STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
Court of Common Pleas
Mikell Scarborough, Master-in-Equity

App. No. 2015-002550
Ct. App. Op. No. 5581, filed August 1, 2018

Nathan Bluestein, Ettaleah Bluestein, M.D.,
Theodore Albenesius, III, and Karen Albenesius,

Appellants,

v.

Town of Sullivan's Island and Sullivan's Island Town Council,

Respondents.

PETITION FOR REHEARING

This action arises from a 1991 Deed by which the Town of Sullivan's Island obtained ownership of certain ocean-front accreted lands and bound itself to certain restrictions and obligations aimed at preserving the conditions and character of the oceanfront area as it existed in February 1991. The Plaintiffs are front-row property owners on Sullivan's Island, third-party beneficiaries under the terms of that Deed, seeking a declaration that the Town is obligated under the terms of the Deed to cut (or allow others to cut) all trees and shrubs on the accreted land to a height of three feet in accordance with the Town ordinance in effect at the time of the Deed was executed in February 1991. This Court has affirmed the Trial Court's orders granting summary judgment to the Town on causes of action for breach of contract, breach of contract accompanied by a fraudulent act, unconstitutional violation of the contract clause, and abatement of nuisance.

The Appellants respectfully submit this petition seeking a rehearing on grounds that the Court has overlooked and/or misapprehended certain points as discussed below.

1. INTERPRETATION OF THE DEED: The Court of Appeals has overlooked or misapprehended the clear language of the 1991 deed and misinterpreted the intention of the parties to preserve the conditions and character of the oceanfront area as it existed in February 1991.

The Town of Sullivan's Island holds ownership of certain ocean-front accreted lands pursuant to a 1991 Deed wherein the Town bound itself to certain restrictions and obligations aimed at preserving the conditions and character of the oceanfront area as it existed a specific point in time - February 1991. The Appellants maintain that the Town is obligated under the terms of the Deed to cut, or to at least allow the property owners to cut, all trees and shrubs on the accreted land to a height of three feet in accordance with the Town ordinance in effect in February 1991. While the Appellants have asserted several causes of action, predominantly, the claims for breach of contract (and the related claim for breach of contract accompanied by a fraudulent act) are grounded in the 1991 Deed. In affirming the dismissal of all the claims founded on the deed, the Court of Appeals has overlooked and misapprehended the core component of the deed restrictions which places a temporal standard for maintaining the accreted land.

a. The Express Intent to set a Standard for Maintaining the Natural Character of the Property as it Existed in February 1991

There are several well-settled principles applicable to interpretation and enforcement of this deed. Wayburn v. Smith, 270 S.C. 38, 41-42, 239 S.E.2d 890, 892 (1977) ("In the construction of this deed, we are guided by two settled rules of law.") "First, the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy." Id. (citation omitted). This is a corollary to the basic contract rule that when an agreement comes before the court for interpretation, the main concern of the court is to give effect

to the intention of the parties. Id. (citation omitted). A court's duty is "limited to interpretation of the contract made by the parties themselves regardless of its wisdom or folly, apparent unreasonableness, or failure to guard their rights carefully." 30 S.C. Jur. *Contracts* § 30; Gilstrap v. Culpepper, 283 S.C. 83, 86, 320 S.E.2d 445, 447 (1984).

The purpose for the land transaction pursuant to which the Town now holds the property was expressly stated as "maintaining the natural character of the property" -- as it existed in February 1991. The intent of the parties as expressly stated in the Deed is a "desire to place restrictions upon the [the accreted land] for the purposes of, inter alia retaining land or water areas predominantly in their natural, scenic, open or wooded condition or as suitable habitat for fish, plants, or wildlife" – as it existed in February 1991.

This Court states that: "Appellants' interpretation of the deed would require the town to continuously remove all vegetation from the beach that was not present in 1991 to preserve this character. We do not read the deed as requiring such drastic management." While the Appellants maintain that the overriding intent of the Town and the Land Trust was to literally and figuratively take a snapshot in time and preserve the accreted land in the same condition as it existed in February 1991, the Appellants have not made such unreasonable, arduous demands.[1]

As the Court states, "[t]he deed indicates the parties intended for the land to stay in the 'condition of the Property at the time of this grant' as shown in multiple photographs taken in 1991." However, it appears that the Court has misapprehended the import of these photographs and the significance to the parties' intent. In this case, those photographs were expressly required as part of the Deed to document the condition of the accreted land as it existed in February 1991.

[1] In fact, the Appellants have themselves attempted to arrange for the trimming on the accreted land abutting their property but they were denied permits to do so.

Those photographs are expressly intended to set the standard for the Town's obligations and the rights of the Plaintiffs as third-party beneficiaries.

As the Trial Court acknowledged, the photographs clearly reflect the appearance of the accreted land in 1991. Photographic evidence also establishes beyond dispute that since 1991, nature has caused a variety of plants to grow higher such that the area no longer bears any semblance to the low-level sea oats and wildflowers found there in 1991. Rather, in shocking contrast, a series of photographs taken in 2010 depict the shocking and unchecked overgrowth that has completely obstructed, or imminently will obstruct, all views of and from the ocean and shoreline.

The Court of Appeals' view that the Deed restriction, if enforced as written, would require "drastic management" has effectively eviscerated that "February 1991" standard and defeats the parties' express intent. While freezing time and stopping all growth may not literally be possible and constant trimming might be arduous, that should not negate the parties' express intent to set a standard for preservation and maintaining the oceanfront as it existed in February 1991, and specific provision of a method for documenting that standard. The Town should not be allowed to avoid the clear express Deed provisions because the current administration now deems compliance unreasonable or impractical.

Common sense and good faith are the leading touchstones of construction of the provisions of a contract[2] and the Town's actions demonstrate neither. Common sense and good faith would require substantial compliance with regular, periodic trimming to the 1991 three-foot levels, or at

[2] C.A.N. Enterprises, Inc. v. S.C. Health & Human Servs. Fin. Comm'n, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988).

perhaps at the very least, the Town could allow the property owners to perform the trimming if it views the job as so drastic or unpractical.

b. Paragraph 6 – The Town's Authority to enact "*more restrictive*" Ordinances

The Court of Appeals also misapprehends the provision and implication of Paragraph 6 of the 1991 Deed, which permits the Town to "enact ordinances and regulations affecting the Property which are more restrictive than these Restrictions or which are not inconsistent with these Restrictions." This Court states that: "It is illogical that an organization 'whose purpose is to preserve and conserve natural areas' would transfer property to the Town and require more land management as a less restrictive regulation. Instead, the master found, and we agree, the Town's ordinances, which permit less trimming of vegetation on the accreted land, are more restrictive than those indicated in the deed, and were specifically contemplated by the deed's unambiguous language."

First, the Court of Appeals has overlooked or misapprehended the Trust's role in the land transaction as evidence of the parties' intent. The Trust has never owned or operated the accreted land as a nature preserve or refuge such as with Botany Bay Plantation or Waites Island. The accreted land was owned by the Town, and a plan as devised by the parties involved selling it to the Lowcountry Open Land Trust, and in turn, the Trust simultaneously reconveyed the accreted land back to the Town by deed with restrictions and enforcement rights to preserve both the condition of the land and the character/lifestyle of the Town – as it existed in February 1991. This two-step transfer of ownership was deemed "necessary to ensure enforceability of the restrictions and prevent a future Town Council with different motivations from changing or weakening the restrictions or doing away with them altogether." [ROA 80.] Unfortunately, that plan has failed

and the Town's new administration has allowed a maritime forest to replace the low sea oats and wildflowers, obstructing the ocean views and breezes and creating nuisances.

Second, the Trial Court's perspective of "more restrictive" is skewed. The "more restrictive" language must be construed in the context of the core intent of the Deed Restrictions and "not inconsistent" with all the Restrictions. *See* Wayburn v. Smith, supra. The Court overlooks or misapprehends that by deliberately adding a temporal defining mark to the standard for preservation, the Trust obviously must have contemplated that management would be required to maintain that status. Any interpretation that allows the Town to limit trimming and allow overgrowth does not serve the intent of the Deed to preserve the accreted land in the condition as it existed in February 1991. In the proper context, the "more restrictive" provision of Paragraph 6 might allow the Town to limit the trimming to shorter – but not taller – heights.

Third, the Court has also overlooked that such construction of Paragraph 6 is inconsistent with the provisions of Paragraph 2 which specifically addresses trimming and places specific parameters on the Town's "unrestricted authority ... to trim and control the growth of vegetation for the purposes of mosquito control, scenic enhancement, public and emergency access to the Atlantic Ocean, and providing views of the ocean and beaches to its citizens." Paradoxically, the Town's new trimming policy in allowing overgrowth to the extent of creating a maritime forest actually contravenes these purposes. Ultimately, the Town's interpretation is not supported by a proper reading of all the Deed restrictions in the context of the express overriding purpose to preserve the accreted land to comparable February 1991 conditions.

c. Lack of Enforcement by the Land Trust

The Court of Appeals overlooks or misapprehends the third-party rights granted to these property owners under the Deed by relying upon the Trust's failure to recognize or report any

violations of the Deed restrictions. The affidavit of the Land Trust Director regarding the Land Trust's annual reports -- noting in the most general way that the Town is in compliance and failing to take note of the serious problems associated with overgrowth – do not amount to an admission, concession, or stipulation binding upon the Appellants. These Appellants are third-party beneficiaries with separate and independent rights to seek enforcement of the Deed Restrictions. If the Land Trust annual reports might be some evidence of the Town's compliance, they do not automatically preclude the Appellants from pursuing a breach of contract claim, and they cannot sustain the grant of summary judgment on interpretation of the Deed.

2. NUISANCE -- The Town's violation of the Deed Restrictions through its new trimming policies have Created a Nuisance by allowing overgrowth that harbors a variety of pests, varmints and poses dangers to the Plaintiffs personally and the other citizens generally.

The Court of Appeals has rejected the Appellants' challenge to the grant of summary judgment on the nuisance clause of action based on its interpretation that the Deed does not require the Town to clear the land. The Appellants respectfully submit that the Court of Appeals has overlooked and/or misapprehended the points as stated above and in their briefs. By breaching the Deed Restrictions, the Town has allowed the overgrowth of the vegetation on the accreted land into a maritime forest that serves as breeding grown for pests and varmint, poses a fire hazard, and provides cover for criminal behavior. Equity demands that the Town Government abate these dangers and honor its contractual obligations to the citizens of Sullivan's Island.

3. OTHER ISSUES RAISED ON APPEAL

The Appellants raised other issues on appeal as stated in their Brief, to wit:

I. A. Did the Trial Court err in construing the Town's right to trim in Paragraph 2 as foreclosing the Plaintiffs' claims for enforcement of the Deed Restrictions?

C. Did the Trial Court err in holding that the Deed Restrictions impair the Town's legislative power?

D. Did the Trial Court err in holding that the Land Trust Annual Reports conclusively establish the Town's compliance and foreclose the Plaintiffs' third-party enforcement rights?

E. Did the Trial Court err in concluding that the existence of the Bayonne Avenue Extension relieves the Town from its obligations to comply with the Deed Restrictions on the accreted land?

II. Did the Trial Court err in striking the Plaintiffs' claims based on its misapprehension of facts and law regarding the State OCRM permitting process for cutting vegetation located inside the designated Critical Line?

A. Did the Trial Court misapprehend that the State OCRM Regulations do not totally prohibit trimming vegetation on the accreted land inside the Critical Line, but rather, it is a discretionary process?

B. Did the Trial Court overlook that these Plaintiffs cannot even apply for an OCRM "cutting permit" without the Town's permission?

C. Did the Trial Court fail to consider that any speculative inability to trim inside the Critical Line does not excuse the Town's obligations under the Deed Restrictions as to the accreted lands that lie outside of the Critical Line?

D. Did the Trial Court err in striking the Contract Clause claim based on its misinterpretation of the OCRM permit process?

III. Did the Trial Court err in granting summary judgment to the Defendant Town on the Plaintiffs' claim for breach of contract accompanied by a fraudulent act because the Tort Claims Act does not provide immunity from contract claims?

A. Did the Trial Court misapprehend that the Plaintiffs are asserting a claim for breach of contract accompanied by a fraudulent act, not a tort for fraud?

B. Did the Trial Court misapprehend that a claim for breach of contract accompanied by a fraudulent act is not a tort claim under the Tort Claims Act?

V. Did the Trial Court err in striking the Plaintiffs' Contract Clause claims because there is no justification for the Town to purposefully and voluntarily enter a contract and then revise their Ordinances to defiantly breach the core purpose of the 1991 Deed Restrictions?

To the extent that the Court of Appeals has not addressed each of these issues, the Appellants respectfully request that the Court reconsider each and all of those issues for the reasons fully set forth in the Appellants' Brief and Reply Brief which are incorporated herein as if fully restated.

The express purpose for the land transaction was "maintaining the natural character of the property" -- as it existed in February 1991 -- which included vegetation at levels no higher than three feet. The intent of the parties as expressly stated in the Deed is a "desire to place restrictions upon the [the accreted land] for the purposes of, inter alia retaining land or water areas predominantly in their natural, scenic, open or wooded condition or as suitable habitat for fish, plants, or wildlife" – as it existed in February 1991. The Court's interpretation of the Deed has overlooked or misapprehended that the overriding intent as expressed in the Deed was to preserve the accreted land in the same condition as it existed in February 1991, for the benefit of the property owners as well as the benefit of the entire Township. The record establishes that the Town's new trimming policies violate the Deed restrictions and have allowed harmful nuisances to develop in the overgrown maritime forest, and these Appellants should be allowed to pursue their causes of action to restore the accreted land to some semblance of its condition in February 1991, or for others remedies for the breach.

CONCLUSION

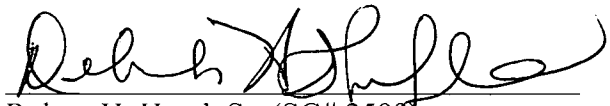
WHEREFORE, based on the foregoing, Appellants respectfully requests that the Court reconsider its rulings affirming the Trial Court grant of summary judgment. For each of those issues raised in the Appellants' briefs, the Trial Court erred in granting summary judgment to the Defendant Town of Sullivan's Island on the Plaintiffs' breach of contract claims[3] because the 1991

[3] The Trial Court further erred in granting summary judgment to the Defendant Town on the Plaintiffs' claim for breach of contract accompanied by a fraudulent act because the Tort Claims Act does not provide immunity from contract claims. In addition, the Trial Court erred in striking

Deed Restrictions obligate the Town to cut (or to allow front-row homeowners the right to cut) vegetation on the accreted land seaward of their homes to preserve the accreted land in the condition as it existed at the time the Deed was executed in February 1991. In addition, the Trial Court erred in granting judgment on the nuisance cause of action because the new trimming policies have allowed overgrowth of a maritime forest that harbors a variety of pests, varmints and poses dangers to the Plaintiffs personally and the other citizens generally.

Respectfully submitted,

Hood Law Firm, LLC



Robert H. Hood, Sr. (SC# 2599)
James B. Hood (SC #70212)
Deborah H. Sheffield, Of Counsel (SC #2757)
172 Meeting Street ~ P.O. Box 1508
Charleston, South Carolina 29402
Phone: (843)577-4435
Facsimile: (843) 722-1630

Attorneys for the Appellants
Nathan Bluestein, Ettaleah Bluestein, M.D.,
Theodore Albenesius, III, and
Karen Albenesius

August 15, 2018

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the Contract Clause claims based on its misinterpretation of the OCRM permit process and the absence of any justification for the Town to purposefully and voluntarily enter a contract and then revise their Ordinances to defiantly breach the core purpose of the 1991 Deed Restrictions.

CERTIFICATE OF SERVICE

The undersigned certifies that on this 15th day of August, 2018, a copy of the foregoing Petition for Rehearing was served by depositing said copy in the U.S. Mail, with sufficient first class postage, on the following counsel at the addresses listed below:

J. Brady Hair (SC # 9040)
Van Raalte, Derk IV (SC # 9286)
Law Offices of J. Brady Hair
2500 City Hall Lane (29406)
PO Box 61896
N. Charleston SC 29419

Hood Law Firm, LLC
Robert H. Hood, Sr. (SC# 2599)
James B. Hood (SC #70212)
Deborah H. Sheffield, *Of Counsel* (SC #2757)
172 Meeting Street ~ P.O. Box 1508
Charleston, South Carolina 29402
Phone: (843) 577-4435
Facsimile: (843) 722-1630

Attorneys for the Appellants
Nathan Bluestein, Ettaleah Bluestein, M.D.,
Theodore Albenesius, III, and
Karen Albenesius

HOOD
LAW FIRM
LLC

Deborah Harrison Sheffield
Of Counsel
DIRECT DIAL: (803) 419-7837
EMAIL: deborah.sheffield@hoodlaw.com

August 15, 2018

Hand Delivered
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Nathan Bluestein, Ettaleah Bluestein, M.D., Theodore Albenesius, III, and Karen Albenesius v. Town of Sullivan's Island and Sullivan's Island Town Council
C/A No. 2010-CP-10-5449
Appeal No. 2015-002550
HLF File No. 625.002

Dear Clerk:

Enclosed for filing please find the original and six (6) copies of the Petition for Rehearing on behalf of the Appellants. As evidenced by the attached Certificate of Service I am serving a copy on Counsel for the Respondent Town this same day. I am enclosing herewith a check in the amount of $25.00 for the filing fee.

Kind regards,

Yours truly,

Deborah H. Sheffield

cc: J. Brady Hair
Derk Van Raalte IV