

ORIGINAL

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

**APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS FOR SPARTANBURG COUNTY**

THE HONORABLE GORDON G. COOPER, MASTER-IN-EQUITY

CASE NUMBER: 2009-CP-42-5129

KATHERYNA MULHOLLAND-MERTZ.....APPELLANT.

V.

**CORIE CREST HOMEOWNERS ASSOCIATION OF SPARTANBURG, INC., RICHARD
T. BIGGS, KATHLEEN A. BIGGS, JAMES HANNAH; AND ELIZABETH A.
HANNAH..... RESPONDENTS**

REPLY BRIEF OF APPELLANT

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SC Court of Appeals

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REPLY TO ARGUMENT I

OF RESPONDENTS:

DID THE LOWER COURT APPLY THE CORRECT STANDARD OF REVIEW IN RULING ON RESPONDENTS RULE 41(b) MOTION TO DISMISS?

RESPONDENTS make the argument that **APPELLANT** did not present sufficient evidence to withstand **RESPONDENTS'** Motion to Dismiss pursuant to Rule 41(b) SCRPC but does concede that the standard of review for this court arises out of an equitable action. That standard of review grants this court the right to make its own findings of fact in accordance with its own view of the evidence. Since the lower court found that Appellant was not entitled to relief after the close of her case pursuant to Rule 41(b) SCRPC, it must have concluded that no triable issue of material fact existed that would have required introduction of evidence from the Respondents. In making this finding, the lower court disregarded the action of Respondent Corie Crest Homeowners Association of Spartanburg, Inc. (**ASSOCIATION**) when it amended the Declaration of Protective Covenants, Conditions, Restrictions, and Easements of Corie Crest Subdivision (**RESTRICTIONS**) on August 25, 2010. Respondents want to persuade this court that they wanted to clarify (*emphasis undersigned*) the **RESTRICTIONS** for ease of application; therefore, Amendment to the **RESTRICTIONS** were made and recorded at the Register of Deeds for Spartanburg County, South Carolina. This court should believe that the motive and purpose of the Respondents were to strike language unfavorable to

them. By their act of amendments to **RESTRICTIONS** they have acknowledged Sections 2, 7, and 8 of the Restrictions were ambiguous and capable of more than one interpretation. These changes created more than a *prima facie* case and should have been determined material facts to withstand a motion to dismiss pursuant to Rule 41(b) SCRPC. The lower court did not view all evidence in the light most favorable to the Appellant and should not have granted an involuntary dismissal in this case. Ex Parte: USAA 365 S.C. 50, 614 SE2d 652, 653 (Ct. App. 2005)

REPLY TO ARGUMENT II

OF RESPONDENTS:

DID APPELLANT MEET HER BURDEN OF PROVING THAT RESPONDENTS VIOLATED THE RESTRICTIONS IN EITHER APPROVING OR CONSTRUCTING THE BUILDINGS ON WHICH SHE OBJECTED?

In viewing the testimony of the Appellant and her witnesses and the introduction of evidence through the exhibits and being most favorable to the Appellant, she proved that Respondents **RICHARD T. BIGGS, KATHLEEN A. BIGGS, (BIGGS), JAMES HANNAH,** and **ELIZABETH A. HANNAH (HANNAH)** violated the **"RESTRICTIONS"**.

First, the **BIGGS** constructed storage buildings in violation of Section 2 and 7 of the **RESTRICTIONS**.

Section 2 state the following:

SINGLE FAMILY RESIDENTIAL USE: No lot shall be used except for private, single family residential purposes. No buildings shall be erected, altered, placed, or permitted to remain on any lot other than detached-single family dwelling not to exceed two (2) stories in height, and, if approved in advance in writing, a private detached garage. No lot or portion of the lot shall be used either as a road or easement or

other means of access to adjoining property without the express written consent of the developer.

It is not disputed that only a private detached garage, if approved in advance in writing, can be erected along with a detached single-family dwelling not to exceed two (2) stories in height. That section is patently clear and unambiguous.

Section 7(A) of the **RESTRICTIONS** read as follows:

No building or structure, whether it is a dwelling, garage, fence, or driveway, shall be erected, placed, or altered on any lot until the buildings, plans, elevations, locations, and specifications have been approved in writing by developer or its nominee. If such shall not be approved or disapproved within thirty (30) days after being submitted, then such approval shall not be required, provided; however, the design and location of the proposed construction shall conform to specific building requirements stated herein and otherwise be in harmony with the existing structures in the subdivision. Any proposed building must be built as permanent structure and designed in harmony with the main dwelling. Disapproval of plans, elevations, location, or specification may be purely upon aesthetic reasons in the sole discretion of the developer or its nominee.

This section emphasizes and declares a proposed building must be built as a permanent structure and be designed in harmony with the main dwelling.

BIGGS' storage building is a permanent structure and is not described or allowed under this section (See Defendant's Exhibit 4)

HANNAH's "lean-to-building" is not allowed or described in Section 2 and/or 7(A) of the **RESTRICTIONS** (See Plaintiff's Exhibit 5).

After the Order of June 15, 2010, in which the lower court granted a temporary injunction to prohibit further erection of "storage" buildings until a final hearing in the case, the **RESPONDENTS** then decided to take steps to revise the **RESTRICTIONS** for the purpose of having the storage buildings of **BIGGS** and **HANNAH** be in conformity with amended section 2 and 7 of the **RESTRICTIONS**. It is specifically noted that **RESPONDENT RICHARD T. BIGGS** voted in favor of the amendments in his capacity as a lot owner (**MEMBER**) and as President of the **RESPONDENT ASSOCIATION**.

Also, the **HANNAHS** had the opportunity to vote and apparently did so in favor of amending the **RESTRICTIONS**. (See Plaintiff's Exhibit 11, Lot 34)

Amendment to Section 2 of **RESTRICTIONS** deletes the language that prohibited any other buildings other than single family residence no more than two (2) stories in height and a private detached garage, if approved in writing.

The amendment to Section 7 of the **RESTRICTIONS** specifically added outbuildings, hobby-type structures, and detached garages to be erected on the property subject to the architectural committee of the **ASSOCIATION**. Outbuildings would be considered synonymous with storage buildings erected by **BIGGS** and **HANNAH**.

Based upon the foregoing, Appellant provided detailed testimony and introduced relevant exhibits into the record to provide requisite evidence to prove **RESPONDENTS**

BIGGS and **HANNAH** violated the **RESTRICTIONS** and as such constitute sufficient evidence to withstand and overcome any Rule 41(b) SCRCP Motion.

REPLY TO ARGUMENT III

OF RESPONDENTS:

**DID APPELLANT MEET HER BURDEN OF PROOF THAT
RESPONDENTS VIOLATED THE RESTRICTIONS IN THE PROCESS OF
OBTAINING THE APPROVAL FOR THE AMENDMENTS TO THE
RESTRICTIONS?**

The Respondents have not correctly interpreted the clear language of Section 41 of the **RESTRICTIONS**.

Section 41 reads as follows:

Terms of Enforcement And Amendments:

The covenants, conditions, easements, and restrictions shall be binding upon the developer, its successors and assigns, and upon all future owners, their respective heirs, successors, and assigns, and all parties claiming unto them, until October 1, 2040, at which time the terms hereof shall be automatically extended for successive periods of ten (10) years thereafter, unless the **then** (*emphasis undersigned*) owners owning at least two-thirds (2/3rds) of the lots in Corie Crest agree in writing to terminate or change same. The terms and conditions of this instrument may be amended or changed only upon written agreement of the owners owning at least two-thirds (2/3rds) of the lots in Corie Crest. Notwithstanding anything herein to the contrary, the developer, its successors or assigns, reserves the right to waive, modify or change in

writing, any of the terms hereof with respect to the application thereof to a lot based upon special, common, unique, or unusual circumstances, unless such waiver, modification, or change shall substantially effect the overall plan of development.

Section 41 has a clear expiration date of October 1, 2040, that binds all present and future owners, developer, the **ASSOCIATION** and its successors, heirs, and assigns. The section is patently clear and unambiguous that **RESTRICTIONS** are automatically extended for successive periods of ten (10) years unless the **then owners** (*emphasis undersigned*) agree in writing to terminate or change the same with a two-thirds (2/3rds) vote of the owners.

The second sentence emphasizes a future amendment can be done with two-third (2/3rd) vote of the owners but only upon written agreement. The **RESPONDENTS** insist the procedure they followed to amend the **RESTRICTIONS** was proper with the requisite number of votes for approval of the change.

Notwithstanding the Appellant's exception as to procedure in obtaining the votes for the amendments as clearly expressed in Argument IV of her Initial Brief, Section 41 is clear to the extent that it does not allow for any change in **RESTRICTIONS** until October 1, 2040. At that time only the **then** owners of record as of October 1, 2040 can consider a change. (*Emphasis undersigned*)

The Supreme Court Case of Hardy v. Aiken, 369 S.C. 160,631 SE2d 539 (2006) is somewhat analogous to this appeal. In that case, Appellant Jeffcoat and others declared

that an amendment to the restrictive covenants within her subdivision community extended duration of the restrictive covenants until September 13, 2029, which prolonged the prohibition of commercial development within their subdivision. The Supreme Court affirmed the lower court decision that declared the restrictive covenants expired on January 14, 2005, or twenty-five (25) years from the date the restrictive covenants were rerecorded. The Supreme Court agreed that the restrictive covenants had a clear expiration date of January 14, 2005, and could only be extended by agreement of one hundred percent (100%) of the then owners. It was worth noting that the Respondents, Defendants not participating in the appeal, and the Appellant filed three separate amendments. One amendment attempted to cancel the restrictive covenants on December 20, 2002. The second amendment created a second set of restrictive covenants with an expiration date of May 20, 2012. The third amendment extended the restrictive covenants to September 13, 2029 or twenty-five (25) years from the date of the initial recordation of the restrictive covenants. The lower court declared the amendment to extend the restrictive covenants to September 13, 2029, in which the Appellant argued was invalid and not enforceable. The Supreme Court agreed with the decision of the lower court and that line of reasoning would have also upheld the decision of the lower court that disregarded the other two amendments for duration extensions of the restrictive covenants

Hardy v. Aiken, 369 S.C. 160,631 SE2d 539 (2006).

In this appeal, Respondents do not state the **RESTRICTIONS** are ambiguous but do argue Section 41 contains clear language that grants them right for amendments **prior** (*emphasis undersigned*) to the expiration date of October 1, 2040. Since the expiration

date has not arrived, Respondents do not want and wish not to explain that the **RESTRICTIONS** have automatic renewal of ten (10) year periods unless the **ASSOCIATION** exercises its authority to amend or terminate the **RESTRICTIONS** if acted upon at or around October 1, 2040. Appellant does agree the language in Section 41 is a manifestly clear and has a profound purpose for definite expiration dates.

When the Developer M. Seay, LLC created Corie Crest Subdivision, it recorded a comprehensive set of **RESTRICTIONS** for the overall plan of development beginning with the preamble that Corie Crest would be a residential community, and its goal is to preserve property values and amenities of the community and to keep proper maintenance of common facilities. In keeping with this goal, the developer included a fundamental section that **RESTRICTIONS** would run with the subdivision for a clearly defined period of time without exception and provide automatic renewal periods unless a two-thirds (2/3rds) written vote made a change.

A prospective owner that has bought or does purchase a lot, lots, or house on a lot within Corie Crest Subdivision has been assured by the **RESTRICTIONS** that no amendments or termination of **RESTRICTIONS** could be made until October 1, 2040. Owners and prospective owners would know, *inter alia*, that his/her property within this subdivision would be a residential community of single family dwellings with a minimum of 1600 square feet. An owner could have no more than two (2) domestic pets, and the erection of trailers and commercial development would be prohibited. An owner purchasing the property within that subdivision would be put on actual and constructive

notice from the recorded **RESTRICTIONS** of the definite date when the **RESTRICTIONS** could either be amended or terminated.

The **RESPONDENTS** want this court to approve the following logic:

If **RESPONDENTS** obtain a two-third (2/3rd) vote to change the **RESTRICTIONS** they have the clear authority to do so at any time. If the **RESPONDENTS** obtain the necessary two-thirds (2/3rds) vote, there could be no **RESTRICTIONS** at all. If agreed upon by two-thirds (2/3rds) vote of the subdivision, a single-family dwelling can be 1200 heated square feet, an office park, a wedding chapel, a funeral home, a mobile home park, and have possession of three (3) animals consisting of a goat, cow, and horse. Between now and until October 1, 2040, another developer could become purchaser of twenty-four (24) lots from present owners, change the **RESTRICTIONS**, and the property is converted to a strip shopping center.

RESPONDENTS' interpretation of the language of Section 41 to amend runs completely contrary to the intent, purpose, and strict interpretation of the **RESTRICTIONS** recorded on February 15, 2005. Appellant and other owners who did not vote had the right to rely on the clear expiration date and expect present attempts to make and record amendments would be determined *null and void*.

The language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it at the time of execution. Taylor v Lindsey, 332 S.C. 4, 498 SE2d at 864 (1998).

In the event this court decides the language is not clear regarding the prohibition for allowable amendments, then the language of Section 41 is conflicting and ambiguous and

susceptible to more than one interpretation. S.C. Department of Natural Resources v. Town of McClellanville, 345 S.C. 617, 550 SE2d 299 (2001). Therefore, the lower court committed error in granting Rule 41(b) motion to dismiss without listening to testimony of the Developer as to its purpose of the **RESTRICTIONS** with special reference to Section 41.

CONCLUSION

Having replied fully to the Arguments of the **RESPONDENTS**, the **APPELLANT** reaffirms her prayer for reversal of the lower court decision and for a new trial.

RESPECTFULLY SUBMITTED,

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OCTOBER 10, 2012

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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COURT OF COMMON PLEAS FOR SPARTANBURG COUNTY**

THE HONORABLE GORDON G. COOPER, MASTER-IN-EQUITY

CASE NUMBER: 2009-CP-42-5129

KATHERYNA MULHOLLAND-MERTZ.....APPELLANT.

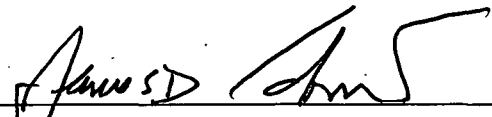
V.

**CORIE CREST HOMEOWNERS ASSOCIATION OF SPARTANBURG, INC.,
RICHARD T. BIGGS, KATHLEEN A. BIGGS, JAMES HANNAH; AND ELIZABETH
A. HANNAH..... RESPONDENTS**

CERTIFICATE OF COUNSEL

**The undersigned certifies that the Final Reply Brief complies with Rule
211(b), SCARC.**

October 10 2012



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The Honorable Gordon G. Cooper, Master-in-Equity

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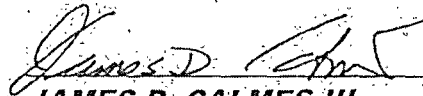
Katheryna Mulholland-Mertz.....Appellant.

v.

**Corie Crest Homeowners Association of Spartanburg, Inc., Richard T. Biggs,
Kathleen A. Biggs, James Hannah, and Elizabeth A. Hannah.....Respondents**

PROOF OF SERVICE

I certify that I have served the **FINAL REPLY BRIEF OF APPELLANT** on **A. TODD DARWIN JR.**, Esquire, Attorney for the Respondents, by depositing a copy in the United States Mail, postage prepaid, on October 11, 2012, addressed to him at Holcombe Bomar, P.A., Post Office Box 1897, Spartanburg, South Carolina 29304



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