STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

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

Case No. 2010-CP-10-5449
App. No. 2018-001888

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

Petitioners,

v.

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

Respondents.

Reply Brief of Petitioners

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ARGUMENT IN REPLY

I. The Plaintiffs' claims are not time-barred.

The Town asserts, as an additional sustaining ground, the argument that the Plaintiffs' claims are time-barred under S.C. Code Ann. §6-29-760 because they did not challenge the validity of the zoning ordinances within 60 days of passage of the 1995 and/or 2005 rewritten trimming ordinances. The Town raised this argument in the Trial Court, but the motion was denied without discussion in the Trial Court's Form 4 Order of August 4, 2014. [ROA 28, 365; Motion for Summary Judgment on All Causes of Action Due to Expiration of Statute of Limitations or Unreasonable Delay, filed February 28, 2014; Form Order.] The Town did not appeal from this order, nor did the Town file a cross appeal. However, the Town attempted to raise this argument in the Court of Appeals as an additional sustaining ground. The Court of Appeals did not address that issue in its opinion.

The Plaintiffs maintain that the Trial Court properly denied the Town's motion because this action is not a direct challenge to the zoning ordinances subject to the 60-day period. Rather, the Plaintiffs assert breach of contract claims under the 1991 Deed as well as a nuisance claim which are not time-barred. The Plaintiffs have attempted to make very clear that while the Town's trimming ordinances are in issue, this is not an ordinary zoning case. Rather, this is a land contract case founded, at its core, in the unique 1991 Deed which was prompted by the unique geology of the Island's shoreline for the intent of preserving and maintaining the character of the beach as it existed in February 1991.

The 1991 Deed is a sealed instrument as evidenced by the language of the signatures and attestation clauses on the document. [ROA 96.] S.C. Code Ann. § 19-1-160; S. Carolina Dep't of Soc. Servs. v. Winyah Nursing Homes, Inc., 282 S.C. 556, 561, 320 S.E.2d 464, 467 (Ct. App.

1984) (citing S.C. Code Ann. Section 19-1-160; Wallingford v. Western Union Telegraph Co., 60 S.C. 201, 38 S.E. 443 (1901); Cook v. Cooper, 59 S.C. 560, 38 S.E. 218 (1901); C.J.S. *Limitations on Actions* § 102. Thus, pursuant to S.C. Code Ann. §15-3-520 a 20-year period of limitations applies to the breach of contract claims. This same 20-year period applies to the claim for breach of contract accompanied by a fraudulent act in that such claim simply is a breach of contract -- a sealed instrument -- claim in which punitive damages are recoverable upon proof of a fraudulent act. Ateyeh v. Volkswagen of Florence, Inc., 288 S.C. 101, 103, 341 S.E.2d 378, 379-80 (1986); Stevenson v. B. B. Kirkland Seed Co., 176 S.C. 345, 180 S.E. 197, 200 (1935). In an alternate view, the statute of limitation on the "fraudulent act" element only began to run after this action had been commenced because the fraudulent acts were first uncovered during discovery. Santee Portland Cement Co. v. Daniel Int'l Corp., 299 S.C. 269, 271, 384 S.E.2d 693, 694 (1989) *overruled on other grounds by* Atlas Food Sys. & Servs., Inc. v. Crane Nat. Vendors Div. of Unidynamics Corp., 319 S.C. 556, 462 S.E.2d 858 (1995) (HELD: the discovery rule is applicable to contract actions).

As to the claim for nuisance – which is constant and abatable – the statute of limitations cannot be a complete bar because a new statute of limitations begins to run upon each invasion of the property. Silvester v. Spring Valley Country Club, 344 S.C. 280, 287, 543 S.E.2d 563, 567 (Ct. App. 2001).

II. The Petitioners complied with the South Carolina Appellate Court Rules to preserve appellate review on all the issues.

A. Error Preservation in the Petition for Rehearing

The Petitioners/Appellants presented five issues with several sub-issues for appeal in their brief in the Court of Appeals. The Court of Appeals did not address or rule all the issues and sub-

issues. In their Petition for Rehearing, the Petitioners addressed the issues upon which Court of Appeals had ruled with particularity as required by Rule 221, SCACR ("A petition for rehearing shall be in accordance with Rule 240, and shall state with particularity the points supposed to have been overlooked or misapprehended by the court."). The Petitioners also stated with particularity the points that the Court had overlooked/not addressed and requested that the Court rule upon those issues. It was not unnecessary for the Petitioners to fully replicate the arguments made in the brief because the purpose of a petition for rehearing is not to reargue the case to the appellate court. *See* Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 643 (2011).

B. Error Preservation in the Petition for a Writ of Certiorari

Rule 242, SCACR, governing petitions for certiorari states that the petition must contain:

> (2) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court. A question presented will be deemed to include every subsidiary question fairly comprised therein.
>
> 4) A direct and concise argument in support of the petition. The argument on each question shall include citation of authority and specific reference to pertinent portions of the Record on Appeal. Failure of a petitioner to present with accuracy, brevity, and clarity the information and arguments that are essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition.

Since the Court of Appeals only ruled on selected points, the Petitioner identified those points in the STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW in their Petition for a Writ of Certiorari. However, the Petitioner also identified and discussed the issues upon which the Court of Appeals had not ruled. The Petitioners identified and discussed those issues as "OTHER ISSUES RAISED ON APPEAL" with the stated purpose of reasserting and preserving those issues, and offered an abbreviated overview of the issues as well as referencing and

incorporating the full arguments made in the appellate briefs filed with the Court of Appeals. In so doing, the Petitioners complied with Rule 242 by presenting the arguments essential to an adequate understanding with "accuracy, brevity, and clarity."

In addressing the requirements of Rule 208(b)(1)(B) in regard to statement of issues, the Court noted that the concern is whether the issue is reasonably clear and distinct from the arguments so that the reviewing court does not have to 'grope in the dark' for the point. Herron v. Century BMW, 395 S.C. 461, 466, 719 S.E.2d 640, 642–43 (2011). Petitioners submit that the Petition (as well as their Brief on Certiorari) clearly and distinctly provides sufficient "light" to see the issues for meaningful appellate review.

C. Error Preservation in the Brief on Certiorari

Rule 208(b)(1)(D), SCACR, requires that: "The brief shall be divided into as many parts as there are issues to be argued. At the head of each part, the particular issue to be addressed shall be set forth in distinctive type, followed by discussion and citations of authority." This Court has held that "when a party fails to cite authority or when the argument is simply a conclusory statement, the party is deemed to have abandoned the issue on appeal." Brouwer v. Sisters of Charity Providence Hosp., 409 S.C. 514, 520, 763 S.E.2d 200, 203 n.4 (2014) (citation omitted).

On pages 17-27 of its Brief, the Petitioners set forth each of the unaddressed issues under separate headings with discussion as well as citations to authority and references to pertinent parts of the Record on Appeal on each point. Petitioners submit that the Brief meets the requirements of Rule 208, and the arguments on these points do not constitute conclusory statements from which abandonment should be presumed. The Petitioners have diligently raised these issues in briefing in the Court of Appeals and petitioned the Court to make a ruling on the points that had been overlooked. The Petitioners petitioned this Court for review of the Court of Appeals' rulings and

also identified the other issues that had been left unresolved. They have pursued review in their Brief on Certiorari with substantive discussion and citation to the Record and relevant authorities.

CONCLUSION

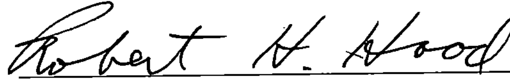
This is not a zoning appeal. The primary claim is for breach of contract action arising from the 1991 Deed wherein the Town bound itself to certain restrictions and obligations aimed at preserving the conditions and character of the oceanfront area as it existed at a specific point in time - February 1991. The Trial Court and the Court of Appeals have misinterpreted certain provisions in the Deed in viewing the intent of the Deed as simply keeping the accreted land as an undeveloped plant/wildlife habitat. The Courts have ignored the core significance of the time-based benchmark which is readily evident in the Deed's carefully documented, temporal standard for maintaining the accreted land – as it existed in February 1991. The Town should not be allowed to escape its contractual obligations under the guise of its zoning power with the boast that it has done "too good of a job of limiting human intervention" when it has allowed growth of a maritime forest to completely change the character of the land from the low sea oats and wildflowers that encompassed ocean views and breezes in February 1991.

Under fundamental contract law, the Town should be bound to the 1991 Deed restrictions to restore and maintain the conditions and character of the oceanfront area as it existed in February 1991. Likewise, the Petitioners should be allowed to pursue their remedies for the nuisances created by the Town's refusal to honor its obligations under the Deed which has allowed the overgrowth of a maritime forest.

WHEREFORE, based on the foregoing, Petitioners respectfully request that this Court vacate the Court of Appeals' decision and reverse the Trial Court grant of summary judgment to the Town.

Respectfully submitted,

HOOD LAW FIRM, LLC



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March 15, 2019

CERTIFICATE OF SERVICE

The undersigned certifies that on this day of March 15, 2019, a copy of the foregoing Reply Brief of Petitioner was served on the Respondents by depositing said copy in the U.S. Mail, with sufficient first-class postage, on the following counsel of record at the address listed below:

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