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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

Case No. 2009-CP-23-7707

R.C. Frederick Hanold, III and Rose F. Hanold, and Carol R. Mitchell and George P. Mitchell, Jr., ... Respondents,

v.

Watson's Orchard Property Owners Association, Inc., a South Carolina Corporation, and Pelham Farm, LLC, a South Carolina Corporation, Legacy One, LLC, a South Carolina Corporation, SESP LLC, a South Carolina Corporation, an unknown Trustee of the Revocable Trust Agreement Dated March 19,1996 established by James B. Stephens as amended, and unknown Jay Stephens and Mike Stephens as Co-Personal Representative of the Estate of James B. Stephens, ...Defendants,

Of whom Pelham Farm, LLC, a South Carolina Corporation, Legacy One, LLC, a South Carolina Corporation, an unknown Trustee of the Revocable Trust Agreement Dated March 19, 1996 established by James B. Stephens as amended, and unknown Jay Stephens and Mike Stephens as co-Personal Representative of the Estate of James B. Stephens, are the .....Appellants.

v.

Property Owners in Watson's Orchard Subdivision: N. Carter Poe, III; McNally Reeves, as Trustee of the Residual Trust under item Five of the Last Will and Testament of Hattie L. Reeves dated February 9, 1998; Janet B. Yusi; Lucy S. Tiller; James G. Stephens; Rachel P. McKaughan; Ramon J. Ashy and Jana Ashy; Christopher D. Scalzo and Heather V. Scalzo; Erma R. Rash, as Trustee of the Erma R. Rash Revocable Trust dated February 12, 2010; James Edwin Conrad, as Trustee of the James Edwin Conrad Living Trust dated September 7, 2010; Sue Lane Conrad; Horst H. H. Eschenberg and Floride C. Eschenberg; Caryl L. Clover, as Trustee of the Caryl L. Clover Revocable Living Trust Agreement dated May 12, 1999; Mary F.

Newell; Timothy M. Conroy and Elizabeth W. Conroy; Nathan Scolari; Joel Wells Norwood and Lynn Norwood; J. Lynn Shook; Juan Hernandez and Janice M. Pelletier; Scott P. Payne and Kathleen H. Payne; Joe G. Thomason and Dana L. Henry Thomason; Traci Segura; Cameron E. Smith and Joan B. Smith; Charles E. Howard and Sharon F. Howard; Penelope J. Galbraith; Meredith C. Vry; Delores B. Mitchell; Lisette M. Silva and Mary F. Colley; Ilona K. Alford and William G. Alford; George T. McLeod and Martha T. McLeod; Ronald S. Wilson and Robin E. Wilson; The Merrill J. Gildersleeve and Anore L. Novak Revocable Living Trust dated November 1, 1996; Anna Marie T.Azores and Kim 0. Gococo; Ashley Westrope as Trustee of Martha Randolph Westrop Trust dated June 6, 1988; Cliff C. Jollie and Martha W. Jollie; David A. Saliny and Xiaoli Saliny; Lecia S. Franklin; Dean D. Varner and Deborah P. Varner; W. Frank Durham, Jr.; Christine M. Howard; Samuel P. Howard, Jr. and Jane H. Howard; Manfred E. Kramer and Jane J. Kramer; Mary J. Steele; James J. Barrett, III and Kimberly A. Barrett; Richard A. Herman and Patricia L. Herrman, ... Third-Party Defendants.

FINAL REPLY OF APPELLANTS

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Dated: February 27, 2014

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ARGUMENT

I. THIS MATTER IS EQUITABLE - RESPONDENTS ARE INCORRECT AS TO THE STANDARD OF REVIEW

The Respondents argue that this matter was tried non-jury but "at law." That is incorrect. Appellants' principle claim in this action was for injunctive relief. The prayer for relief in both the initial and the amended complaints concludes: "FURTHER, that this Court enjoin and restrain the Watson's Orchard Property Owners Association, Inc. from using the property for any uses which are more intensive than the current uses within the Watson's Orchard Subdivision together with costs and any other relief this Court deems just and proper." (Declaratory Judgment Complaint, filed Sept. 8, 2009, at 6 [Rec. 25]; (1st Amended) Declaratory Judgment Complaint (Sept. 10, 2009), at 6 [Rec. 31].) And, as Appellants' motion for transfer to the non-jury docket, stated:

> **An action to enforce restrictive covenants by injunction is in equity.** *Cedar Cove Homeowners Ass'n, Inc. v. DiPietro*, 368 S.C. 254, 628 S.E.2d 284, 286 (App. 2006):
>
> > **The character of an action as legal or equitable depends on the relief sought.** Compare *O'Shea v. Lesser*, 308 S.C. 10, 14, 416 S.E.2d 629, 631 (1992) (holding an action for breach of restrictive covenants was at law, because relief sought was general damages for loss of view and invasion of privacy) and *Kneale v. Bonds*, 317 S.C. 262, 265, 452 S.E.2d 840, 841 (Ct. App. 1994) ("**An action to enforce restrictive covenants by injunction is in equity.**"); see also *S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001) (**holding an action to enforce restrictive covenants by injunction is an equitable action**). Because the Association's action is one to enforce restrictive covenants by injunction, it is in equity, and we may find facts in accordance with our own view of the evidence. *Brenco v.*

> *S.C. Dep't of Transp.*, 363 S.C. 136, 142, 609 S.E.2d 531, 534 (Ct. App. 2005).
>
> See also *Matsell v. Crowfield Plantation Community Services Ass'n, Inc.*, 393 S.C. 65, 710 S.E.2d 90, 93-94 (S.C. App. 2011) ("**An action seeking an injunction to enforce restrictive covenants sounds in equity.**").
>
> **As an action in equity, plaintiffs are not entitled to a jury trial.** *Verenes v. Alvano*, 387 S.C. 11, 690 S.E.2d 771, 773 (2010): "Generally, the relevant question in determining the right to trial by jury is whether an action is legal or equitable; there is no right to trial by jury for equitable actions." Citing *Lester v. Dawson*, 327 S.C. 263, 491 S.E.2d 240, 242 (S.C. 1997).

(Defendants' Motion To Transfer To Non-Jury Docket, March 22, 2012 [Rec. 159-61], emphasis added.)

In any event, as this Court has made clear, the interpretation of a deed and allied documents is an equitable matter:

> The parties disagree on our scope of review. This case began as an equitable mortgage foreclosure action. **It is beyond question, however, that the disposition of this case depends largely on the interpretation of the master deed and allied documents. The interpretation of a deed is an equitable matter**. *Wayburn v. Smith*, 263 S.C. 518, 211 S.E.2d 560 (1975), citing *Hann v. Carolina Cas. Ins. Co.*, 252 S.C. 518, 167 S.E.2d 420 (1969); *Wolf v. Hayes*, 161 S.C. 293, 159 S.E. 620 (1931). **In any event, because the predominate issues involved in this appeal are equitable, we review the evidence to determine the facts in accordance with our view of the preponderance of the evidence.** *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 425 S.E.2d 764 (App.1993).

Heritage Federal Sav. and Loan v. Eagle Lake and Golf Condominiums, 318 S.C. 535, 539, 458 S.E.2d 561, 564 (App. 1995) (emphasis added).

Hence, this Court is entitled to "review the evidence to determine the facts in accordance with [its] view of the preponderance of the evidence." *Id.* In such a

review, as demonstrated in Appellants' Final Brief, it is clear that the Stephens Lots were lots and entitled to vote on the amendments to the 1981 R&Cs, and thus that the judgment below should be reversed.

II. RESPONDENTS CANNOT DISPUTE THAT THE "SETTLED RULE" IN SOUTH CAROLINA IS THAT RESTRICTIONS AS TO THE USE OF REAL ESTATE ARE TO BE STRICTLY CONSTRUED AND ALL DOUBTS RESOLVED AGAINST THEM

Respondents do not and cannot challenge the rules set forth by the Supreme Court for the interpretation of restrictive covenants:

> **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.

345 S.C. at 622, 550 S.E.2d at 302, emphasis added, citing *Taylor v. Lindsey*, 332 S.C. 1, 4-5, 498 S.E.2d 862, 863-64 (1998) (court refused to enlarge a restrictive covenant beyond its plain language in order to prohibit the erection of mobile homes).

Under this "settled rule" (and even without it), as demonstrated in Appellants' Final Brief, there is little doubt that the Stephens Lots were entitled to vote under the 1981 R&Cs on the proposed amendment.

III. RESPONDENTS HAVE NO ANSWER TO THE OVERWHELMING EVIDENCE THAT THE STEPHENS LOTS WERE IN FACT LOTS

Respondents have no answer to the overwhelming evidence that the Stephens Lots were in fact lots. To list just a few of the facts showing the Stephens Lots were lots:

- The original offer was to purchase five lots, and the acceptance was for five lots. (Appellants' Final Brief at 10-11.)
- The circuit court in a declaratory judgment action in 1980 approved the sale of the five lots. (*Id.* at 11-12.)
- The 1981 deed issued pursuant to that order was for five lots. (*Id.* at 13.)
- The plat referenced in the deed shows the five lots. (*Id.* at 13-14.)
- The metes and bounds description in the deed gives the interior dimensions for the five lots. (*Id.* at 14-16.)
- The tax map shows the five lots. (*Id.* at 17.)
- The title opinion for the 1981 transaction was for the purchase of five lots. (*Id.*)
- The index in the RMC office identified the transaction as being for five lots. (*Id.* at 18.)
- Patrick Grayson, the attorney who prepared the 1981 deed, testified that it was for the transfer of five lots. (*Id.* at 21.)
- William Kehl, the attorney who provided a title opinion to the buyer, testified that it was for five lots. (*Id.*)
- Mr. Michael Stephens, the son of the purchaser (the purchaser is now deceased), confirmed that his father had offered to sell him one of the five lots. (*Id.* at 21-22.)
- Coleman Shouse, former Executive Director of the Greenville County Planning Commission testified as an expert that the Stephens Lots were lots. (*Id.* at 22.)
- Larry Estridge, another long-time real estate attorney in Greenville, also testified as an expert to the same effect. (*Id.* at 22-23.)[1]

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[1] There are numerous other factors demonstrating that the Stephens Lots were in fact lots. (*See* Appellants' Final Brief at 18-21.)

Appellants offered no evidence to the contrary of the foregoing. None at all.

IV. RESPONDENTS' SUGGESTION THAT THE STEPHENS LOTS HAVE TO BE MORE THAN JUST LOTS IS WITHOUT ANY BASIS

Respondents apparently implicitly concede that the Stephens Lots were in fact lots as they now attempt to argue that they had to be "developed" beyond being just "lots." However, the language of the 1981 R&Cs is unmistakable on this point. The pertinent language is "**lots into which the property described above shall have been developed . . . .**" (Def. Ex. 1 at D11, emphasis added [Rec. 322].)

The obvious meaning of this is that the "development" required is "development" into "lots." There is nothing in the language of the 1981 R&Cs to suggest any further requirement. This is made even more clear by language on the second page of the 1981 R&Cs where it is stated that the restrictions can be enforced against "any property owner of any lot **into which the property described above shall subsequently be cut.**" (*Id.* at D12, emphasis added [Rec. 323].) The property did not need to be developed except into lots. And a lot is simply a portion into which the property has been "cut."

V. MISCELLANEOUS POINTS

1. Respondents assert repeatedly without any citation to the record or authority that a lower tax was paid on the Stephens Lots because they were taxed as one unit and not as separate lots. (Respondents' Final Brief at 10, 15 & 17-18.) There

is no support for this in the record, and it is contrary to the information provided to counsel for Appellants. If this is an important fact, the matter should be remanded to receive evidence on this point.

2. The Watson's Orchard subdivision did not "adjoin" the Property as stated by Respondents. (Respondents' Final Brief at 7.) It is across Pelham Road from the subdivision. As the photograph of the area in the record (Plaintiffs' Ex. 4 [Rec. 690]) shows, Pelham Road is at least four lanes wide (plus turning lane). (*See* Plaintiffs' Ex. 6 [Rec. 691]; Def. Ex. 3 [Rec. 658-60]; Def. Ex. 5 [Rec. 661].) Hence, the issue in this case is not, as Respondents' state, about homeowners "living next door to commercial offices." (Respondents Final Brief at 6.) Regardless of the outcome of this case, homeowners in Watson's Orchard subdivision would not be "living next door to commercial offices."[2]

3. Respondents assert that it would be an illegal contract if the deeds at issue had in fact conveyed five lots. The statutes and regulation referred to by Respondents do not in any manner begin to make the conveyance of lots by such a deed "illegal." As demonstrated in Appellants' Final Brief with careful citations to the record and the law, (a) it is perfectly lawful to convey lots by reference to an

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[2] It should also be noted that the "offices" permitted by the new R&Cs would only be low-density offices such as two-story doctors' offices. (Def. Ex. 1 at D22-D23 [Rec. 333-34].)

unrecorded plat (Appellants' Final Brief at 24-27); (b) the Greenville County Subdivision Regulations[3] do not make the transfer unlawful but, to the contrary, recognize such a transfer by not providing that such a transfer is void or voidable (*id.* at 28-30) but simply subject to a small penalty; and (c) S.C. Code § 30-5-240 also does not make the transfer unlawful but, again, recognizes the viability of a sale without a recorded plat by using the word "sold" in the past tense and referring to the "purchaser or ... any subsequent grantee" of the property. (Appellants' Final Brief at 31-32.) Proving the point, the evidence in the record demonstrated that lots have routinely been conveyed in this manner in South Carolina. (See Appellants' Final Brief at 31 & n. 6.[4])

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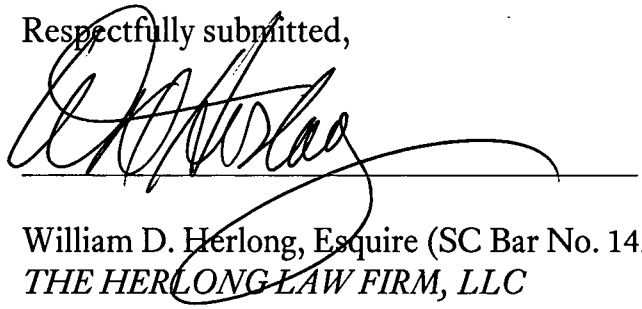
[3] Greenville County Subdivision Regulations, §1.4 (1979) (Def. Ex. 1 at D-288-89 [Rec. 602-03].)

[4] Mr. Estridge testified that transfers without recorded plats were "common" in 1981. (Tr. 234:21-21 [Rec. 300].) Claire Manning, State Manager for Chicago Title Insurance Company ("CTI"), testified that "most plats in Charleston County don't get recorded." She said the "lawyers just refer to the plats, but they don't record them. It's just custom there." (Manning Dep. 5-6 & 35:8-11 [Rec. 216-17 & 220].) In connection with their decision on whether to provide a title insurance commitment, Mrs. Manning's office concluded that the Stephens lots were in fact lots and entitled to votes in connection with the effort to amend the R&Cs. As a result, Chicago Title gave a commitment to issue title insurance if a majority vote was obtained for the amended R&C's with the Stephens Lots having one vote each. (Manning Dep. at 20:21-21:6 [Rec. 218-19].

CONCLUSION

The evidence was overwhelming that the Stephens Lots were in fact lots and there was no evidence to the contrary. Respondents' arguments that the lots are not lots because the Plat was unrecorded is contrary to South Carolina law. Because the 1981 R&Cs provide that lots are simply section into which property is "cut," the Stephens Lots were entitled to vote on the amendment to the 1981 R&Cs. Appellants respectfully request that this Court reverse the judgment of the trial court.

Respectfully submitted,



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APPELLANTS' CERTIFICATE OF COMPLIANCE WITH RULE 211(B)

I hereby certify that the **FINAL BRIEF OF APPELLANTS** and the **FINAL REPLY BRIEF OF APPELLANTS** comply with Rule 211(b).

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February 27, 2014

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PROOF OF SERVICE

I hereby certify that I have served the **FINAL BRIEF OF APPELLANTS,** the **FINAL REPLY BRIEF OF APPELLANTS**, and the **APPELLANTS' CERTIFICATE OF COMPLIANCE WITH RULE 211(B)** on respondents by depositing a copy of each in the United States Mail, postage paid, addressed to their attorney of record, Randall S. Hiller, P.O. Box 1716, Greenville, SC 29602, on this date.

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