THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Master-in-Equity

Maite Murphy, Master-in-Equity

Case No.: 2009-CP-18-3315

LARRY E. KINARD,. . . . . .Appellant,

vs.

DOUGLAS S. RICHARDSON AND JULIE D. RICHARDSON,. . . . . .Respondents.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF CASE

On or about December 8, 2009, Appellant filed suit against the following Defendants: Town of Summerville, Hoa Van Nguyen, Xuan Thi Nguyen, Senrab Farms Homeowners Association and Madeline A. Ingalls, d/b/a Thin Blue Line Stables. (R. pp. 16-32.) Appellant

amended the Complaint on or about February 23, 2010 to add Respondents Douglas S. Richardson and Julie D. Richardson, Appellant's neighbors, as Defendants. (R. pp. 33-91.) Appellant alleged that the Respondents were in breach of Covenants and Restrictions that allegedly applied to both his and Respondents' property and sought a declaratory judgment from the Court regarding the same. Id. Respondents answered the Amended Complaint on April 19, 2010 and amended their answer on April 29, 2010. (R. pp. 92-101; R. pp. 102-111.) Appellant settled the dispute with the initial Defendants. (R. pp. 396-398.) Appellant's settlement with Defendants Nguyens allowed Defendants Nguyen to maintain up to ten (10) horses on the Nguyens' property. (R. pp. 396-398; R. pp. 207-209.) The Nguyens' property adjoins the Respondents' property. The Nguyens' property has fenced paddocks and boarding stables for horses. (R. pp. 210, 219.)

In Appellants' Amended Complaint, Appellant alleged the following causes of action: Declaratory Judgment – Unlawful Annexation; Declaratory Judgment – Unlawful Zoning; Breach of Covenants and Easement Rights Against the Nguyens; and Breach of Covenants by Douglas S. Richardson and Julie D. Richardson. (R. pp. 33-91.) Only the fourth and last cause of action was brought against Respondents.(R. pp. 33-91, fourth cause of action.)

Respondents denied the Appellant's allegations. (R. pp. 92-101; R. pp. 102-111.) Respondents denied the applicability of the Covenants and Restrictions to their property, and contested Appellant's ability to enforce the Covenants and Restrictions that applied to Appellant's property. (R. pp. 102-111, Paragraphs 14, 58 and R. pp. 33-91, Paragraphs 20, 113.) Appellant and Respondents both filed Motions for Summary Judgment in or about May 2011 which were heard before the Honorable Edgar W. Dickson on or about August 1, 2011.(R. pp. 422-423; R. pp. 424-425; and R. pp. 13-14.) Judge Dickson found "that Tracts 'A' and 'B' are

part of the original Tract 'L' and are subject to any covenants and restrictions that applied to the original Tract "L" which include the covenants and restrictions known as Amendment to Restrictions filed on March 18, 1998." (R. pp. 13-14, emphasis added). Appellant filed a Motion for Reconsideration which was denied. (R. p. 15.) No appeal was taken from Judge Dickson's Order.

This case was tried before the Honorable Maite D. Murphy, the Master-In-Equity for Dorchester County, on or about June 7, 2012. (R. pp. 3-9). She rendered an opinion on this case on September 28, 2012. (R. pp. 3-9). Appellant moved for reconsideration which was heard on November 16, 2012. (R. pp. 399-406.) On December 6, 2012, the Master-In-Equity issued a Final Order denying Appellant's Motion for Reconsideration. (R. pp. 10-12.)

FACTS

Appellant and Respondents are neighbors in Summerville, South Carolina with their properties separated by the unimproved road known as Saddle Trail. (R. p. 325; R. p. 136, l. 5-13.) Respondents own approximately seven (7) acres of land on which is located their residence and a fenced horse pasture. (R. p. 245; R. pp. 351-354, 361-364.) After purchasing their land, Respondents divided the property into two (2) tracts for tax purposes. (R. p. 364, R. p. 296, l. 1-2.) Appellant owns approximately two (2) acres of land directly across the street. (R. pp. 349-350; R. p. 140, l. 1-2.) Appellant initially bought one (1) lot and then subsequently bought an adjoining lot. Id. Both Appellant's and Respondents' land was previously owned by James M. Barnes and Delene Barnes (hereinafter "Barnes" or "Declarant"). (R. p. 325.)

On or about June 27, 1997 Barnes recorded a plat with the Dorchester County Register of Mense Conveyances (RMC), entitled "PLAT SHOWING ELEVEN LOTS OF SENRAB FARMS A SUBDIVISION OWNED BY JAMES M. BARNES AND DELENE BARNES". (R.

p. 325.) Appellant's property consists of Lots G and F on this plat and are two (2) of the eleven (11) lots referenced in the plat. (R. pp. 325-326, 349-350.) Respondents' property is a portion of the property (approximately one-half) designated as "14.19 ACRES RESIDUAL" depicted on the plat.(R. p. 136, l. 9-13.)

On or about September 11, 1997, Barnes as the Declarant recorded Restrictive Covenants expressly applicable to lots D, E, F, G, H and I of the aforementioned plat. (R. p. 326.) The Restrictive Covenants state that Barnes as the Declarants "hereby covenant and agree ... with persons who shall hereafter purchase the property described in the attached Exhibit 'A' ...." (R. p. 326, first paragraph.) Exhibit "A" to the Restrictive Covenants lists only Lots D, E, F, G, H and I. Id. Significantly Barnes did not state that the purchasers of lots A, B or C shown on the plat or the area shown on the 1997 Plat as "14.19 ACRES RESIDUAL" were part of the property with which he covenanted and agreed. At that time no Restrictive Covenants were in place on Lots A, B or C or the '14.19 ACRES RESIDUAL". Only Lots D, E, F, G, H and I had Deed Restrictions from Barnes.[1]

Subsequent to the imposition of the Restrictive Covenants on Lots D, E, F, G, H and I, Barnes sold to Appellant and third parties all of the Lots subjected to the original Restrictive Covenants as follows: Lot H sold on or about September 11, 1997; Lot G sold on or about December 1, 1997; Lot E sold on or about December 15, 1997; Lot D sold on or about December 16, 1997; and Lot I sold on or about December 23, 1997. (R. pp. 337-350.) Appellants purchased Lot F on or about January 21, 1998, with a recording date of January 22, 1998, and constructed a house on the property. (R. pp. 349-350.) Appellant later purchased the adjoining Lot G from the

[1] Barnes had also originally owned the land owned by J.J. Madison to the west and adjacent to Respondents' property subsequently purchased by the Nguyens. Barnes sold this land and the house, stable and paddocks located thereon. At the time, Barnes placed different restrictions on the propertry allowing. See Plaintiff's Exhibit 16(a)(b)(c); and Plaintiff's Exhibit 17.

initial purchaser. (R. p. 134, l. 24; p. 136, l. 2.) Lot G does not have a house on it. Appellant uses it for agricultural purposes. (R. p. 135, l. 7-11.)

Towards the end of 1997 Respondents were looking for property on which to build a home and upon which they could keep horses. (R. p. 281, l. 24 – p. 282, l. 9.) Although the property was not listed for sale, Respondents'' realtor was aware that Barnes owned approximately fourteen (14) acres behind the subdivision known as Senrab Farms and approached Barnes about Respondents buying the property. (R. p. 283, l. 3-14.) Barnes wanted to sell the entire fourteen (14) acres to Respondents, but Respondents could not afford to purchase the entire property. Id. Barnes and Respondents reached an agreement for Respondents to purchase seven (7) acres of the total. (R. p. 283, l. 7-22.) As a result of that agreement, Barnes subdivided that property as shown on a plat recorded with the RMC on January 29, 1998. (R. p. 351.) The plat is entitled "PLAT SHOWING 14.19 ACRES OF LAND BEING SUBDIVIDED INTO TRACT 'L' (7.00 AC) AND TRACT 'M'(7.03) AS REQUESTED BY THE OWNERS JAMES M. BARNES AND DELENE BARNES". Id. This Plat does not state that the property is part of Senrab Farms. Id.

On February 25, 1998, Barnes then sold Tract "L" to Respondents' builder Steve Hill/Habersham Builders Inc (Hereinafter "Hill"). (R. pp. 352-354; R. p. 283, l. 17- p. 284, l. 10.) That deed was recorded with the RMC on March 3, 1998. Id. In anticipation of that sale, Barnes and Hill executed on February 25, 1998 a document entitled Amendment to Restrictions. (R. pp. 355-357.) The document specifically states that Hill is about to purchase the property. Id. After Hill constructed Respondents' home, Hill deeded Tract "L" to Respondents on December 23, 1998. (R. pp. 361-363; R. p. 283, l. 23 – p. 284, l.7.)

In addition to stating that Hill "is about to purchase the property describe (sic) in Exhibit "A" attached hereto," Amendment to Restrictions also permits up to six (6) horses to be kept on the property. (R. pp. 355-357.) Respondents negotiated with Barnes to allow up to six (6) horses on the property. (R. p. 294, l. 23-p. 295, l. 17.) Respondents would not have purchased the property if the Restrictions did not allow for the horses and other farm equipment. Id.

The actual deed to Tract L from Barnes to Hill describes the property and states that the property is subject to "Restrictive Covenants dated September 8, 1997 and recorded in the RMC Office for Dorchester County in Book 1821, Page 331" and "Amendment to Restrictions dated February 25, 1998 and recorded simultaneously herewith." (R. pp. 352-354.) Prior to February 25, 1998 there were no restrictions placed on Tract L. (R. p. 295, l. 18-21.) Further at no time did Barnes, Hill or any of the owners of Lots D, E, F, G, H or I move or act to amend or alter the original Restrictive Covenants to include Tract L within the original Restrictive Covenants. (R. p. 199, l. 7-13; p. 200, l. 8-25; p. 202, l. 20-24; p. 203, l. 18-21.)

In or about 2000, Respondents constructed a fence to enclose approximately 5.83 acres of Tract L. (R. p. 284, l. 16-20; p. 291.) Respondents designed the fence to accommodate horses, taking pains to ensure that appropriate materials were used and placed at the correct angles. (R. p. 284, l. 21 – p. 286, l. 1.) Each post is a 4x4 post with 6x6 posts at the corners. (R. p. 284, l. 21 – p. 286, l. 7.) The three (3) railings are angled to prevent injuries to horses and there is an electric strip running around the top rail. Id. In or about April 2003, Respondents subdivided Tract "L" into Tracts "A" and "B" for tax purposes. (R. p. 364; R. p. 296, l. 1-2.) Tract "A" is approximately 1.18 acres with Respondents' home. Id. Tract "B" is approximately 5.83 acres and comprises the fenced in area. (R. p. 245, l. 10-16; R. p. 364.)

Respondents eventually leased Tract "B" to a third party individual. (R. p. 248, l. 23-24; p. 299, l. 4-7.) The lease limits the use of Tract B for keeping horses and restricts the number of horses that could be kept on the property to five (5). (R. pp. 382-390.) Respondents did not lease the property to a company or business. (R. pp. 382-390; R. p. 299, l. 8-12.) In or about 2003, Respondents, in order to take advantage of tax write-offs incorporated a business known as Greener Pasture, LLC. (R. p. 245, l. 10-16; p. 296, l. 1-2.) The income from leasing Tract B and the expenses associated with maintaining the property were run through the LLC. (R. p. 297, l. 2-14.) At no time did the title to Tract B change hands.

Adjacent to Respondents' property is property owned by former Co-Defendants Hoa Van Nguyen and Xuan Thi Nguyen. Located on the Nguyens' property, in addition to their home, is a stable or barn and some riding paddocks and a fenced area. (R. p. 205, l. 23 – p. 207, l. 9.) This stable existed on the property at the time Appellant purchased his property. (R. p. 134, l. 4-5; p. 205, l. 27- p. 207, l. 6.) Horses are kept on this property and had been at the time Appellant purchased his property. (R. p. 206, l. 2-25; p. 286, l. 21-24.) As part of the settlement between Appellant and the Nguyen's, Appellant agreed to dismiss his suit against the Nguyens in exchange for Reciprocal Covenants that expressly permit not only the keeping and raising of farm animals, but also provides that the property "may be leased ... to individuals wishing to board their personal horses upon their (sic) property" and "that the property shall not accommodate more than ten horses at any one time." (R. pp. 396-398; R. p. 209, l. 4-12.)

Respondents did not lease Tract B to the entity running the stable on the Nguyens' property, nor were Respondents aware of the business activities operating out of the Nguyens' property. (R. p. 160, l. 21-22.) Respondents were only aware that the horses grazed on the

pasture area of Tract B and were occasionally ridden on Tract B and were stabled on the Nguyens' property. (R. p. 210, l. 12-14.)

Appellant contended that he has a right to enforce the original Restrictive Covenants placed on his property against Respondents. (R. pp. 33-91.) Appellant further argued that the Declarant Barnes since he had sold off the original lots did not have the authority to amend the original Restrictive Covenants applicable to and binding on Appellant's property and therefore the document entitled "Amendment to Restrictions" that the Declarant Barnes put on Respondents' property in anticipation of the sale of the property from Barnes to Hill was invalid. Appellant also contended that Respondents violated the Restrictive Covenants.

The Trial Court found that it was the law of the case that the Amendment to Restrictions applied to Respondents' property because of Judge Dickson's finding in his Order on the Motions for Summary Judgment. (R. pp. 3-9.) The Trial Court further found that while the deed from Barnes to Hill referenced, in addition to the Amendment to Restrictions, the original Restrictive Covenants, it did not serve to bring the property within the scope of the original subdivision. Rather, it only imposed on the property Restrictions identical to those imposed on Appellant's property. Barnes did not amend the original Restrictive Covenants to include Tract "L" within the Covenants. Further, since Barnes owned 100% Tract "L", he was able to put any Restrictions on it including those he titled "Amendment to Restrictions" even if they did not technically amend the original Restrictive Covenants. Lastly, the Trial Court found that Respondents leasing a portion of their property for horses did not violate any of the Restrictive Covenants and that even if Appellant did have privity of contract to enforce the original Restrictive Covenants on Respondents' property, Respondents were not in breach of the Restrictions.

ARGUMENTS

An action to enforce restrictive covenants by injunction is in equity. Taylor v. Lindsey, 332 S.C. 1, 3, n. 2, 498 S.E.2d 862, 864, n. 2 (1998). South Carolina Dep't of Natural Res. v. Town of McClellanville, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001). On appeal of an equitable action tried by a Master, the Court can find facts in accordance with its own view of the evidence. Id.; Townes Assoc. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). However, a Master's findings, concurred with by the circuit court, will not be disturbed on appeal unless without evidentiary support. Townes Assoc., 266 S.C. at 86, 221 S.E.2d at 775-76; See Tiger, Inc. v. Fisher Agro, Inc., 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989) (Recognizing that the court should not disregard the findings of the special referee, who was in a better position to weigh the credibility of the witnesses.

> Restrictive covenants are contractual in nature, so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document. The court may not limit a restriction in a deed, *nor, on the other hand, will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written.* It is still the settled rule in this jurisdiction that restrictions as to the use of real estate should be strictly construed and *all doubts resolved in favor of free use of the property,* subject, however, to the provision that this rule of strict construction should not be applied so as to defeat the plain and obvious purpose of the instrument. It follows, of course, that where the language of the restrictions is equally capable of two or more different constructions that construction will be adopted which least restricts the use of the property. a *restriction on the use of property must be created in express terms or by plain and unmistakable implication,* and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property.

Taylor, 332 S.C. at 4-5, 498 S.E.2d at 863-64 (emphasis added) (internal quotations and citations omitted).

I. THE MASTER DID NOT ERR IN DECLARING THAT THE RICHARDSON'S PROPERTY WAS NOT MADE SUBJECT TO THE ORIGINAL RESTICTIVE COVENANTS RECORDED BY BARNES ON ONLY SIX (6) LOTS

Appellant argues the Court erred in finding Respondents' property was not subject to the original Restrictive Covenants. This alleged issue raised by Appellant confuses the totality of the trial court's findings and rulings. The Appellant attempted to argue at trial that he could enforce the original Restrictive Covenants on Respondent and that the document entitled Amendment to Restriction was invalid because the Declarant Barnes did not have authority to amend the original Restrictive Covenants. (R. p. 265, l. 25 – p. 267, l. 7; R. pp. 422-423; R. pp. 428-444; and R. pp. 426-427.) The Master's ruling should be read in light of the position Appellant took at trial.

The Master did not rule that there were no restrictions on Respondents' property, nor that those restrictions did not incorporate the same restrictions placed on Appellant's property. Judge Murphy's ruling was consistent with Judge Dickson's ruling in that both found that the Amendment to Restrictions was a valid Restriction on the property because Barnes owned the property at the time. The Trial Court held that Appellant could not enforce his restrictive covenants on Respondents' property because there was no proper amendment to include the additional property.

The original Restrictive Covenants filed by Barnes on or about September 11, 1997 expressly state that Barnes covenants and agrees "with persons who shall hereafter purchase the property described in the attached Exhibit A[.]" (R. pp. 326-336.) As mentioned above, that property was expressly limited to Lots D, E, F, G, H and I as shown on the original Senrab Farms subdivision plat. Id. When Barnes sold off those lots, he referenced the Restrictions in the deed. (R. pp. 337-350.) At no time did Barnes or the property owners amend the original

Restrictive Covenants to include Tract L within the covenants. As even Appellant argued, Barnes did not have the capacity to amend the Restrictive Covenants since he had sold off all of the Lots prior to selling Tract L to Hill. (R. p. 265, l. 25 – p. 267, l. 23.)

The Restrictive Covenants state that they can only "be altered, modified, canceled or changed ... by the written consent of the majority of the owners of record of the lots which are subjected hereto." (R. pp. 326-336, Paragraph 18.) Since Barnes did not own any lots which were "subjected hereto" at the time he sold Tract L to Hill, and since the owners of those lots "subjected hereto" never amended the Restrictive Covenants to include Tract L, the Trial Court was correct in its ruling.

"[W]hen a developer fails to expressly reserve a right to amend the covenants, amendments are not allowed." Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp., 368 S.C. 342, 628 S.E.2d 902, 914 (Ct. App. 2006); citing Heritage Federal Savings and Loan Association v. Eagle Lake and Golf Condominiums, 318 S.C. 535, 541, 458 S.E.2d 561, 565 (Ct. App. 1995); Shipyard Property Owners' Association v. Mangiaracina, 307 S.C. 299, S.E.sd 795 (Ct. App. 1992). In the present case, Barnes did not expressly reserve a right to amend so he cannot later amend the original Restrictive Covenants to include additional properties within the covenant relationship. This case is also different than McDonald v. Welborn, 220 S.C. 10, 66 S.E.2d 327 (1951) or Brown v. Echols, 270 S.C. 676, 244 S.E.2d 308 (1978), in that those properties were sold pursuant to a general plan of development. Here, in this case only the original eleven (11) lots depicted on the Senrab Farms plat were subdivided as part of the subdivision. (R. p. 326; R. p. 133, l. 25 – p. 134, l. 5.) Both the area purchased by Madison and the 14.19 RESIDUAL ACRES were outside the original Covenants. Further, Appellant

offered no evidence at trial as to Barnes' general plan of development or improvement or as to Barnes' intent.

II. BECAUSE THE COURT WAS CORRECT IN FINDING THAT THE ORIGINAL RESTRICTIVE COVENANTS WERE NOT AMENDED TO INCLUDE RESPONDENTS' PROPERTY, THE COURT WAS CORRECT IN FINDING THAT THERE WAS NO PRIVITY OF CONTRACT BETWEEN APPELLANT AND RESPONDENTS WHEREBY APPELLANT COULD ENFORCE THE RESTRICTIONS ON RESPONDENTS' PROPERTY

Appellant contends the Master erred in finding Appellant lacked privity of contract with Respondents. "Restrictive Covenants are contractual in nature...." Taylor v. Lindsey, 332 S.C. 1, 498 S.E.2d 862 (1998). "[O]ne not in privity of contract with another cannot maintain an action against him in breach of contract ...." Windsor Green Owners Ass'n v. Allied Signal, Inc., 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct.App.2004) (citing Bob Hammond Constr. Co. v. Banks Constr. Co., 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct.App. 1994)).

Respondents, and their predecessor Hill, never entered into a convenant with Appellant. In the introductory paragraph of the original Restrictive Covenants applicable to Appellant's property, the Declarant Barnes expressly limits the covenant relationship between Barnes and the owners of the Lots listed in Exhibit A, to wit: Lots D, E, F, G, H and I. (R. pp. 326-336, Exhibit "A" thereto.) It does not include the owners or the subsequent owners of the 14.19 RESIDUAL ACRES. This was never amended.

As noted above, Appellant admitted that he had no evidence showing Tract "L" was subject to any Covenants and Restrictions prior to Barnes selling the property to Hill. (R. p. 202, l. 20 – p. 204, l. 2.) Appellant was unable to state when Tract "L" became part of Senrab Farms Subdivision. Id.

Appellant attempts to rely on the Declarant's definition of a "lot" to support his claim that he can enforce the restrictions against Respondents. Barnes stated in the original Restrictive

Covenants that "the term "Lots" shall refer to lots which are subject hereto, whether by specific reference in this instrument, or to lots made subject to the provisions of this instrument by separate legal instrument recorded in the Dorchester County RMC Office." This is a definition of "Lots" and not a reservation of a right to amend the Covenants to add more property to the subdivision. Appellant contends that the separate legal instrument was the Deed from Barnes to Hill which referenced the original Restrictive Covenants. While Barnes had the right to subject Tract L to any Restrictions he so chose, Barnes did not, as Appellant argued at trial and in Appellant's Motion for Summary Judgment, have the right to amend the original Restrictive Covenants to bring Tract L into the subdivision. Per the express terms of the original Restrictive Covenants, they could only be amended by written consent of the majority of the owners. (R. pp. 326-336, Paragraph 18.) As the Court noted in Taylor, 332 S.C. at 4-5, 498 S.E.2d at 863-864, the Court will not enlarge or extend "by construction or implication beyond the clear meaning of its terms even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written." Id.

Appellant admits that Barnes could not and did not amend the original Restrictive Covenants to include Tract L, but maintains that by using the above language to define the word "Lots" as it is used in the Restrictive Covenants, Barnes somehow reserved the right to bring additional properties into a covenant or contractual relationship with the original property owners simply by referencing the original Restrictive Covenants in subsequent deeds to properties regardless of whether the addition of property amended the original Restrictive Covenants.

Because Appellant's argument ignores the express language that states the original Restrictive Covenants are between Barnes (and his successors) and the owners of the original six

(6) lots, because Appellant also ignores the express language of the original Restrictive Covenants that require a majority vote of all the property owners before it can be amended, (R. pp. 326-336, Paragraph 18) which did not occur and because Appellant's argument before this Court ignores Appellant's own argument in the lower Court that Barnes lacked the capacity to amend the Restrictive Covenants, the Master was correct in finding that there was no privity of contract between Appellant and Respondents.

In Appellant's Amended Complaint, Appellant alleges that its original Restrictive Covenants applicable to his property apply to Respondents' property and that he has the right to enforce them. Respondents denied the application of said Restrictive Covenants and denied Appellant's right to enforce them. Appellant cannot therefore claim he was "surprised" at trial by Respondents alleging that Appellant had no right to enforce the Restrictive Covenants due to lack of privity.

As the Master correctly noted in the September 28, 2012 Order, "Barnes could place the same restrictions on Defendants' property as he placed on Plaintiff's property, [but] he was unable without following the procedure in the original Restrictive Covenants to bring Defendants' property within the contractual reach on the original property owners." (R. p. 6.) Further "while Barnes had every right to place restrictions on property he sold to Steve Hill, he had no ability to unilaterally bring Defendants' property within the original Restrictive Covenants applicable to Plaintiff's property." Id. The fact that Barnes used the same Restrictive Covenants on two (2) distinct properties does not necessarily place the properties and their owners in a covenant relationship. To hold that it does would allow Barnes, as the developer of Senrab Farms, to sell off the original Lots, and then later unilaterally bring in other distinct properties simply by referencing the original Restrictive Covenants in the deeds to the new properties.

Barnes, as a Declarant and property developer, can subject various property he owns to the identical Restrictions without placing them in a covenant relationship. He can use the same document for different subdivisions. However, had Barnes reserved the right to do so, he could have brought additional property into the original subdivision. As Appellant himself argued, Barnes could not amend the existing original covenant encumbered subdivision unless he complied with the existing applicable original Covenants and Restrictions for that subdivision which did not occur. Barnes expressly limited his ability to amend the original Restrictive Covenants.

To hold otherwise would be to allow Barnes to develop Senrab Farms and then later, after selling off his interest and without retaining the right to amend, develop another property of unlimited size and scope and bring that property into Senrab Farms. The inequity of this is apparent as it could subject the original property owners to unwanted or unanticipated burdens on their subdivision.

As there is no contractual agreement between Appellant and Respondents, Appellant cannot enforce said Covenants. Essentially, the original lots subject to the original Restrictive Covenants and Respondents' property are two (2) separate and distinct properties and there is no evidence of a general plan of development for both properties. Appellant has no right to enforce the Restrictions on Respondents' land.

III. THE MASTER WAS CORRECT IN FINDING THE "AMENDMENT TO RESTRICITONS" WAS NOT AN AMENDMENT TO THE ORIGINAL RESTRICTIVE COVENANTS, BUT AN ORIGINAL RESTRICTION ON TRACT L

Notwithstanding that both Judge Dickson, in ruling on Summary Judgment, and Judge Murphy in her Order found that the Amendment to Restrictions apply to Respondents' property, Appellant contends the Master somehow rewrote or transformed the Amendment to Restricitons. Appellant is incorrect. Prior to the Barnes' sale of Tract L to Hill there were no restrictions or

covenants on Tract L. (R. p. 202, l. 20 – p. 204, l. 2.) No evidence was presented that there were any restrictions on Respondents' property prior to the sale to Hill. The Amendment to Restrictions states that Hill is about to purchase the property at the time of sale of Tract "L" from Barnes to Hill. (R. pp. 355-357.) Further, Barnes' deed to Hill for Tract "L" states that the Amendments to Restrictions are being recorded simultaneously with the deed. (R. pp. 352-354.) These Restrictions were negotiated between Respondents and Barnes. (R. p. 294, l. 15-p. 295, l. 17.) From the language used in the deed and the restrictions, it is apparent that Barnes, Respondents and Hill agreed to place the restrictions specified in the Amendment to Restrictions on property. Since it previously had no restrictions, both Judge Dickson and Judge Murphy were correct in finding that the document entitled Amendment to Restrictions was original in that is did not change an existing restriction.

As the Master found, parties can place restrictions on their property as they wish. Further Judge Dickson held in his January 12, 2012 Order that the restrictions found in the Amendment to Restrictions applied to Respondents' property notwithstanding that Respondents subdivided their property into Tracts A and B. (R. pp. 13-14.) Appellant did not appeal this Order following its entry nor has he raised the issue that Judge Dickson erred in so ruling.

At the time Barnes sold Tract L to Hill (who then sold to Respondents), Barnes owned 100% of Tract L. He was absolutely authorized to subject that property to lawful restrictions. The fact that he titled some of those restrictions as "Amendments" is irrelevant. Had Barnes simply titled the document as "Restrictions" they would still apply to the property. Likewise he could also subject, and did subject Tract L, to the same restrictions found in the neighboring Senrab Farms Subdivision. However, as noted in the preceding argument, the fact that he may have used the same

restrictions does not necessarily bring the owners of the properties into a covenant relationship with each other.

The Amendments to Restrictions specifically state that "[i]t shall be permissible for the Purchaser, and his/her successors and assigns, to keep up to six (6) horses on the ... property. Such horses shall be permitted upon the front portion of the property and the rear portion of the property." This restriction limiting the number of horses to six (6) is different than that found in the original Restrictive Covenants which allows "for the owner of any lot to keep up to one (1) horse on that lot so long as the rear portion of the lot is fenced for such purpose and such rear portion contains a minimum area of twenty-five thousand (25,000) square feet."(R. pp. 326-336, Paragraph 13 (c).)

As Judge Dickson noted, Restrictive Covenants run with the land. (R. pp. 13-15) See also Marathon Finance Co. v. HHC Liquidation Corp., 325 S.C. 589, 604, 483 S.E.2d 757, 765 (ct. App. 1997). Because Judge Dickson found them applicable to Respondents' property even after subdivision into Tracts "A" and "B", because it was the law of the case, and because Barnes owned the property when he executed the Restrictions and did so as part of and in anticipation of the sale, the Master was correct in finding that the Amendment to Restrictions applied to Respondents' property.

IV. THE MASTER WAS CORECT IN FINDING THAT RESPONDENTS' SUBDIVISION OF THEIR TRACT L PROPERTY DID NOT CAUSE THE DEMISE OF THE RESTRICTIONS ON RESPONDENTS' PROPERTY AND RESPONDENTS' USE OF THEIR PROPERTY DID NOT VIOLATE THE APPLICABLE RESTRICTIONS.

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).

Appellant attempts to argue that because Respondents subdivided their property into Tracts "A" and "B" for tax purposes, that they no longer use their property for residential purposes.

Appellant's argument presupposes that he has the right to enforce the Restrictions and that the subdivision of the property somehow requires that the lot separate from Respondents' residence must have a house on it. Clearly none of the Restrictions require this.

Even if Appellant had the authority to enforce the Restrictions against Respondents, Respondents' subdivision of their property does not change their use of the total property. Respondents continue to reside on the property. The fallacy of Appellant's argument that the subdivision somehow affects their use is apparent if, rather than subdividing the property, Respondents kept the original tract as one (1) parcel and still leased out the fenced area. Then Respondents' subdivision would not be an issue.

Also, Appellant's argument that the Amendment to Restrictions does not apply to Respondents' property fails to address Judge Dickson's ruling on the cross motions for Summary Judgment wherein Judge Dickson held that the document entitled Amendment to Restrictions applies to Respondents' property. Appellant did not appeal this Order, but seeks to now attack Judge Dickson's ruling by alleging that it was the Master who initially made this finding. Appellant is barred from raising this issue. Assuming however for the sake of argument that Appellant can raise the issue, Appellant's argument fails.

Respondents reside on the property comprising the original Tract L. Their residence is located on Tract "A" and their additional property is Tract "B". As Appellant notes, Respondents subdivided Tract "L" in 2003. Subdivision of property is expressly allowed under the original Restrictive Covenants. (R. pp. 326-336, paragraph 9.) As Judge Dickson noted the covenants run with the land so the entirety of Tract "L", now designated as Tracts "A" and "B" continues to be subject to the applicable Restrictions which limits the owners from keeping more than six (6) horses

on the property. (R. pp. 13-14.) So whether Tract "L" is divided into one, two, three or even more lots, the number of horses that can be kept on the entire property may not exceed six (6).

Paragraph 9 of the original Restrictive Covenants allows for persons owning an adjacent lot to use it as a side yard. (R. pp. 326-336, paragraph 9.) The Master correctly determined this. Since under the original Covenants, property owners could own adjacent lots and could subdivide their property and use the contiguous lots as a side yard, Respondents' subdivision of their property for tax purposes does not change the nature of their use and does not violate the Covenants.

In South Carolina Department of Natural Resources v. Town of McClellanville, 345 S.C. 617, 550 S.E.2d 295 (2001), SCDNR contended that McClellanville's ordinance requiring that users of a boat launching ramp obtain a permit by paying a fee violated the deed from SCDNR to the town. The deed required that the parking area and ramp "remain accessible to and remain available for use by the public." Id, 345 S.C. at 623, 550 S.E.2d at 302. The South Carolina Supreme Court in reversing the Court of Appeals held that the phrases "remain accessible" and "remain available for use by the public" do not equal "reaming free and unrestricted." Id. 345 S.C. at 623, 550 S.E.2d at 303. The Court found that nothing in the deed prohibited the Town from requiring a permit or charging a fee.

The Supreme Court quoted extensively from its decision in Taylor v. Lindsey, 332 S.C. 1, 4-5, 498 S.E.2d 862, 863-864 (1998), and found that the Court of Appeals' construction of the restriction did not comport with the Taylor rules. South Carolina Department of Natural Resources, 345 S.C. at 623, 550 S.E.2d at 303. The Court found it inappropriate to focus on the definition of "remain" to the exclusion of the covenant as a whole. Id.

Likewise in the present case, Appellant's argument requires a focus on the phrase "residential building lots" without construing the Covenants as a whole. When construed as a

whole, it is apparent that owners can have side yards comprised of separate lots, can subdivide their property and can have horses on those lots. Further, even under the original Covenants if an owner has multiple lots, they theoretically can have multiple horses so long as they have the requisite square footage. (R. pp. 326-336, paragraph 13(c).)

V. THE MASTER WAS CORRECT IN FINDING THAT RESPONDENTS' USE OF THEIR PROPERTY WAS CONSISTENT WITH THE RESTRICTIVE COVENANTS APPLICABLE TO RESPONDENTS' PROPERTY

Appellant contends in his fifth argument that the Master found that Respondents' use of Tract B was for residential purposes. In addition to the arguments below, Respondents refer to the arguments set forth in the preceding portion of this brief. Appellant's argument attempts to mislead this Court as to the Trial Court's findings. Contrary to what Appellant argues, the Master found not that Respondents' use of tract B was for residential use, but that Respondents' use of Tract B was not inconsistent with the language of the Covenants which allow adjacent lots to be used as side yards and allows the subdivision of the lots. (R. pp. 10-12, Paragraph 1.) Even if Appellant has the right to enforce the Restrictive Covenants against the Respondents and is in privity of contract with Respondents, his argument that Respondents are in breach fails.

The original Restrictive Covenants do not prohibit property owners from leasing their property. Paragraph 13(j) of the Restrictive Covenants expressly recognizes that property owners may place "for rent" signs on their property thereby implicitly acknowledging that property can be leased. (R. pp. 326-336, Paragraph 13(j).) Nowhere in the Covenants does it require that the property leased must be a residence. Appellant acknowledged that property owners in his subdivision could lease their property and be paid for it. (R. p. 213, l. 3-13.) Because the leasing of property is not forbidden by the original Restrictive Covenants, even if they do apply to Respondents' Tract "L" property and even if they are enforceable by Appellant,

which Respondents deny, Respondents are not in breach of the Covenants. The original Restrictive Covenants do not prohibit leasing of the property and do not specify what can or cannot be leased.

A Restriction will not "be enlarged or extended by construction or implication beyond the clear meaning of its terms ...." Taylor, 332 SC at 5, 498 S.E.2d at 864. "[R]estrictions as to the use of real property [should] be strictly construed and all doubts resolved in favor of free use of the property..." so long as strict construction does not "defeat the plain and obvious purpose of the instrument." Id. "A restriction on the use of property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of the property." Id. quoting Hamilton v. CCM, Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980). See also South Carolina Department of Natural Resources v. Town of McClellanville, 345 S.C. 617, 55 S.E.2d 299 (2001).

Strictly construing the original Restrictive Covenants in favor of the free use of Respondents' property demonstrates that there is no prohibition on leasing property. The allowance of "For Rent" signs implies this. Further the plain and obvious purpose of the original Restictive Covenants was to allow horses to be kept on the property. The original Covenants allow for the owner of a lot to have one (1) horse pen minimum fenced area of twenty-five thousand (25,000) square feet. (R. pp. 326-336, Paragraph 13(j).) The Covenants acknowledge that Lots may be subdivided, and that a property owner may purchase more than one lot and re-subdivide it. (R. pp. 326-336, Paragraph 9.) The original Restrictive Covenants allow for owners to acquire a contiguous lot and use it for a side yard. Id. Since each lot of the original properties, whether subdivided or not may have up to one (1) horse on it so long as the fenced area has a minimum square foot fenced area, it is plausible that owners with multiple lots could have more than one (1) horse. Further the

Amendment to Restrictions (executed in anticipation of selling the property) allows the owner of Tract "L" to have up to six (6) horses on the property. Thus it is not clear or evident from either document, or any other for that matter, that Respondents cannot lease their property for the keeping of up to six (6) horses.

The original Restrictive Covenants expressly state that "[n]othing contained in the foregoing paragraph shall prohibit the owner of a lot from acquiring a contiguous lot and using the same as a side yard." Id. Indeed, Appellant himself acquired an additional lot and uses it to grow fruit. (R. p. 135, l. 1-11; p. 211, l. 10-24.) Because of this the Master was correct in finding that Tract B served as Respondents' side yard. Since the entire Tract L (divided into Tracts A and B) was being used by Respondents for their residence and side yard and since there is no prohibition about leasing the property to third persons, Appellant's argument must fail.

Further the facts demonstrate that Respondents were not running a business, but rather simply leasing their property, again not prohibited by the Restrictions. All of the testimony regarding the business operating out of the adjacent property owners' stable was not related to Respondent, but to the Nguyens. (R. p. 160, l. 21-22; p. 210, l. 2-11; p. 250, l. 5-10.) Respondent did not sell horses, give riding lessons, or participate in any other equine activity other than leasing their property. (R. p. 219, l. 6-15.) The absurdity of Appellant's argument is exposed when contemplating the scenario of Respondents leasing their entire property including their home. (R. p. 212, l. 3-6.) Obviously this would be allowed and the tenant could keep up to six (6) horses on the property. The only difference here is that Respondents continue to live in their house and only rent out the fenced area.

Also, if the horses belonged to Respondents there would be no real issue. Neither the language of the original Restrictive Covenants nor the Amendment to Restriction requires or

specifies that the horse(s) permitted on each lot actually be owned by the lot owner. In property rental situations where the entire property, including the house is leased, as well as a myriad of other situations, the horse(s) could be owned by a person or persons that do not own the lot and this would not violate the Restrictions.

Appellant's reliance on Buffington v. T.O.E. Enterprises, 383, S.C. 388, 680 SE2d 289 (S.C. 2009) is misplaced. Appellant attempts to equate Respondents' use of their property with operating a car lot, going so far as to state that Respondents "have parked the automobile predecessor – horses – upon their lot...." See Appellate Brief, p. 34. Appellant fails to recognize that the restrictions applicable to Respondents' property expressly allow for horses and do not prohibit leasing. The original Covenants expressly allow purchase of side lots and allow for horses on those lots without the need to have a residence on that lot.

VI. THE MASTER DID NOT ERR IN FINDING THAT APPELLANTS FAILED TO PROVE THAT THERE WERE MORE THAN SIX (6) HORSES KEPT ON THE PROPERTY

The Master properly found Appellant failed to prove that Respondent kept more than six horses on the property. Appellant introduced photographs showing more than six horses on the property but did not establish whether those horses were kept on the property or were there on a temporary basis. Appellant acknowledged that the horses were stabled at the adjacent property. Both parties acknowledged that from time to time horses from the adjacent property were allowed to graze on Respondents' property but were stabled at the Nguyen's property. (R. p. 210, l. 7-11.) The Restrictions prohibit the keeping of horses above the maximum number allowed – one (1) per lot for the original six lots and six (6) for respondents' property. (R. pp. 326-336, 355-357.) The restrictions do not prohibit more than six (6) coming on the property. So even if Appellant is in a position of privity to enforce the restrictions on Respondents' property, Appellant failed to establish that Respondent kept more than six horses on their property. The photos do not demonstrate that

Respondent kept more than six (6). Rather the photos only show that on occasion the property in question had more than six (6) horses on it. No testimony or evidence was entered as to how many horses were kept on the property.

VII. THE MASTER DID NOT ERR IN HER BALANCE OF THE EQUITIES IN THIS MATTER

Even if Appellant is in privity of contract with Respondents to enforce the restrictions on Respondents' property, his arguments about balancing the equities tilts in favor of allowing Respondents to have up to six (6) horses on their property.

The Amendment to Restriction allows six (6) horses to be kept on Tract "L" no matter how it is subdivided. Appellant makes the spurious argument that to uphold the Master's ruling will allow Tract L to be subdivided in to multiple lots with each lot having up to six (6) horses. This is clearly not the Master's ruling nor does Respondent contend this is the law of the case. Further, Judge Dickson's ruling already established that the number of horses on the entirety of Tract L however it is subdivided is limited to six (6).

Appellant purchased his property knowing that all of the other owners were allowed to have horses. (R. pp. 326-336, Paragraph 13(c).) Appellant purchased his property knowing that at the time of purchase there were already horses on the property that eventually became Tract "L". (R. p. 205, l. 23 – p. 206, l. 25.) Appellant purchased the property knowing that there was a stable on the property, now owned by the Nguyens, and that there was a fenced area with horses on the back portion of what is now Respondents' property. (Id.; R. p. 286, l. 8 – p. 288, l. 8; p. 289, l. 22 – p. 290, l. 23.) Appellant cannot credibly argue, as the Master found, that he has some how been surprised that horses are kept on Respondents' property. Appellant settled with the Nguyens in this suit allowing the Nguyens to keep up to ten (10) horses on their property with the full knowledge that those ten horses did not need to belong to the Nguyens and could be leased.(R. pp. 396-398; R.

p. 220, l. 6 – p. 221, l. 7.) To now argue that Appellant is or was unprepared for or unfairly affected by Respondent having up to six (6) horses is preposterous. Further when Appellant purchased his property there were no Restrictions on Respondents' property. Any use could have been made of that property subject to zoning requirements.

Respondents purchased their property with the idea of having horses on it. (R. p. 282, l. 7-9.) Barnes, as the Declarant, expressly provided in the Amendment to Restrictions that there could be up to six (6) horses on the property Respondents eventually purchased and that those Restrictions were being placed on the property in anticipation of sale. The uncontroverted testimony at trial was that it was because of Respondents' request that Barnes set the number of horses permitted at six (6).

Appellant attempts to argue that his use and enjoyment of his property has been usurped by Respondents having horses on their property. Assuming again that Appellant can even raise this argument, the incidents set forth by Appellant as affecting his enjoyment of his property are not caused by Respondents nor is there any evidence to support that the problems are caused by Respondents' lease of the property. At most, the alleged problems are caused by persons going to the Nguyens' property with whom Appellant settled by allowing them to have up to ten (10) leased horses on the property.

Appellant also contends that he had the right to rely upon the Covenants that applied to his property as restricting all future subdivision lot use to residential purposes. This argument completely ignores the fact that when Appellant purchased his lot, the only restrictions were expressly limited to Lots D, E, F, G, H and I and that Barnes did not place any restrictions on the fourteen (14) residual acres that appear on the original plat. At most the subdivision applies to the original eleven (11) lots identified on the plat. (R. p. 325).

Further, when Appellant purchase his lot(s), Barnes fourteen (14) residual acres already had horses from the adjacent property on it. It is disingenuous for Appellant to attempt to argue that he had the right to assume that the property eventually conveyed to Respondents was restricted to prohibit horses or somehow limit those horses to one (1) horse for the entire fourteen (14) acres. Barnes, had he so desired and assuming zoning requirements were met, could have developed the property in question into multi-family apartments or a mobile home park or even a riding stable. There was no restriction on Barnes use of the property listed as Tract L prior to Barnes placing his restrictions on it in 1998 and thus the balance of equities tilts in favor of Respondents.

CONCLUSION

Because Appellant is not in privity of contract with Respondents, because the Respondents' use of their property does not violate any of the applicable restrictions even if they applied and if Appellant was in privity to enforce them, because the Trial Court was correct in its ruling that Respondents' use of their property was not inconsistent with the Restrictions and because the balancing of the equities favors allowing Respondents to continue using their property for horses, the Master's ruling should be affirmed.

Respectfully Submitted,

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June 18, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Master-in-Equity

Maite Murphy, Master-in-Equity

Case No.: 2009-CP-18-3315

LARRY E. KINARD,. . . . . .Appellant,

vs.

DOUGLAS S. RICHARDSON AND JULIE D. RICHARDSON,. . . . . .Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Respondents complies with Rule 211(b), SCACR.

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July 3, 2013
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PROOF OF SERVICE

I certify that I have served a copy of the Final Brief of Respondents by depositing a copy of it in the United States Mail, postage prepaid, on July 3, 2013 addressed to the following:

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