THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cynthia Graham Howe, Master-In-Equity

Case No. 2004-CP-26-2075
Appellate Case No. 2012-212773

John Musick, ... Respondent

v.

Thomas L. Dicks and Robert E. Dicks, Jr., ... Appellants.

FINAL REPLY BRIEF OF APPELLANTS

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ARGUMENT

I. THE MASTER ERRED IN HOLDING THE RIGHT OF REVISION OF LOT ARRANGEMENT WAS RESTRICTED TO SOME UNIDENTIFIED "GRANTORS" AND THAT THE "GRANTORS" ENTITLED TO EXERCISE THIS RIGHT WERE GENE LEWIS AND CARMEN WARD, AND MUSICK HAS PRESENTED NO SUBSTANTIVE ARGUMENT OR AUTHORITY TO THE CONTRARY.

The 1972 Order states the 1958 Restrictions apply to the Subject Property "but with right of revision of the lot arrangement or for combination with abutting portions of lots in Blocks 24 and 25." (R. p. 461). According to the plain language of the 1972 Order, the right of revision of the lot arrangement established in the 1972 Order is not restricted to any particular party, much less to some unidentified "Grantor."[1] It is this plain meaning of the language of the 1972 Order which must be honored and adhered to. S.C. Dep't. of Natural Res. v. Town of McClellanville, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001) (a restriction upon real property shall not "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.").

Musick's only argument in response to the fact that the plain language of the 1972 Order by its terms does not limit the right of lot revision to any particular party, and the only support given for his contention that the right of revision of lot arrangement was restricted to some unidentified "Grantor," is the unsupported and conclusory statement

[1] In a sentence following the grant of rights in question, Judge Vaught states, almost as an afterthought, the 1958 Restrictions as well as other restrictions used in the area provide "to grantor" the right to change certain boundary lines "in any event." Id. This "in any event" language appears to have been added almost as an aside and to state that the parties should not be offended that the 1972 Order was providing rights of revision of the lot arrangement because the neighbors in this residential subdivision should have known that certain rights did exist to make alterations in this residential subdivision. Musick's argument is grounded almost exclusively in this "in any event" sentence - a sentence unnecessary to Judge Vaught's ruling which appears to be surplusage and dicta.

that the 1972 Order is "clear and unambiguous that only the Grantor retained the right to change the boundary lines and building line [sic] . . . ." It is unclear, however, how the 1972 Order could *unambiguously*[2] restrict these rights to the "Grantor" when the word "Grantor" is not even mentioned in the operative provision of the 1972 Order. Aside from this one conclusory and patently erroneous statement, Musick presents no evidentiary or legal support whatsoever[3] challenging the fact that the Master erred in holding the right of revision of lot arrangement within the Subject Property (being made applicable to the Subject Property pursuant to the 1972 Order) was limited to this unidentified "Grantor."

Likewise, Musick presents no substantiated response to the Dicks' assertion the Master erred in finding "the language 'Grantor'" refers to "Gene Lewis and/or Carmen Ward . . . ." At the outset, "the language 'Grantor'" to which the Master refers is presumably the reference to the word "Grantor" contained within the "in any event" sentence of the 1972 Order, which sentence follows the grant of rights in question and, as discussed above, appears to have been included by Judge Vaught as dicta simply justifying his grant of the right of lot revision specifically established in the 1972 Order – but not altering or modifying the right of lot revision which he unequivocally and unambiguously established in the preceding portion of the 1972 Order. The word "Grantor" is not used anywhere in the operative provision of the 1972 Order effecting the grant of rights now in issue. The word "Grantor" is not defined anywhere in the 1972

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[2] To the extent the operative language of the 1972 Order could be considered ambiguous (as the operative provision of the 1972 Order certainly could not *unambiguously* grant rights to an unidentified "Grantor" without mentioning the word "Grantor"), the language in question should have been interpreted in the manner that least restricts the Subject Property, with any ambiguities being strictly construed against the party seeking to enforce it. Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891, 893-94 (1987); Anderson v. Buonforte, 365 S.C. 482, 617 S.E.2d 750 (Ct. App. 2005).

[3] Musick makes no reference whatsoever to any portion of the Record nor citation to any case law in his responsive argument on this issue.

Order, or in the 1958 Restrictions for that matter. Despite the foregoing, Musick asserts as his only argument supporting the Master's finding that the right of revision established in the 1972 Order was actually to be restricted to certain "Grantors" identified as Gene Lewis and Carmen Ward, that "Master Howe used her common sense" in reaching this conclusion, and Musick thereafter refers to (unsubstantiated) circumstances outside of the four corners of the 1972 Order relating to the historic ownership of the Subject Property in further support of this co-called "common sense" interpretation.[4] The fact that Musick himself has had to point to extrinsic evidence (outside the four corners of the 1972 Order) in order to support the interpretation of the 1972 Order adopted by the Master (and urged by Musick) is telling. Even Musick cannot justify the Master's interpretation of the 1972 Order without looking to extrinsic evidence, and it is undisputed that extrinsic evidence should not be examined absent an ambiguity, and ambiguity requires a construction against the party seeking enforcement and which least restricts the property. Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891, 893-94 (1987); Anderson v. Buonforte, 365 S.C. 482, 617 S.E.2d 750 (Ct. App. 2005).

Musick has failed to offer any viable argument supporting the Master's finding that the right of lot revision, as established pursuant to the 1972 Order, was restricted to certain "Grantors" and that those "Grantors" were Gene Lewis and Carmen Ward. Musick does not offer any evidentiary or legal support for such a finding. The Master undoubtedly erred in this respect.

[4] Musick again does not make any reference to any portion of the Record or any other evidence before this Court in support of these factual allegations.

II. MUSICK ADMITS THE MASTER'S INTERPRETATION OF THE 1972 ORDER REQUIRES EXAMINATION OF EXTRINSIC EVIDENCE AND THE MASTER THEREFORE ERRED IN EITHER FAILING TO FIND THE 1972 ORDER UNAMBIGUOUS AND APPLYING THE PLAIN LANGUAGE OF THE 1972 ORDER OR IN FAILING TO NOTE ANY PERCEIVED AMBIGUITIES AND APPLYING THE APPROPRIATE RULES OF INTERPRETATION RELATING TO PERCEIVED AMBIGUITIES.

Musick argues the language of the 1972 Order is clear and unambiguous in its grant of rights to some particular "Grantor" wholly unidentified therein, and therefore believes the Master should be upheld in finding the 1972 Order unambiguous on this point. While the Dicks do believe the 1972 Order to be clear and unambiguous, the clear and unambiguous language of the 1972 Order actually and indisputably does not restrict the right of lot revision to any particular party. Musick again asserts that "when read in conjunction with the original restrictions" it "is clear that only the Grantors were given the right of revision." However, reading the 1972 Order "in conjunction with" the 1958 Restrictions necessarily requires consideration of matters outside the four corners of the 1972 Order. Musick further relies upon the purported "intent" of Judge Vaught in issuing the 1972 Order. This consideration of extrinsic evidence should have only occurred in the event the 1972 Order was found ambiguous, and then the ambiguities must have been resolved in the manner that least restricts the property, and the restriction must be strictly construed against the party seeking to enforce it. Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997) ("*Once the court decides that the language is ambiguous*, evidence may be admitted to show the intent of the parties.") (emphasis added); see also, e.g., Sea Pines Plantation Co. at 270, 363 S.E.2d at 893-94; Anderson at 495, 617 S.E.2d at 757. Musick admits the Master's interpretation of the 1972 Order cannot be reached without consideration of the 1958 Restrictions and perhaps

other extrinsic evidence. The only way the Master's conclusion can be upheld is if the 1972 Order is found ambiguous; justifying the examination of extrinsic evidence. However, if the 1972 Order is ambiguous then the Master was bound to construe the language in favor of the free use of the property.

In sum, if the 1972 Order is not ambiguous, then, according to its plain language, the right of revision of lot arrangement is not restricted to any particular party (and therefore runs with the land). See Hardy v. Aiken, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006) (language of restrictive covenant must be construed according to its plain and ordinary meaning). If, however, the 1972 Order is ambiguous, then all ambiguities and doubts should have been construed in favor of the free use of the property. Anderson at 495, 617 S.E.2d at 757. As shown (and even explicitly stated) by the Master and as confirmed by Musick throughout his Brief, the Master's interpretation of the 1972 Order requires consideration of extrinsic evidence. The Master therefore erred either in a) failing to find the 1972 Order unambiguous and honoring the plain language contained therein or b) failing to acknowledge any perceived ambiguities in the 1972 Order when turning to extrinsic evidence for interpretation and then failing to apply the appropriate rules of construction relating to any of these perceived ambiguities.

III. THE SUBJECT PROPERTY HAS ALWAYS BEEN SEVEN LOTS; MUSICK'S RELIANCE ON THE CULLER SURVEY TO DEFEAT THIS PROPOSITION IS MISPLACED.

Contrary to the questionable assertions of Musick in his Brief, the Master absolutely erred in holding the Subject Property has always been one lot. The 1955 Plat clearly shows Blocks 28 and 29 as containing seven lots. (R. p. 530). The map attached to the 1972 Order itself shows the remaining portions of Blocks 28 and 29 as containing

seven lots.[5] (R. p. 470). Musick himself admitted in his Answers to Defendants' First Requests for Admissions (entered into evidence without objection) that the 1955 Plat shows Blocks 28 and 29 as containing seven lots. (R. p. 529). The 1972 Order specifically states that the Subject Property is subject to residential restrictions "but with right of revision of the lot arrangement" – clearly the court in the 1972 case (correctly) believed the Subject Property in fact contained lots. (R. p. 461). The Court of Appeals' prior Opinion in this case (the "2010 Opinion") expressly holds that "[t]he 1955 Plat and a map attached to the 1972 Order show Blocks 28 and 29 as divided into seven different lots." Musick v. Dicks, Unpublished Opinion No. 2010-UP-351, *6 (S.C. App. 2010). This holding is now the law of this case.[6] ML-Lee Acquisition Fund, L.P. v. Deloiotte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) ("an unappealed ruling, right or wrong, becomes the law of the case"). Despite this overwhelming evidence, Musick's admission and the binding law of the case established in the 2010 Opinion, the Master held the Subject Property has always been one lot.

Musick's only argument in support of the Master's finding that the Subject Property has always been one lot is that the survey referenced in the deed from Carmen

[5] The lot lines shown on the plat attached to the 1972 Order are shown as dotted lines only to indicate that (as opposed to other lot lines shown on this map), the lot lines shown within the Subject Property were taken from the 1955 Plat. The 1955 Plat, of course, shows these lot lines as solid lines. Musick has not challenged this fact in his Brief.

[6] An extensive analysis of the application of the law of the case doctrine is set forth by the Dicks in their Brief. Musick claims the law of the case principles are "over-reaching" based apparently on the fact that the 2010 Opinion was unpublished (as is often the case with opinions establishing the law of the case moving forward) and also some claim that the 2010 Opinion did not make any findings of fact but simply reversed and remanded. In actuality, the 2010 Opinion is nine pages long and includes factual findings along with a detailed statement of the applicable law and analysis. Id. Musick has not offered any justifiable reason why the law of the case doctrine is inapplicable to this case, and has cited no legal authority or precedent whatsoever as to why the law of the case doctrine should not be duly applied in this instance.

Ward to the Meeses (the "Culler Survey") shows the Subject Property as one lot.[7] However, there was no evidence submitted to show the Culler Survey was anything other than a boundary survey. (R. p. 517). Mr. Mumford (the Dicks' closing attorney) testified it is customary that old lot lines would be indicated on a survey and the Culler Survey, which did not show these old lot lines, "didn't appear to be anything but a boundary survey and [he] took it as such." (R. p. 422, lines 20-22, p. 264, lines 12-15). The Culler Survey does not refer to the 1972 Order, the map attached to the 1972 Order which shows seven lots, or the 1955 Plat which shows seven lots. Id. There is no indication on the Culler Survey that the existing seven lots were being eliminated, which is required by local ordinance. (Id.; R. p. 308, lines 8-11). Furthermore, as set forth in detail in the Dicks' Brief, Carmen Ward did not even have the right to combine the seven lots into one. Neither the 1958 Restrictions nor the 1972 Order provide anyone (the Grantors, whoever they are, or any other party) the right to do away with lots or to combine the seven lots into one lot, and Musick has not challenged this fact in his Brief. (R. pp. 530, 600, 454-470).

In addition, the general rule remains that lines shown on a senior survey control over lines shown on a junior survey if conflict occurs between the two. Kirkland v. Gross, 286 S.C. 193, 197, 332 S.E.2d 546, 548 (Ct. App. 1985) (overruled on other grounds by Boyd v. Hyatt, 294 S.C. 360, 364 S.E.2d 478 (Ct. App. 1988)). Therefore,

[7] Musick asserts later in his Brief, in further arguing that the Subject Property has always been one lot, that this was "to preserve the residential character of the neighborhood." This assertion by Musick is supported by no reference to the Record whatsoever. On the contrary, and as the Dicks have previously pointed out, both Musick himself and Robert DeCiero, a neighboring landowner (who testified on Musick's behalf), testified that the Subject Property being used as seven lots is consistent with the overall character of the neighborhood. (R. p. 273, line 20 – p. 274, line 3, p. 197, lines 9-11). Other than the common area and except for one large lot in Long Bay, this property remaining as one large lot would be abnormal for this subdivision. (Id.; R. p. 319, line 23 – p. 320, line 1, p. 320, lines 3-4, p. 334, lines 3-4, 461, 530).

the lot lines shown on the 1955 Plat control in the event of any asserted discrepancy between the 1955 Plat and the Culler Survey (which as noted above is merely a boundary survey which says nothing about abandoning the lot lines established and shown on the prior plats).

Despite the foregoing, Musick references testimony identifying and relating to the Culler Survey and concludes that based thereon "it is an undisputed fact" the Meeses bought and sold the Subject Property as one lot and the Subject Property had always been one lot. Musick's reliance upon the Culler Survey is misplaced, and Musick's conclusion in this regard directly contradicts all the evidence before this Court including the 1955 Plat, the 1972 Order and attached map, the 2010 Opinion of this Court now constituting the law of this case, and Musick's own express admissions.

IV. MUSICK MISINTERPRETS THE DICKS' ARGUMENT RELATING TO WETLANDS; THE MASTER ERRED IN RELYING ON HER OPINION OF WHETHER THE DICKS' CHOSEN LOT ARRANGEMENT IS "PRACTICAL" WHICH IS IRRELEVANT TO THE ISSUES OF THIS CASE.

Musick interprets the Dicks' argument on the wetlands issue as one of admissibility of evidence relating to wetlands. This is simply not the case. Without addressing the admissibility of any of evidence relating to wetlands that may be in the Record, the Dicks illustrate in their Brief the error of the Master in relying on the location of claimed wetlands within the Subject Property in an attempt to evaluate the "practicality" of the Dicks' chosen lot arrangement. There is no relation between the Dicks' right of revision of lot arrangement within the Subject Property and the resulting "practicality" of their chosen arrangement, which is clearly a matter within their own

discretion (subject to any applicable governmental regulations.)[8] This principle is firmly established by the Dicks in their Brief, and aside from Musick's argument as to the admissibility of evidence relating to wetlands, which is not responsive to the Dicks' argument on this issue, Musick does not challenge or refute the Dicks' position that the Master erred in considering the "practicality" of their chosen lot arrangement.

V. MUSICK MISINTERPRETS THE NOTICE REQUIREMENTS AND PROPER APPLICATION OF THE SHELTER RULE; THE MEESES ACQUIRED THE SUBJECT PROPERTY WITHOUT NOTICE OF THE 1958 RESTRICTIONS OR 1972 ORDER AND THE DICKS ARE THEREFORE ENTITLED TO PROTECTION UNDER THE SHELTER RULE.

Musick's misinterpretation of the notice requirements of the Shelter Rule is immediately apparent based on the continued reliance by Musick in his Brief on the purported knowledge of the Meeses *after* their acquisition of the Subject Property and *any* knowledge of the Dicks (whether before or after their purchase) – all of which is absolutely irrelevant for protection under the Shelter Rule. In fact, the only knowledge that has any relevance whatsoever to the application of the Shelter Rule is the knowledge of *the Meeses (not the Dicks) at the time of their purchase of the Subject Property (not after).*

Our Supreme Court has quoted the following with approval as it relates to the Shelter Rule:

> After property has passed into the hands of a bona fide purchaser, *every subsequent purchaser* stands in the shoes of such bona fide purchaser and is entitled to the same protection as the bona fide purchaser, *irrespective of notice. . .*

Goodwin v. Harrison, 231 S.C. 243, 98 S.E.2d 255, 258 (1957) (emphasis added). The purpose of the Shelter Rule is not only to protect bona fide purchasers for value without

[8] The Dicks' 2003 Plat was approved by all applicable authorities for recording. (R. p. 542).

notice from matters affecting their property in connection with their purchase and use of the property, but also to protect these bona fide purchasers in connection with their subsequent sale of the property in order to ensure that bona fide purchasers are entitled to "receive the benefit of [their] bargain and permit [them] to market the property." 1 PATTON AND PALOMAR ON LAND TITLES § 13, at 78 (3d. ed. 2003).

Accordingly, the Meeses only had to *purchase* the Subject Property without actual notice of the purported restrictions in order for the Dicks to be entitled to protection under the Shelter Rule. See Spence v. Spence, 368 S.C. 106, 117, 628 S.E.2d 869, 874-75 (2006) ("A purchaser may assert a plea in equity of a bona fide purchaser for value, without notice of defect in his title, by showing (1) he actually paid in full the purchase money . . . ; (2) he purchased and acquired the legal title . . . ; and (3) *he purchased bona fide*, i.e., . . . without notice of a lien or defect. The bona fide purchaser must show all three conditions - actual payment, acquiring of legal title, and bona fide purchase - occurred *before he had notice* of a title defect or other adverse claim . . . .") (emphasis added). Therefore, any actual notice which Musick claims the Meeses may have acquired after they purchased the Subject Property is simply irrelevant. See Knox v. Gruhlkey, 192 S.W. 334, 337 (Tex. Civ. App. 1917) ("notice after the purchase cannot act retroactively, so as to defeat an already vested title acquired by a bona fide purchaser").

Likewise, any actual or constructive notice of the Dicks of the purported restrictions is irrelevant for purposes of application of the Shelter Rule. The Shelter Rule, by definition, applies regardless of any notice on the part of the Dicks with respect to the restrictions contained in the 1972 Order. 77 AM. JUR. 2D *Vendor & Purchaser* § 423

(2007) (specifically stating that "if one is entitled to protection as a bona fide purchaser, such person may convey a good title to a subsequent purchaser irrespective of the latter's notice of an outstanding equity or unrecorded interest; in other words, a purchaser with notice from a bona fide purchaser without notice succeeds to the rights of the latter").

Regarding the notice of the Meeses at the time of their purchase, Musick expressly admits in his Brief that "Leigh Ammons Meese, an attorney herself, testified that she had no recollection of any discussions or concern about restrictions on the property at the time of its purchase." No other evidence or testimony whatsoever is referenced by Musick in his Brief establishing any notice of Mrs. Meese *at the time of her purchase of the Subject Property.*[9] Leigh Meese unequivocally testified as follows with respect to her knowledge at the time of the purchase:

> Q: At the time you purchased the property, can you tell me today whether you had any notice of any restrictions that would have encumbered the property?
>
> A: **I did not**. At some point obviously I became aware of, you know, of a number of potential restrictions on the property. I don't know at what time I became aware of those restrictions.

(R. p. 396, line 21 – p. 397, line 3) (emphasis added).

Similarly, the only evidence or testimony relied upon by Musick relating to the claimed knowledge of Mr. Meese prior to his purchase of the Subject Property is some confusing testimony as to whether Mr. Meese could recall what his attorney might have told him about possible title matters relating to the property, although his attorney inarguably gave him a title opinion not mentioning these restrictions. (R. p. 390, lines 3-14). This testimony is confusing at best and certainly does not contradict the clear and unequivocal testimony of Mr. Meese at trial which repeatedly and unequivocally

[9] All references by Musick to knowledge of Mrs. Meese after her acquisition of the property, through subsequent lawsuits, etc. are, again, inapplicable.

confirms he had no knowledge of the restrictions at the time of his purchase.[10] (R. p. 384, lines 15-19, p. 385, lines 14-25, p. 386, lines 1-11, p. 386, line 25 – p. 387, line 8).

Musick makes some allegation in his brief that Mr. Meese conceded receiving a copy of certain "Covenants and Restrictions at the time he purchased the 2.67 acre tract." This statement is not supported by any reference to the Record whatsoever and there is no mention in Mr. Meese's testimony of his receipt of any supposed "Covenants and Restrictions" before his purchase. It is impossible to discern from the statement in Musick's Brief even what is meant by this reference to "Covenants and Restrictions" and certainly hard to imagine how this statement could be true as nothing of this nature has ever been asserted at any time since this case began in 2004. To the extent that Mr. Meese could have actually testified he received any such "Covenants and Restrictions" prior to his purchase, which he specifically did not, the "Covenants and Restrictions" he received must have been the 1958 Restrictions, which 1958 Restrictions, again, according

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[10] Mr. Meese testified, verbatim, as follows:

Q: At the time you purchased the property, were you aware of any claims or assertions that the property was subject to any restrictions that would have prevented it from being subdivided?
A: No, I'm not.
....
Q: At the time you and your wife purchased the property, did y'all have any notice that there were any restrictions or covenants of record that would have prevented you from using the property as more than one lot?
A: I did not believe there were any restrictions to our knowledge and belief.
Q: Did you or your wife have any notice of any judicial orders that would have been entered that would have affected the title to the real estate you were buying?
A: None that I recall.
....
Q: To the best of your recollection, you would not have had knowledge of an Order issued in 1972 at the time you and your wife purchased the property?
A: I don't remember such a thing from the purchase, no.
....
Q: You had no knowledge of any restrictions on the property; correct?
A: Restrictions in terms of subdivision?
Q: Yes.
A: I was not aware of any such restrictions for subdivision.

(R. p. 384, lines 15-19, p. 385, lines 14-25, p. 386, lines 1-11, p. 386, line 25 – p. 387, line 8).

to their express terms, do not encumber the Subject Property.

In addition, Musick shockingly asserts that the Master found the Meeses had constructive notice of the 1972 Order thus defeating the protection afforded the Dicks under the Shelter Rule. This assertion is blatantly incorrect as no such statement was made by the Master anywhere in her Order. In fact, the 1972 Order was not discoverable during a routine title examination of the Subject Property and did not operate to provide constructive or inquiry notice to third parties of its terms.[11] (R. p. 360, lines 20-24, p. 380, line 16 – p. 381, line 5, p. 404, lines 11-22). **This fact has been acknowledged and admitted by all parties to this litigation**. (R. p. 167, lines 12-18, p. 182, lines 2-5). The fact that Musick now attempts to assert otherwise (though offering no evidence whatsoever in support of this position) is disingenuous to say the least.

VI. THE SHELTER RULE IS APPLICABLE TO ACTIONS TO ENFORCE RESTRICTIVE COVENANTS; MUSICK'S ARGUMENT TO THE CONTRARY IS MISPLACED.

Musick asserts the Shelter Rule for some reason does not apply to protect a purchaser (from a bona fide purchaser for value without notice) from restrictive covenants affecting or allegedly encumbering the property purchased. This argument, which is centered around Musick's belief that the Shelter Rule does not apply with respect to restrictive covenants but only with respect to mortgages or liens, is unfounded, not supported by South Carolina law, and is completely without merit.

[11] The 1972 Order was indexed in the Clerk of Court's office under the name of Leroy Adams, but was not indexed as a judgment against the names of the plaintiffs in that case - Gene Lewis and Carmen Ward - as required by Section 15-35-520 of the South Carolina Code. (R. p. 167, lines 12-18, p. 182, lines 2-5); S.C. CODE ANN. § 15-35-520 (2005). Because the plaintiffs in the case out of which the 1972 Order arose were the record owners of the Subject Property, the 1972 Order was not indexed in the chain of title to the Subject Property.

It is well-settled law in this country that "[u]nder the general doctrine that a *restrictive covenant* will not be applied against one who purchases property from a bona fide purchaser who lacks notice of the covenant, a purchaser of land with notice of outstanding *restrictions*, from one who is without notice thereof, in turn acquires the status of a bona fide purchaser, and will be protected in his or her title on account of the bona fides of the vendor." 20 AM. JUR. 2D Covenants § 257 (2008) (emphasis added); see also Reiner v. Danial, 259 Cal. Rptr. 570 (Cal. Ct. App. 1989) (specifically holding that one who purchases property from a bona fide purchaser for value without notice of certain restrictions affecting the property is entitled to receive the same protections against the restrictions affecting the property as were afforded to his seller in accordance with seller's status as a bona fide purchaser for value without notice). Clearly, it has never been the intention of the courts to arbitrarily limit the application of the Shelter Rule to only situations involving mortgages and liens. In fact, the very purpose of the Shelter Rule is not only to protect bona fide purchasers for value without notice from matters affecting their property in connection with their purchase and use of the property, but also to protect these bona fide purchasers in connection with their subsequent sale of the property in order to ensure that bona fide purchasers are entitled to "receive the benefit of [their] bargain and permit [them] to market the property." 1 PATTON AND PALOMAR ON LAND TITLES § 13, at 78 (3d. ed. 2003).

In support of his argument that the Shelter Rule does not apply with respect to restrictive covenants, Musick relies solely upon the case of Harbison Community Assoc.,

Inc. v. Mueller, 319 S.C. 99, 459 S.E.2d 860 (Ct. App. 1995).[12] The Harbison case, however, has absolutely nothing to do with the Shelter Rule. Musick is correct that the Harbison case states that a covenant is enforceable against a subsequent grantee even if not in the grantee's deed. This is absolutely true. The Harbison case, however, does not relate in any way to or even mention the application of the Shelter Rule. Id. The Harbison case does not involve a bona fide purchaser for value – and the protection of a bona fide purchase for value is the sole purpose of the Shelter Rule. Id. In fact, the Harbison case involves properly recorded covenants (constructive notice to all parties), and the deed to the grantor of the party seeking to avoid the restrictive covenants specifically mentions the covenants in question. Id. Of course the grantee in that case is bound by the properly recorded restrictive covenants (of which every owner in the chain of title was absolutely aware) whether or not the covenants were specifically mentioned in his deed. This case obviously has no application to the Shelter Rule doctrine, and Musick's assertion that the Shelter Rule does not apply to restrictive covenants is simply without merit.

VII. MUSICK'S REPEATED REFERENCES TO FOUR OTHER ORDERS WHICH HAVE SUPPOSEDLY ADDRESSED THE APPLICABILITY OF THE 1958 RESTRICTIONS TO THE SUBJECT PROPERTY IS MISLEADING AS ONE OF THE REFERENCED ORDERS IS THE 1972 ORDER, TWO ARE PRIOR ORDERS IN THIS VERY CASE (INCLUDING THE ORDER SUBJECT TO THIS APPEAL AND A PRIOR ORDER GRANTING SUMMARY JUDGMENT), AND THE FOURTH IS THE DECIERO ORDER WHICH DOES NOT RELATE TO THE SUBJECT PROPERTY OR THE APPLICABLE PROVISIONS OF THE 1972 ORDER IN ANY WAY.

[12] Musick also cites to Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C.342, 628 S.E.2d 902 (Ct. App. 2006), which case also has nothing to do with the Shelter Rule and simply cites to Harbison for the same principle discussed above.

Musick makes various statements throughout his Brief that the application of the 1958 Restrictions, made applicable to the Subject Property through (and pursuant to the terms of) the 1972 Order, is an issue that has been heard and ruled upon in four prior actions. These statements are misleading to say the least. At the outset, Musick claims these other lawsuits have established that the Subject Property is bound by the 1958 Restrictions. There is no dispute that the 1958 Restrictions do not encumber the Subject Property according to their terms. (R. p. 530). The 1958 Restrictions are only made applicable to the Subject Property by and pursuant to the 1972 Order which specifically provides that the Subject Property shall be encumbered by the 1958 Restrictions "*but with* right of revision of the lot arrangement . . . ." (R. p. 461) (emphasis added). The Subject Property has always consisted of seven lots and all the Dicks have ever sought is to revise the arrangement of these seven lots as they are clearly entitled pursuant to the 1972 Order.

The four orders relied upon by Musick in an attempt to convince this Court that the issues of this case have been previously addressed are as follows:

- The 1972 Order. Musick has included the 1972 Order itself in its list of cases which it claims have consistently held the 1958 Restrictions applicable to the Subject Property. The 1972 Order, of course, specifically stated that the 1958 Restrictions were applicable to the Subject Property "but with right of revision of the lot arrangement . . . ." It is the language of this 1972 Order which has been at issue throughout this litigation. It is unclear how Musick could claim the issues presented in this appeal were

addressed in the 1972 Order when the language and application of the 1972 Order to the Subject Property is what is now in issue.

- The Final Order Ending Action issued *in this case* by the Honorable J. Stanton Cross, Jr., as Master-in-Equity for Horry County on March 6, 2007, wherein Musick's Motion for Summary Judgment was granted. (R. pp. 21-35). Musick relies upon the prior Order granting summary judgment in this very case, which was reversed on appeal, as one of the four cases which he asserts has previously addressed and ruled on the issues presented herein. It is interesting that Musick claims the prior Order granting summary judgment in this case, which has been reversed, should have some binding effect on this appeal, but Musick does *not* believe this Court of Appeals' 2010 Opinion (reversing the Order granting summary judgment) is the law of the case in this action.
- The 2011 Order of Judge Howe *which is the subject of this appeal.* Musick includes the very Order which is now under appeal as one of the four cases it claims has already ruled on the issues of this case.
- The Order issued by The Honorable J. Stanton Cross, Jr. in March 2000 in connection with the case captioned DeCiero, et. al. v. Long Bay Properties, identified as case number 98-CP-26-4275 (the "DeCiero Order"). (R. pp. 471-477). The DeCiero Order, however, does not affect or concern the Subject Property, but instead analyzes the application of the 1958 Restrictions and the 1972 Order to Block 11, Lots 1 and 2 of the Long Bay Estates subdivision – which Block was clearly subject to the

1958 Restrictions according to their terms.[13] Id. The DeCiero Order simply confirms the 1958 Restrictions do, by their terms, apply to Block 11, and cites the portion of the 1972 Order confirming the 1958 Restrictions apply to Blocks 1-27. Id. Nothing in the DeCiero Order even mentions any property located outside of Blocks 1-27 which could be subject to the 1958 Restrictions, and certainly nothing in the DeCiero Order addresses the provision of the 1972 Order which subjects the Subject Property to the 1958 Restrictions "but with right of revision of the lot arrangement . . . ." The reliance upon the DeCiero Order by Musick is wholly misplaced.

[13] The DeCiero Order plainly states that the "Restrictive Covenants apply to all of Blocks 1-27 Long Bay Estates subdivision, including Block 11, Lots 1 and 2." (R. p. 476).

CONCLUSION

For all of the reasons set forth above and in the Dicks' Brief, the Master's Order, and her Order Denying Motion for Reconsideration, should be reversed and vacated and this Court should find the Dicks are entitled to own the Subject Property as seven lots as shown on their 2003 Plat.

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I hereby certify that this Final Reply Brief complies with Rule 211(b), SCACR.

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