STATE OF SOUTH CAROLINA **COUNTY OF BEAUFORT** **BERKELEY HALL CLUB, INC.,** **Plaintiff,** **vs.** **ROBERT A. POINTON, AS TRUSTEE OF THE REVOCABLE TRUST OF ROBERT A. POINTON DATED SEPTEMBER 8, 1999, and ROBERT A. POINTON, INDIVIDUALLY,** **Defendants.**	**IN THE COURT OF COMMON PLEAS** **FOURTEENTH JUDICIAL CIRCUIT** **CIVIL ACTION NO.: 2017-CP-07-01495** **ORDER**

STATE OF SOUTH CAROLINA **COUNTY OF BEAUFORT** **BERKELEY HALL CLUB, INC.,** **Plaintiff,** **v.** **MARY E. FITZGERALD, TRUSTEE OF THE MARY E. FITZGERALD 1997 TRUST and MARY E. FITZGERALD, INDIVIDUALLY,** **Defendant(s).**	**IN THE COURT OF COMMON PLEAS** **FOURTEENTH JUDICIAL CIRCUIT** **CIVIL ACTION NO.: 2017-CP-07-01607** **ORDER**

THESE MATTERS came before this Court, consolidated, on cross motions for Summary Judgment pursuant to Rule 56, SCRCP, in Beaufort County on June 26, 2018. It was stipulated by the Parties that the underlying facts were identical. It was further stipulated that the

Trusts had no objection to judgment being entered; only the individual Defendants were resisting the Plaintiff's motions and only the individual Defendants filed their own Motions for Summary Judgment. Present were Brian C. Pitts, Esq. representing the Plaintiff and Roberts Vaux, Esq. representing the Defendants.

STANDARD OF REVIEW

"Summary judgment is proper when it is clear there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." *Bowen v. Lee Process Sys. Co.*, 342 S.C. 232 (Ct. App. 2000). "Summary judgment should be granted when plain, palpable, and undisputed facts exist upon which reasonable minds cannot differ." *Id.* "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." *Id.* When the facts are not in dispute, the question before the court is one of law. *Dawson v. S.C. Power Co.*, 220 S.C. 26, 32 (1951).

Real covenants have been defined as "agreement[s]... to do, or refrain from doing, certain things with respect to real property." 20 Am. Jur.2d *Covenants, Conditions, and Restrictions* § 1 (2005). Therefore, covenants, "in a sense are contractual in nature and bind the parties thereto in the same manner as would any other contract." *Id.*, citing *Seabrook Island Prop. Owners Assoc. v. Pelzer,* 292 S.C. 343, 356 S.E.2d 411 (Ct. App. 1987). Restrictive covenants are construed like contracts and may give rise to actions for breach of contract. 17 S.C. Jur. *Covenants* § 2 (2005), citing *Hoffman v. Cohen,* 262 S.C. 71, 202 S.E.2d 363 (1974), *Manning v. City of Columbia,* 297 S.C. 451, 377 S.E.2d 335 (1989).

Restrictive covenants differ from contracts in that they "run with the land," meaning that they are enforceable by and against later grantees. 17 S.C. Jur. *Covenants* § 18 (2005). Restrictive covenants that require grantees to pay assessments for the upkeep of a particular

parcel of property are held to be real covenants which "touch and concern" land, and therefore, run with the land. *Epting v. Lexington Water Power Co.,* 177 S.C. 308, 314-317, 181 S.E. 66, 69-70 (1935); 17 S.C. Jur. *Covenants* §§ 18 and 19.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The facts in these cases are not in dispute and are agreed to by the Parties. Berkeley Hall is a residential subdivision located in southern Beaufort County (Bluffton) and has had, since its inception, restrictive covenants that require the owners of the various lots to be members of the Berkeley Hall Club. The covenants that were in effect at the time that both Defendant Trusts acquired title are found in Official Records Book 2979 at Pages 1045-1098 in the Beaufort County Public Records, and provide in Section 8.3 as follows:

> "In the event a Lot or Non-Property Owner Membership certificate is owned by more than one individual (other than spouses holding title jointly) or by a trust, corporation or other legal entity, the owners(s) must designate one designated Member on an annual basis on accordance with Section 3.01 of the By-Laws. Except as provided in Section 1.1(p), only the Member designated shall be entitled to access the facilities of the Club as a "Member" of the Club for the period of designation; non-designated owners shall be entitled to access only in accordance with the Rules and Regulations established by the Club for guests. Each record Owner of any Lot or Non-Property Owner Membership designating a Member pursuant to this section and the designated Member shall be jointly and severally liable for any dues, assessments or other charges due to the Club."

Sometime after the Defendant Trusts acquired title, the Plaintiff modified Section 8.3 in accord with the amendment process set forth in the Covenants. The new Section 8.3 reads as follows:

> "In the event a Lot or Non-Property Owner Membership certificate is owned by more than one individual (other than spouses holding title jointly) or by a trust, corporation or other legal entity, the owners(s) must designate one natural person over the age of eighteen (18) years to be the Designated Member of the Owner (the "Designated Member") on an annual basis on accordance with Section 3.01 of the By-Laws; provided, however, that a former Owner of a Lot or Dwelling Unit that has been foreclosed upon or sold at a tax shall not be eligible to be named as a Designated Member. The annual written designation of the

Designated Member shall be provided to the Club on or before January 1 and shall be executed by the Designated Member and the Owner, by its appropriate representative. If such annual designation is not provided to the Club by or before January 1, the prior year's Designated Member shall continue to the Designated Member of the Owner. Except as provided in Section 1.1(p), only the Member designated shall be entitled to access the facilities of the Club as a "Member" of the Club for the period of designation; non-designated owners shall be entitled to access only in accordance with the Rules and Regulations established by the Club for guests. Each record Owner of any Lot or Non-Property Owner Membership and the Designated Member, individually, shall be jointly and severally liable for any dues, assessments or other charges due to the Club relating to such Membership. In the event an Owner fails to designate a Designated Member as required by this Section and/or the Bylaws or a Designated Member resigns and a successor Designated Member is not designated by the Owner within thirty (30) days of the date that the written resignation of the Designated Member is received by the Club then (1) all individuals having a legal or equitable interest in the trust, corporation, or other legal entity shall be jointly and severally liable for any dues, assessments, Initiation fees, or other charges due to the Club and (2) for each month a Designated Member is not designated, there shall be a monthly fine of $500.00".

The person designated by the Plaintiff to testify in its Rule 30(b)(6) deposition testified that neither of the individual Defendants ever signed any document regarding the revised covenants, much less agreeing to be subjected to the revised and updated obligations contained in the new Section 8.3. Further, neither trust ever designated anyone to be the designated member, and the Plaintiff took no action regarding the failure to designate a member until it brought the present litigation. It is the Plaintiff's position that the Club may amend the covenants and the individual Defendants are thereby bound by such changes whether or not the individual Defendants agreed to be so bound.

The individual Defendants take the position that they are not individually liable for a number of reasons:

1. While the Club has the right to amend the Covenants, the right is not unlimited and has to be done in a manner that does not violate the common law. Any amendment must be

reasonable in light of the contracting parties' original intent, and the amendment must be reasonable, finite and must not violate public policy;

2. Because restrictive covenants in South Carolina are contractual in nature, the covenants obviously may only be enforced by and between the parties to the underlying contract; in this instance the parties to the contract were the Club and the two trusts;

3. Restrictive covenants may only be amended if done so in accordance with South Carolina statutory and common law. The Statute of Frauds, as codified in S.C. Code Ann. § 32-3-10(2), requires that for any suretyship where a third party is sought to be held accountable for the debts or obligations of another, there must be a writing signed by the party to be charged. *See Springob v. Univ. of S.C.*, App. Case No. 2012-206887, Op. No. 27363 (2014); *Fici v. Koon*, 372 S.C. 341 (2007);

4. S.C. Code Ann. § 62-7-1010(a) provides that, "Except as otherwise provided in the contract, a trustee is not personally liable on a contract entered into in the trustee's fiduciary capacity in the course of administering the trust if the trustee in the contract discloses the fiduciary capacity."

A review of South Carolina case law finds very few cases on amending restrictive covenants: *AJG Holdings, LLC, et al. v. Levon Dunn, et al.*, 410 S.C. 346, 764 S.E. 2d 912 (2014) (mem) and *The Gates at Williams-Brice Condominium Assn., et al. v. DDC Construction, Inc., et al.*, 418 S.C. 282 792 S.E.2d 240 (Ct. App. 2016)[1].

There is, however, an opinion from North Carolina and opinions from other states[2] that follow the basic principles of the law of restrictive covenants as outlined above. In the case of

[1] The Gates opinion was subsequently vacated at the request of the Parties.

[2] A number of other states considering amendments to the founding documents of common interest communities have also applied a reasonableness standard. See Hutchens v. Bella Vista Vill. Prop. Owners' Ass'n, 82 Ark.App. 28, 37, 110 S.W.3d 325, 330 (2003) (concluding "the power of [a] homeowner's [sic] association . to make rules,

Robert Louis Armstrong, et al., v. The Ledges Homeowners Assn., Inc., et al. 633 S.E.2d 78, 360 N.C. 547 (N.C., 2006), the Court focused on issues of reasonableness, expectations, notice, and additional obligations. The North Carolina Court said, "In so doing, we echo the rationale of the Supreme Court of Nebraska in *Boyles v. Hausmann*, 246 Neb. 181, 191, 517 N.W.2d 610, 617 (1994): 'The law will not subject a minority of landowners to unlimited and unexpected restrictions on the use of their land merely because the covenant agreement permitted a majority to make changes in existing covenants.'" *Id.* In *Armstrong*, petitioners purchased their lots without notice that they would be subjected to additional restrictions on use of the lots and responsible for additional affirmative monetary obligations imposed by a homeowners' association. The *Armstrong* Court did not permit the Association to use the Declaration's amendment provision as a vehicle for imposing a new and different set of covenants, thereby substituting a new obligation for the original bargain of the covenanting parties. *Id.*

In the instant case, neither of the individual Defendants were parties to the contract and neither Defendant ever held title to the real property. Neither Defendant agreed to be responsible for the obligations of the grantee member. Because the individual Defendants were never owners of the lots, never members of the Club, and never agreed to be responsible for the obligations of

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regulations, or amendments to its declaration or bylaws is limited by a determination of whether the action is unreasonable, arbitrary, capricious, or discriminatory"); Holiday Pines Prop. Owners Ass'n v. Wetherington, 596 So.2d 84, 87 (Fla.Dist.Ct.App.1992) (per curiam) ("In determining the enforceability of an amendment to restrictive covenants, the test is one of reasonableness."); Zito v. Gerken, 225 Ill.App.3d 79, 81, 167 Ill.Dec. 433, 587 N.E.2d 1048, 1050 (1992) ("A restrictive covenant which has been modified, altered or amended will be enforced if it is clear, unambiguous and reasonable."); *Buckingham v. Weston Vill. Homeowners Ass'n*, 1997 ND 237, ¶ 10, 571 N.W.2d 842, 844 (A condominium association's amendment to the declaration or bylaws "must be reasonable" and "a rule which is unreasonable, arbitrary, or capricious is invalid."); Worthinglen Condo. Unit Owners' Ass'n v. Brown, 57 Ohio App.3d 73, 75-76, 566 N.E.2d 1275, 1277 (1989) (adopting "the reasonableness test, pursuant to which the validity of condominium rules is measured by whether the rule is reasonable under the surrounding circumstances"); Shafer v. Bd. of Trs. of Sandy Hook Yacht Club Estates, Inc., 76 Wash.App. 267, 273-74, 883 P.2d 1387, 1392 (1994) (a covenant amendment "respecting the use of privately-owned property is valid, provided that such power is exercised in a reasonable manner consistent with the general plan of the development"), disc. rev. denied, 127 Wash.2d 1003, 898 P.2d 308 (1995).

the trusts, they, as beneficiaries of the trusts and/or trustees of the Defendant Trusts cannot be individually liable.

CONCLUSION

THEREFORE IT IS ORDERED that Plaintiff's Motion for Summary Judgment against the Trusts in both cases be respectfully **GRANTED**.

Accordingly, the Plaintiff's Motion for Summary Judgment as to the individual Defendants in both cases is respectfully **DENIED**, and the individual Defendant's Motions for Summary Judgment are respectfully **GRANTED**.

AND IT IS SO ORDERED.

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The Honorable, PERRY M. BUCKNER
Resident Judge of the Fourteenth Judicial Circuit

Walterboro, South Carolina
July _____, 2018

Beaufort Common Pleas

Case Caption: Berkeley Hall Club Inc. , plaintiff, et al VS Robert A Pointon As Trustee And Individually , defendant, et al

Case Number: 2017CP0701495

Type: Order/Summary Judgment

It is so Ordered

s/ Perry M Buckner III 2122