

**STATE OF SOUTH CAROLINA
IN THE SUPREME COURT**

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S.C. SUPREME COURT

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

Case No. 2010-CP-10-5449
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,

Petitioners,

v.

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

Respondents.

**Appendix
on Petition for Writ of Certiorari**

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

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

Appellate Case No. 2015-002550

Appeal From Charleston County
Mikell R. Scarborough, Master-in-Equity

Opinion No. 5581
Heard April 10, 2018 – Filed August 1, 2018

AFFIRMED

Robert Holmes Hood, Jr and James Bernard Hood, both
of Hood Law Firm, LLC, of Charleston; A. Walker
Barnes, of Hood Law Firm, LLC, of Spartanburg; and
Deborah Harrison Sheffield, of Columbia, for Appellants.

J. Brady Hair and Derk Van Raalte, IV, both of Law
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LOCKEMY, C.J.: In this appeal from the Charleston County Master-in-Equity, Appellants assert the master erred in granting the Town of Sullivan's Island's (Town's) motion for summary judgment on numerous claims regarding the Town's decision not to cut a maritime forest on the island. We affirm.

FACTS

Appellants in this case own front row property on Sullivan's Island. However, Appellants do not own the property closest to the beach—rather, the Town owns those lots, which continue to grow each year, through a process known as sediment transport. *See* Josh Eagle, Coastal Law 6 (2011). Professor Eagle explains, "sand grains do not magically vanish from or appear on a beach; rather they are going to, or coming from somewhere else along the coast." *Id.* While most land use cases along our coast involve erosion, or the loss of beachfront sediment, this case involves accretion, or the addition of sediment to the beach front.

The question here is whether the Town must maintain the land exactly as it was in 1991, including cutting any vegetation to a height of three feet, as Appellants assert. The land owned by the Town is subject to certain restrictions resulting from a deed conveying the land to the Town from the Low Country Open Land Trust (the Trust). In order to protect the Town's ocean adjacent property from development, the Town's council enacted an ordinance on January 15, 1991, which authorized the Town to convey the land between the ocean and the front row properties to the Trust. The Trust subsequently conveyed the land back to the Town on February 12, 1991.

The conveyance from the Trust included the deed restrictions at issue here. The deed explained the purposes behind the conveyance.

Whereas the Lowcountry Open Land Trust (the "Grantor") is a nonprofit corporation whose purpose is to preserve and conserve natural areas; and

WHEREAS, the Grantor is the owner in fee simple of certain real property (hereinafter referred to as the "Property") which has aesthetic, scientific, educational, and ecological value in its present state as a natural area which has not been subject to development or exploitation, which property is described more on the attached Exhibit A;

WHEREAS, the parties desire to place restrictions upon the Property 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; and

WHEREAS, "natural, scientific, educational, aesthetic, scenic and recreational resource," as used herein shall, without limiting the generality of the terms, mean the condition of the Property at the time of this grant, evidenced by:

- A) The appropriate survey maps from the United States Geological survey, showing the property line and other contiguous or nearby protected areas;
- B) An aerial photograph of the Property at an appropriate scale taken as close as possible to the date hereof; and
- C) On-site photographs taken at appropriate locations on the property

To further those purposes, the deed provided certain restrictions. Specifically,

1. Except as otherwise provided or permitted in Paragraphs 2 and 3 hereof, the Property shall remain in its natural state, no changes shall be made to its topography or vegetation and no structures or improvements shall be erected on the Property.
2. Notwithstanding the provisions of Paragraphs 1 and 3 and subject to the limitations of paragraph 4, the Town Council is given the 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. . . .
6. During the term of these restrictions, the Town shall cause to remain in effect an ordinance of the Town making it a violation of the law for any person to violate

the provisions of these Restrictions, as such Restrictions may be modified pursuant to Paragraph 8 hereof. The Town may enact ordinances and regulations affecting the Property which are more restrictive than these Restrictions or which are not inconsistent with these Restrictions.

The deed also gave all property owners the right to challenge any action on the property by the Town in violation of the agreement. The deed also provided the restrictions were self-renewing unless repealed by a 75% vote of the town's electorate.

When the deeds were executed in 1991, the Town had an ordinance, passed in 1981, restricting the use of the ocean adjacent property. The ordinance indicated

There shall be no construction of any type, no destruction of vegetation (except trimming, cutting and pruning of bushes and trees as provided in this section) and no man-made changes of topography in [the] area. The Town Council may establish a program pursuant to which citizens may apply to the Town for permission to prune, trim and cut bushes and trees in the . . . area as follows . . . (5) in those areas where the height of trees or bushes are deemed objectionable, the trees or bushes may be pruned to a height of no less than three (3) feet, provided that the cumulative effect of the trimming, cutting or pruning shall not be detrimental to the safety, welfare, and health of the people of the Town.

§ 21-39A. In 1995, that ordinance was amended. The 1995 Ordinance was, in most material ways, identical to the 1981 Ordinance. However, the 1995 Ordinance noted, "vegetation may be trimmed and pruned so as to have a maximum height of no less than seven feet (7') above the ground." § 21-39.1G. Finally, the Town amended the ordinance again in 2005. The 2005 Ordinance indicated which plants could be trimmed and pruned and noted "[t]his vegetation may be trimmed and pruned so as to have a maximum height of no less than five (5) feet above the ground." § 21-71(C)(3).

When the 1991 deeds were executed, the ocean adjacent land was covered in sea oats and wildflowers and the Appellants' homes had unobstructed ocean views and

access to ocean breezes. Because of the Town's trimming and pruning ordinances, however, the vegetation on the ocean adjacent land has grown into a maritime forest.

In the summer of 2010, Appellants applied to the Town for a permit to trim and prune the ocean adjacent property, as allowed by the deed. Appellants wished to cut the vegetation to a height of no less than three feet, as indicated in the 1981 Ordinance. The Town denied the permit.

Appellants then filed this action. In their complaint against the Town, Appellants asserted claims for breach of contract, breach of contract accompanied by a fraudulent act, a violation of the South Carolina Unfair Trade Practices Act (SCUTPA)¹, nuisance, and inverse condemnation.² Appellants demanded injunctive relief, a writ of mandamus, a declaratory judgment, attorney's fees and costs, and compensatory damages. Appellants also requested the court invalidate the 1995 and 2005 Town ordinances.

According to the Appellants, the unchecked growth of vegetation on the ocean adjacent land has resulted in public and private harms. Appellants claim they and the public have been deprived of their ocean views and breezes. Furthermore, the overgrowth has allegedly caused other dangers and nuisances including fire hazards, mosquitos, raccoons, snakes, and coyotes. Appellants' also claim the value of their properties has been diminished by \$1,000,000 because of the maritime forest.

After briefing and argument, the master granted the Town summary judgment in several orders throughout the litigation. First, the master granted the Town summary judgment as to the breach of contract accompanied by a fraudulent act claim. The master found the Town was immune from suit for breach of contract accompanied by a fraudulent act because the Tort Claims Act provides a governmental entity cannot be sued for legislative action or inaction or for employee conduct outside the scope of his official duties.

¹ S.C. Code Ann. §§ 39-5-10 to -180 (1985 & Supp. 2017).

² Appellants' inverse condemnation and SCUTPA claims are not at issue in this appeal.

Subsequently, the master granted summary judgment on Appellants' request for injunctive relief because the deed's language did not obligate the Town to only trim and prune bushes and trees in the ocean adjacent property to three feet. The master found "[t]he 1995 and 2005 Deed Restrictions allow less cutting than did the 1981 Ordinance. As such, these ordinances are 'more restrictive.'" The master also found the 1981 Ordinance did not provide Appellants a right to cut all vegetation, but rather any decision to allow pruning would issue, "[w]hen the Zoning Administrator finds as a fact that bushes and trees create a hazard to health, safety, and welfare of the Town in a particular area." Additionally, the master granted summary judgment on the inverse condemnation claim as no legal right had been taken.

On July 29, 2015, the master submitted an order containing more grounds for its decision. The master found Appellants failed to secure a cutting permit from the South Carolina Department of Health and Environmental Control (SCDHEC), and could not, therefore, prove any damages resulting from the Town's denial of their permit to trim vegetation on the ocean adjacent property.

Finally, the master issued an order purporting to grant the Town's motion for summary judgment on the nuisance, breach of contract, and mandamus causes of action. The master found the Town could not be held responsible for acts of nature which occurred after the Town stopped trimming the vegetation on the land. The master also noted "[Appellants'] claims of a public nuisance cannot stand against the Town because their argument alleges a duly enacted law constitutes a nuisance." The master held these legislative acts cannot be the basis for a nuisance claim.³ This appeal followed.

STANDARD OF REVIEW

"The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder." *Penza v. Pendleton Station*, 404 S.C. 198, 203, 743 S.E.2d 850,852 (Ct. App. 2013).

³ This was the final order in the record. Appellants filed a motion for reconsideration and clarification asking the master to indicate which causes of action survived for trial. The order denying the motion for reconsideration does not indicate which, if any, causes of action the master did not dismiss. Based on the record before us, we cannot determine what causes of action remain.

When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRPC; summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

Id. "In determining whether a genuine issue of [material] fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party." *Id.* at 203, 743 S.E.2d at 852-53. "Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial." *Id.* at 203-04, 743 S.E.2d at 853 (quoting *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004)).

INTERPRETATION OF THE DEED

Appellants assert the master erred by granting the Town summary judgment on its various contract claims because the deed's language requires the Town to preserve the ocean adjacent property exactly as it existed in 1991. We disagree.

"[T]he interpretation of a deed is an equitable matter." *Id.* at 204, 743 S.E.2d at 853 (quoting *Eldridge v. City of Greenwood*, 331 S.C. 398, 416, 503 S.E.2d 191, 200 (Ct. App. 1998) (alteration in original)). "The construction of a clear and unambiguous deed is a question of law for the court." *Id.* (quoting *Hunt v. Forestry Comm'n*, 358 S.C. 564, 568, 595 S.E.2d 846, 848 (Ct. App. 2004)). "[T]he determination of whether language in a deed is ambiguous is a question of law. The language in a deed is ambiguous if it is reasonably susceptible to more than one interpretation." *Id.* (quoting *Proctor v. Steedley*, 398 S.C. 561, 573 n. 8, 730 S.E.2d 357, 363 n. 8 (Ct. App. 2012) (alteration in original)).

"One of the first canons of construction of a deed is that the intention of the grantor must be ascertained and effectuated if no settled rule of law is contravened." *Id.* (quoting *Bennett v. Investors Title Ins. Co.*, 370 S.C. 578, 590, 635 S.E.2d 649, 655 (Ct. App. 2006)). "[O]nce a contract or agreement is before the court for interpretation, the main concern of the court is to give effect to the intention of the parties." *Id.* (quoting *Williams v. Teran, Inc.*, 266 S.C. 55, 59, 221 S.E.2d 526, 528 (1976) (alteration in original)). "Moreover, in ascertaining [the grantor's] intention, the deed must be construed as a whole and effect given to every part thereof, if such can be done consistently with law." *Id.* (quoting *Bennett*, 370 S.C.

at 590, 635 S.E.2d at 655 (alteration in original)). "When a deed is unambiguous, any attempt to determine the grantor's intent when reserving the easement must be limited to the deed itself and using extrinsic evidence to contradict the plain language of the deed is improper." *Id.* Only "[w]hen the agreement is ambiguous the court may take into consideration the circumstances surrounding its execution in determining the intent." *Id.* at 205, 743 S.E.2d at 853 (quoting *Williams*, 266 S.C. at 59, 221 S.E.2d at 528 (alteration in original)).

The 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. But that language cannot be taken in isolation, and must be read with the remainder of the document. *See Bennett*, 370 S.C. at 590, 635 S.E.2d at 655 (noting, to determine the intention of a grantor, "the deed must be construed as a whole and effect given to every part thereof, if such can be done consistently with [the] law"). The deed's language evidences an intent that the town maintain the land's natural character. 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.

The deed's initial language was "made subject to" 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 Atlanta Ocean and providing views of the ocean and beaches to its citizens" and the Town's ability to "enact ordinances and regulations affecting the Property which are more restrictive than these Restrictions or which are not inconsistent with these restrictions." Appellants asserted during argument before this court these phrases mean the Town can only trim the vegetation lower than it was in 1991 to comply with the deed. 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.

While the deed's language is unambiguous, it is noteworthy that both the Town and the grantor of the deed agree the Town's ordinances are appropriate under the language of the deed. Elizabeth Hagood, the executive director of the Lowcountry Open Land Trust stated in an affidavit the Trust "periodically and regularly visited the [ocean adjacent land] each year since 2001, reviewed the existing field

conditions, compared the field conditions to the deed restrictions, and found nothing that violated the deed restrictions." Although that affidavit alone does not determine whether the Town's actions comply with the deed's plain language, it provides additional evidence that the only two parties to the contract agree the Town's ordinances are in keeping with the intentions of the parties in 1991.

Accordingly, based upon the plain language of the deed in its entirety, we affirm the master's order granting summary judgment on each of the breach of contract causes of action.

NUISANCE

Appellants assert the master erred by granting the Town summary judgment on the nuisance cause of action. Appellants argue the master received affidavits indicating the overgrown nature of the ocean adjacent property has created a breeding ground for an enormous and highly undesirable increase in the populations of bugs, raccoons, snakes, rats, spiders and other unwanted varmints and dangerous animals. Finally, Appellants state the overgrowth poses dangers from fires and criminal activity. Based on Appellants' complaint and the arguments presented in their briefs to this court, we affirm.

"[A] nuisance is 'anything which works hurt, inconvenience, or damages; anything which essentially interferes with the enjoyment of life or property.'" *Ravan v. Greenville Cty.*, 315 S.C. 447, 463, 434 S.E.2d 296, 306 (Ct. App. 1993) (quoting *Neal v. Darby*, 282 S.C. 277, 285, 318 S.E.2d 18, 23 (Ct. App. 1984)). "However, the interference or inconvenience must be unreasonable to be actionable." *Id.* "Nothing is a public nuisance which the law itself authorizes." *Home Sales, Inc. v. City of N. Myrtle Beach*, 299 S.C. 70, 81, 382 S.E.2d 463, 469 (Ct. App. 1989). A governmental entity is not liable for a loss resulting from a nuisance. S.C. Code Ann. § 15-78-60(7) (2005).

We note nothing in the Tort Claims Act prohibits Appellants from pursuing a nuisance theory in order to seek an injunction to abate the nuisance. *See* S.C. Code Ann. § 15-78-50(c) (2005). However, as framed in Appellant's complaint and the briefs, the basis of Appellants' nuisance claims is "[b]y 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[d] for pests and varmint, poses a fire hazard, and provides cover for criminal behavior." Appellants assert, "[e]quity demands that the Town Government abate these dangers and honor its contractual obligations to the citizens of Sullivan's Island." Appellants'

arguments sound in contract, not in tort. Indeed, Appellants acknowledged as much during oral argument. Because we find the contract does not require the Town to clear the land, we also affirm the master's order granting summary judgment on Appellants' nuisance cause of action.

CONCLUSION

Accordingly, the decision of the circuit court is

AFFIRMED.⁴

WILLIAMS and KONDUROS, JJ., concur.

⁴Appellants also assert the master erred by: (1) finding Appellants could not prove an injury because they had not requested a permit from SCDHEC to allow them to cut on the property; and (2) finding the Tort Claims Act provides the Town with immunity from a claim for breach of contract accompanied by a fraudulent act. Because we find the town has not breached a contract, we decline to reach these additional sustaining grounds. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598, (1999) (holding an appellate court need not address remaining issues when the disposition of a prior issue is dispositive).

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Charleston County
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Mikell Scarborough, Master-in-Equity

App. No. 2015-002550
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Nathan Bluestein, Ettaleah Bluestein, M.D.,
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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 contract² 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 ground 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

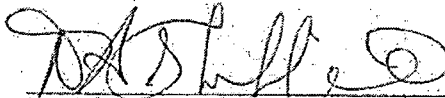
WHEREFORE, based on the foregoing, Appellants respectfully requests that the Court reconsider its rulings affirming the Trial Court grant of summary judgment. For each of those issues raised in the Appellants' briefs, the Trial Court erred in granting summary judgment to the Defendant Town of Sullivan's Island on the Plaintiffs' breach of contract claims³ 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,

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Karen Albenesius

August 15, 2018

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:

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AUG 15 2018

SC Court of Appeals

The South Carolina Court of Appeals

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

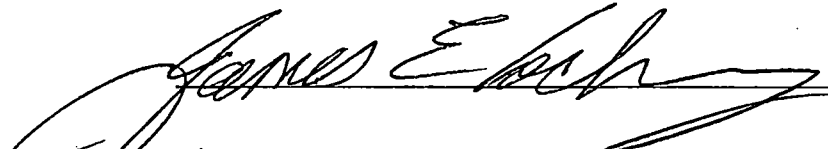
v.

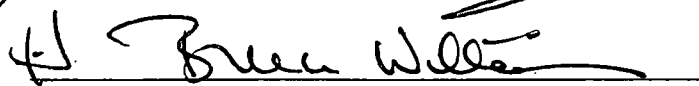
Town of Sullivan's Island and Sullivan's Island Town
Council, Respondents.


Appellate Case No. 2015-002550

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.


C. J.


J.


J.

Columbia, South Carolina

cc:
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James Bernard Hood, Esquire
A. Walker Barnes, Esquire

FILED

Sept. 20, 2018

Deborah Harrison Sheffield, Esquire
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Julie J. Armstrong