evidence and all its inferences in a light most favorable to the nonmoving party. *Koester v. Carolina Rental Ctr. Inc.*, 313 S.C. 490, 443 S.E.2d 392 (1994). Thus, according to the law, not only must the trial court have considered the evidence before it, but it must have considered the inferences which may be drawn from such evidence. "Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Hamilton v. Miller*, 301 S.C. 45, 47, 389 S.E.2d 652, 653 (1990).

The parties fundamentally agree that the parking space in question is either a Limited Common Element or a General Common Element. If the parking space is a Limited Common Element, it conveyed with the property to Appellant. It the parking space was not a Limited Common Element, it did not convey to Appellant.

The master deed, at paragraph 5, states

> The percentage interest in the common elements, both general common elements and limited common elements, **cannot be separated from the Residence to which it appertains and shall be automatically conveyed or encumbered with the Residence even though such interest is not expressly mentioned or described in the deed, mortgage or other instrument**. (All emphasis added).

The **only** exception to this rule is the case of GCE [General Common Element] Assignable

Parking Spaces. Under paragraph 24 of the master deed, special rules are given regarding GCE spaces. By the terms of Paragraph 24 of the master deed a GCE space will **always** eventually sever from the unit to which it was assigned. Either the owner will assign it to another owner, which is wholly permissible, or it will revert to the Homeowners' Association when the owner sells the unit. However, either way, a GCE space is excluded by the express terms of the master deed from those general common elements and limited common elements which "**cannot be separated from the Residence to which it appertains**." (Master Deed, para. 5).

If the Appellant's predecessors in interest had a GCE space, then they were at liberty *arguendo* in theory, to convey it to Respondent assuming they did so in compliance with the provisions of the other rules in the covenants. However, if the Appellant's predecessor in interest owned the parking space as a Limited Common Element, the space "**cannot be separated from the Residence to which it appertains** and shall be automatically conveyed or encumbered with the Residence... ." (Exhibit 2, para. 5).

It is the position of the Appellant that to determine how the Appellant's predecessors held the interest, one need look no further than their own grant. In construing a deed, "the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy." *Wayburn v. Smith*, 270 S.C. 38, 41, 239 S.E.2d 890, 892 (1977). "In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law." *Gardner v. Mozingo*, 293 S.C. 23, 25, 358 S.E.2d 390, 391-92 (1987). "**The intention of the grantor must be found within the four corners of the deed.**" *Id.* at 25, 358 S.E.2d at 392. (Emphasis added).

In this case, the Court determined

> MacConnell has presented no evidence that the Maiers ever elected to have the

> additional parking space (Space Number 38) designated as a Limited Common Element for their Residence, nor was the Master Deed amended to reflect such an election as required by Section 24 of the Master Deed.

However, there is significant error to be found in the court's conclusions. Appellant presented the Court with the deed to her predecessors in interest. Keeping in mind that the master deed defines what is and is not a Limited Common Element space, i.e. a space which cannot be separated from the unit. The deed to the Maiers states as follows

> TOGETHER WITH THE EXCLUSIVE RIGHTS OF the Grantee the use of an additional parking space designated as space number 38 **which shall run with the title to the said Unit Number 405** in the Albemarle Horizontal Property Regime, and **shall inure to the benefit of Grantee his heirs and assigns** and shall be binding on Riverview Condominium Associates, LLC, its successors and assigns. (Emphasis added).

In the light most favorable to Mrs. MacConnell, which the trial court did not consider, a reasonable construct is that (1) because only a Limited Common Element space is inseparable from the unit, and (2) because the grant made the parking space run with the title to the unit, that it was a grant of a Limited Common Element. This construct is wholly supported by the law. If the space is intended to "run" with Unit 405, then it was intended to be a part of and inseparable from the title, and thus to convey with the title. From this standpoint there is some evidence which if viewed in the light most favorable to Appellant supports her claims and creates a dispute of fact.

This is supported even further by standard canons of construction. Constructions which result in an absurdity should be avoided. See *Kitchen v. Southern Ry,* 1 Ann.Cas. 747, 4, 68 S.C. 554, 48 S.E. (1904). In the light most favorable to the Appellant, a reasonable finder of fact could easily find that because the grant of the parking space expressly made the space run with the title to unit 405, that it would be an absurdity to conclude that it was a severable General

Common Element which at some point in time **will** separate from the unit.1

It is manifest that the grant of the space coupled with the language of the master deed raises an inference favorable to the Appellant who was the non-moving party. Summary judgment was not proper, and the trial court should be reversed.

Because there is some evidence regarding the nature of the grant (which controls the outcome of the case) which is genuinely in dispute, the grant of summary judgment was not proper and should be vacated.

2. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT WHEN IT CONSIDERED THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE MOVING PARTY RATHER THAN THE NON-MOVING PARTY

As stated above, when a motion for summary judgment is properly before a court, the court must consider the evidence in the light most favorable to the non-moving party instead of the moving party. See e.g. *Prestwick Golf Club v. Prestwick Ltd.,* 331 S.C. 385, 503 S.E.2d 184 (Ct App., 1998). In this case, there were cross motions for summary judgment. Regarding the Plaintiff's motion, the trial court was obliged to consider the evidence in the light most favorable to the Defendant, and in regard to the Defendant's motion, the trial court was obliged to consider the evidence in the light most favorable to the Plaintiff. If the question is one of construction. "[s]ummary judgment is appropriate where evidence is susceptible of only one reasonable interpretation and the moving party is entitled to judgment as a matter of law." *Gray v. State Farm Auto Ins. Co.*, 491 S.E.2d 272, 327 S.C. 646 (Ct. App., 1997).

As shown above, the Court failed to consider the evidence in the light most favorable to the non-moving party. There was some evidence before the court which showed that the initial,

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1 It will separate either upon the sale of the space by the GCE Space owner or upon the sale of the unit whereby it will revert to the Association. Regardless, it will discontinue running with the land.

grant was a grant of a Limited Common Element. Not only was this evidence ignored by the trial court, but the inferences from the evidence before the trial court were taken in the light most favorable to the moving party rather than the non-moving party. The Court reasoned:

> In fact, the Maiers' subsequent conduct is emphatic evidence that they did not elect to convert Space 38 into a Limited Common Element of Unit 405. The Maiers negotiated and sold the rights to Space 38 to Ms. Welch, and executed an Assignment consistent therewith. Presumably the Maiers would not have done this if they reasonably believed they had elected to make Space 38 a Limited Common Element. This is further evidenced by the deed from the Maiers to MacConnell, which conspicuously omits any reference to Space 38 or any parking spaces at all.

Of course, there is no evidence in the file of what the Maier's intent was at the time when they received the grant. None whatsoever.

Yet the Court looked at actions taken many years later and from these actions drew inferences and conclusions about what the Maiers' intent was many years prior. These inferences were drawn in the light most favorable to the moving party and not the non-moving party. For all the court knew, the Maiers may have been mistaken as to what rights they acquired or forgot the nature of their grant. Any number of inferences can be taken, yet the court focused its conclusion upon the single inference which was in favor of the moving party and against the non-moving party. The decision was error and should be reversed.

3. THE TRIAL COURT ERRED IN DRAWING AN INFERENCE FROM THE FACT THAT THE DEED FROM THE MAIERS TO APPELLANT OMITS REFERENCE TO SPACE 38.

The trial court, noting in its order that the "deed from the Maiers to MacConnell, which conspicuously omits any reference to Space 38 or any parking spaces at all," drew from that an inference that the Maiers did not intend to convey the parking space to Plaintiff. This is error on many levels.

"In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law." *Gardner v. Mozingo*, 293 S.C. 23, 25, 358 S.E.2d 390, 391-92 (1987). "The intention of the grantor must be found within the four corners of the deed." *Id.* at 25, 358 S.E.2d at 392. The deed in question incorporates the master deed (covenants and restrictions) by subjecting the conveyance to the covenants. Therefore, the trial court should have considered the master deed which states that a Limited Common element "**shall be automatically conveyed or encumbered with the Residence even though such interest is not expressly mentioned or described in the deed, mortgage or other instrument**." (Master Deed, Paragraph 5).

The error of the court in this instance was failing to construe the deed as encompassing all Limited Common Elements whether they were expressly stated or not. The limited common elements pass pursuant to the master deed whether they are referenced in the deed or not as a matter of law. However, the trial court ignored the master deed and concluded that a lack of mention must have meant a lack of intent on the Maiers part to convey the parking space. This inference and the court's holding based upon it: (1) expressly ignores paragraph 5 of the master deed which says it was automatically conveyed without reference; (2) considers the Maiers' intent at the time of the grant rather than considering the nature of the estate in the parking space which the Maiers acquired, and (3) takes another inference in favor of the moving party and against the non-moving party.

Returning to the question of the Maiers' the question is the nature of the parking space. Is it a Limited Common Element or a General Common Element space? The real issue is whether the Maiers acquired a Limited Common Element or a General Common Element space. What it is does not hinge upon the Maiers' impressions or understandings of what the nature of

the space was at the time they attempted to convey it. The matter hinges upon what type of grant the Maiers received from the grantor, and the Maiers deed to Appellant, and the language therein, simply fails to bear upon the issue. Regardless, a silence in the deed raises no inference as a matter of law, because a Limited Common Element passes with the property even without reference in the deed. The error warrants reversal.

4. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT BECAUSE THE MOVING PARTY FAILED TO SHOW THAT BASED ON THE EVIDENCE THAT SHE WAS ENTITLED TO JUDGEMENT AS A MATTER OF LAW.

The lack of a dispute of genuine fact does not entitled a party to summary judgment. Even if, *arguendo*, there were no genuine disputes of material fact, the moving party is not relieved of the obligation of demonstrating that she is entitled to judgment as a matter of law. See SCRCP 56(c). In this case, not only did the moving party fail to demonstrate a lack of a genuine dispute of material facts, she failed to demonstrate to the court that she was entitled to judgment.

The court determined that

> MacConnell has presented no evidence that the Maiers ever elected to have the additional parking space (Space Number 38) designated as a Limited Common Element for their Residence, nor was the Master Deed amended to reflect such an election as required by Section 24 of the Master Deed.

The court fails to note that the Defendant failed to present a shred of evidence showing that the Space number 38 was designated as a General Commons Element. Under Paragraph 24, a purchasing party (the Maiers) "shall at the time of the closing of the purchase of his Residence elect to have that space designated as a Limited Common Element for his Residence, or have it remain as a GCE/Assignable Space as hereinafter defined."

Based on this language, an election had to be made one way or the other. A decision had to be made. For the court to confirm ownership of the parking space in respondent, she was required to demonstrate that the Maiers elected to classify the purchase as a General Common Element in order to demonstrate to the Court that she was entitled to judgment as a matter of law. There is not a shred of evidence before the court **other than the deed to the Maiers itself** which gives any indication of what the parties' intent was at the time of the grant, and the language of the deed shows that it was intended to run with Unit 405, which of the definition of a Limited Common Element under the Covenants and Restrictions.

Moreover, the Court declared "nor was the Master Deed amended to reflect such an election as required by Section 24 of the Master Deed." Where in the file is there one shred of evidence supporting this conclusion? There is no affidavit to that effect. There is no admissible evidence in the file at all demonstrating that the master deed was never altered. If the Defendant wanted judgment granted to her, she was required to demonstrate her entitlement with competent evidence but did not do so.

The Court apparently felt that the master deed offered by Defendant as an exhibit was controlling.

> Even if one assumes that the language contained in the deed from the Developer to the Maiers is sufficient to show that the Maiers elected to convert Space 38 into a Limited Common Element of Unit 405, the alleged conversion was still ineffective because the Association did not amend the Master Deed to reflect this alleged change in status. **At the time of the deed to the Maiers, the Master Deed included a table showing that Space 38 is a GCE-A or General Common Elements – Assignable space.**

The question is not controlled by the master deed at the time of the conveyance. The master deed was recorded on 24 August 2004. Of course, the information on it does not

reflect anything done after that date, and the Maiers did not purchase their lot until 24 January 2005. In short, the Defendant failed to demonstrate to the court that the master deed was not amended after the transfer to the Maiers. The court again assumed a fact which was not in evidence.

Regarding the question of whether or not a dispute of fact exists, a moving party may discharge the duty of demonstrating no dispute "'showing'— that is, pointing out to the [trial] court—that there is an absence of evidence to support the nonmoving party's case." *Baughman v. AT& T*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). No affidavits are required. However, the moving party is not relieved of all obligation to prove her case. If she would not use affidavits, then she must demonstrate to the court that based upon the undisputed facts, that she is entitled to judgment as a matter of law and she must do so based on "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits... ." SCRCP 56. No competent evidence was before the court which demonstrates that she is entitled to judgment as a matter of law. She presented nothing more than conclusory opinions and a deed which fails to define whether the space was a Limited Common Element which could not be conveyed to her or a General Common Element which could. The holding should be reversed.

5. THE COURT ERRED AS A MATTER OF LAW IN HOLDING THAT THE ASSOCIATION WAS REQUIRED TO ALTER THE MASTER DEED.

As stated above, the Court determined that the Master Deed had not been amended. There was no admissible evidence before the court as to whether the master deed had or had not been amended. Nevertheless, without a factual basis, the trial court made a specific finding of fact that it had not.

The Court noted that

> Even if one assumes that the language contained in the deed from the Developer to the Maiers is sufficient to show that the Maiers elected to convert Space 38 into a Limited Common Element of Unit 405, the alleged conversion was still ineffective because the Association did not amend the Master Deed to reflect this alleged change in status. At the time of the deed to the Maiers, the Master Deed included a table showing that Space 38 is a GCE-A or General Common Elements – Assignable space.

This is a wholly unsupportable construct. Firstly, the master deed before the trial court was dated prior to the conveyance to the Maiers. It obviously reflected space 38 as a GCA-A because it was at the time. As the Court noted in its order the Covenants and restrictions state:

> [i]f an Owner has been assigned an additional parking space in addition to the spaces provided above, he shall at the time of the closing of the purchase of his Residence elect to have that space designated as a Limited Common Element for his Residence, or have it remain as a GCE/Assignable Space as hereinafter defined. **If such Owner elects to have the additional space designated as a Limited Common Element for his Residence, the Master Deed shall be amended by the Association to reflect such election**. (Emphasis added)

A plain language examination of the provision demonstrates that it is the election of the purchaser, and nothing else, that makes the grant a limited common element or a general common element. Once the election is made, the Association's act of amending the Master Deed is purely a ministerial reflection of what had already occurred. Secondly, there was no evidence before the court that the master deed was never subsequently amended.

The Court erred in concluding that this ministerial act (1) never happened or (2) was necessary to effect a conveyance of a Limited Common Element parking space – particularly when the description of the space conveyed matches the description of a Limited Common Element by the Master Deed.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court.

Respectfully submitted,

12 June 2018

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