THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III,
Master-in-Equity

RECEIVED
Oct 16 2020
SC Court of Appeals

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Appellate Case No. 2020-001275

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Westbury Park Residential Association, Inc…….Respondent,

v.

Estate at Westbury Owners Association, Inc…….Appellant.

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**RETURN TO RESPONDENT'S MOTION TO DISMISS**

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Appellant Estate at Westbury Owners Association, Inc. ("Estate at Westbury") respectfully opposes Respondent Westbury Park Residential Association, Inc.'s ("Westbury Park") motion to dismiss, filed on October 12, 2020. As set forth below, the lower court's order is ripe for review because it makes substantive rulings that finally determine a core issue in this lawsuit—the payment of an Assessment—which is the ultimate question in this litigation.

## BACKGROUND

### A. The Assessment

This lawsuit involves two neighboring communities that both were established by the same developer on the same tract of land (Respondent Westbury Park and Appellant Estate at Westbury, respectively). Estate at Westbury (marked in **blue**, below) is landlocked from access to outside roads, with the exception of an easement through Westbury Park along Kensington Boulevard (marked in **red**, below). That is how the property was developed, and that is how it has always been (since 1998).


For a specified twenty-year period, Estate at Westbury paid an exorbitant assessment to the Developer, as set forth in the governing documents (the "Assessment"). The Developer was to use the Assessment funds for the express purpose of offsetting the Estate at Westbury's share of maintenance and landscaping along Kensington Boulevard. Over the course of those twenty years, Estate at Westbury paid about $1.3 million for the Assessment; since 2005, Estate at Westbury has paid $7,200 per month ($86,400 per year)—a huge amount for its portion of the simple maintenance of a straight road.

That Assessment is at the heart of this lawsuit. Westbury Park contends that it may unilaterally extend and modify the Assessment, for as long as it wishes, for as much as it wishes, and that it properly did so in October 2018. In contrast, Estate at Westbury contends that under the controlling documents, its obligation to pay the Assessment expired in October 2018, and that the Assessment may not be unilaterally extended or modified—instead, any extension must be negotiated and consented to by all parties to the contract. Both parties base their positions on interpretations of Sections 8 and 9 of the Declaration of Covenants, Conditions, Restrictions and Easements for Palmetto Lakes Apartments at Westbury Park ("the Declaration"). The construction of those provisions is purely a question of law for the court.

**B. The Court Hearing**

On January 24, 2020, Westbury Park filed a motion for a preliminary injunction, seeking (*inter alia*) an order of the trial court regarding Estate at Westbury's use of Kensington Boulevard. On May 21, 2020, Estate at Westbury filed a motion for partial summary judgment, seeking legal rulings on numerous claims made in the lawsuit, all of which Estate at Westbury believes require pure legal determinations, not factual determinations (*e.g.*, interpretations of the governing documents at issue, including the Declaration's Sections 8 and 9, regarding extending the Assessment).

On September 16, 2020, the trial court held an extensive in-person hearing on both motions. The all-day hearing was, for practical purposes, a mini-trial: witnesses testified and were cross-examined, documents were submitted into evidence, videos were shown to the Court, and extensive legal arguments were made on the motions. On September

21, 2020, the trial court issued the written order at issue here, making numerous findings of fact and conclusions of law ("Order Denying Injunction And Granting In Part And Denying In Part Motion For Partial Summary Judgment," filed Sept. 21, 2020—the "Order"). On the Assessment—a core issue in dispute, and a primary reason this lawsuit was filed—the trial court made findings of fact and conclusions of law:

> **I find** that the easement is an express appurtenant Easement and [1] that the renewal of the term was intended to be unilateral under 9.01. **I find** that [2] the term was properly extended by the filing of the extension as contemplated under 9.01. [3] I do not see a conflict between 9.01 and 9.02. [4] 9.01 deals with term and 9.02 deals with "… this Declaration, or any provision hereof, or any covenant, condition or restriction contained herein …"
>
> **Further**, the assessment provision (8.02) of the Declaration agreement (as further modified by paragraph 4 of the 2005 amendment), calls for a sum certain in payments. [5] The obligation of the Estate is to pay the contracted sum and the obligation of Park is to maintain the easement. Had the proportional maintenance cost exceeded the actual revenue received under the assessment provision, Park would have suffered a loss. [6] Estate has no right of accounting and [7] there is no right by Estate to direct how the funds are used. [8] So long as the easement is in good condition and available for the reasonable, contracted and anticipated use of Estate residents, Park has complied with its contractual obligations.

Order at p. 1 (bolding and bracketed numbers added).

Thus, to Estate at Westbury's dismay, the Order found in favor of Westbury Park on the Assessment issue, including the following findings of law (as bracketed in the passage above):

1. The renewal of the Assessment term was intended to be unilateral under the Declaration Section 9.01;
2. The Assessment term was properly extended by the filing of the extension as contemplated under Section 9.01;

3. There is no conflict between Section 9.01 (regarding the extension of the Declaration) and Section 9.02 (requiring consent of all parties to extend, modify, or amend the terms of the Declaration);
4. Section 9.02 (requiring consent of all parties to extend, modify, or amend the terms of the Declaration) does not apply to the Assessment at all;
5. Section 8.02 of the Declaration requires Estate at Westbury to keep paying the Assessment;
6. Estate at Westbury has no right to an accounting for the money it pays for the specific purpose of its share of maintaining Kensington Boulevard (apparently meaning both the $1.3 million already paid, and the potentially millions the trial court was ruling that Estate at Westbury must keep paying);
7. Estate at Westbury has no right to direct how the funds are used;
8. "So long as the easement is in good condition and available for the reasonable, contracted and anticipated use of Estate residents, Park has complied with its contractual obligations." — in other words, as long as Estate at Westbury residents can get into and out of their property, the Estate at Westbury has no rights whatsoever regarding the Assessment, and must simply pay as much as Westbury Park wishes, for as long as Westbury Park wishes.

*See id*. (Order, emphasis added).

In short, the trial court expressly ruled upon the Assessment issue in its entirety, construing the Declaration in favor of Westbury Park. The language of the Order is clear — the trial court repeatedly states that "I find . . . " — meaning the court is issuing

legal and factual rulings on the Assessment issue. "I find" is not dictum. Given that the Assessment issue had substantively been decided, Estate at Westbury had no choice but to seek appellate review of the Order.

## ARGUMENT

### I. S.C. Code § 14-3-330 allows and compels appeal of the Order.

S.C. Code § 14-3-330 addresses appellate jurisdiction:

> The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and **shall** review upon appeal:
>
> (1) Any intermediate judgment, **order** or decree in a law case **involving the merits in actions commenced in the court of common pleas** and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from; . . . .

S.C. Code § 14-3-330(1) (2019 edition) (emphasis added)[1]; *see also* S.C. R. App. P. 201 (appeal may be taken from any final order, by a party aggrieved by the order). The South Carolina Supreme Court has stated that:

> an order which "involves the merits," [is] an order which "must finally determine some substantial matter forming the whole or a part of some cause of action or defense. . . . "

*Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780, (S.C. 1993) (internal citations omitted). "[T]he question of whether an order is immediately appealable is determined on a case-by-case basis. . . ." *Stone v. Thompson*, 426 S.C. 291, 295, 826 S.E.2d 868, 870 (S.C. 2019); *see also id.* ("Accordingly, the court

[1] Arguably, sections 14-3-330(2) and (3) apply here as well. This Return will address the arguments under § 14-3-330(1) because that section appears to be most on-point; however, the same arguments apply as to §§ 14-3-330(2) and (3), and those points are asserted and preserved.

weighed the evidence and finally determined a substantial matter forming part of Stone's causes of action, as well as Thompson's defense, which satisfies the test we clarified in *Mid-State. . . .*").

Here, the trial court's order "involves the merits," and "finally determine[s] some substantial matter forming the whole or a part of some cause of action or defense." As discussed above, the Order construes the contract in dispute (which was the precise question of law before the trial court), and it determines all substantial parts of the Assessment issue that forms the core of this lawsuit—it "finds" who must pay whom, how much must be paid, and for how long the payments must be made. The Order also "finds" legal and factual conclusions regarding the meaning of the key provisions of the documents at issue (§§ 8.01, 9.01, 9.02). The Order also "finds" that, as a matter of law, Estate at Westbury has no rights regarding key aspects of the Assessment (accounting and directing Assessment funds). For all legal and practical purposes, the Order issues "findings" in favor of Westbury Park, and against Estate at Westbury, that finally determine the the Assessment at issue. Estate at Westbury has every right to seek review of the trial court's errors on dispositive questions of law, as permitted by § 14-3-330.

**II. The law of the case doctrine requires immediate appeal of the Order.**

Estate at Westbury is required to appeal the Order now, or risk it becoming the law of the case and impervious to future challenge. This Court recently issued a thoughtful summary of the law of the case doctrine:

> "**An unappealed ruling is the law of the case and requires affirmance**." *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ; *see also Berry v. McLeod*, 328 S.C. 435, 442, 492 S.E.2d 794, 798 (Ct. App. 1997) ("**There is no appeal from this ruling, and thus, it becomes the**

> **law of the case**."). "**Where no exception is taken to findings of fact or conclusions of law, they become the 'law of the case.'**" *Walters v. Canal Ins. Co.*, 294 S.C. 150, 151, 363 S.E.2d 120, 121 (Ct. App. 1987) (*quoting Ashy v. WeCare Distribs., Inc.*, 289 S.C. 526, 528, 347 S.E.2d 123, 125 (Ct. App. 1986)). "**The law of the case applies both to those issues explicitly decided and to those issues [that] were necessarily decided in the former case**." *Ross v. Med. Univ. of S.C.*, 328 S.C. 51, 62, 492 S.E.2d 62, 68 (1997). "This State has a long-standing rule that one judge of the same court cannot overrule another." *Shirley's*, 403 S.C. at 573, 743 S.E.2d at 785.

*Ralph v. McLaughlin*, 428 S.C. 320, 341, 834 S.E.2d 213, 224 (S.C. App. 2019) (emphasis added), *cert. granted* April 24, 2020. As this Court articulated, a substantive ruling on the merits of a lawsuit must be appealed, or it becomes the law of the case going forward.

So too here. The trial court's Order is—for all intents and purposes—a final ruling on all key aspects of the Assessment issue, which is a core legal and factual dispute in this lawsuit. Estate at Westbury is *required* to appeal such a portentous decision, or risk having it become the law of this case and not subject to challenge later. *See id.* ("Where no exception is taken to findings of fact or conclusions of law, they become the 'law of the case.'") This falls squarely within the language of S.C. Code § 14-3-330(1), which identifies matters that this Court "shall review upon appeal".

## III. The procedural posture does not override the substantive ruling by the trial court.

Westbury Park's Motion makes the legitimate point that the Order includes a denial of a summary judgment motion, and such denials rarely are appealable.[2] That

[2] To be truly precise, the Order contains: (1) the denial of a motion for preliminary injunction; (2) the grant of a motion for summary judgment; *and* (3) the denial of a motion for summary judgment. Two out of three of those items are, without question, immediately appealable.

might be true here, too, if the Order simply denied Estate at Westbury's motion for partial summary judgment, and left it at that. But the Order goes much farther.

The typical denial of summary judgment is based on the trial court's decision that there is a "mere scintilla of evidence" raising factual issues for a trier of fact. The parties then move forward on the substantive issues, which are to be decided by the trier of fact. Here, however, the Order "finds" on numerous questions of law, and makes corresponding factual determinations, that (as discussed above) finally resolve the Assessment at issue:

- the legal construction of the key Declaration provisions, §§ 8.01, 9.01, 9.02;
- that the Assessment was validly extended by Westbury Park in accordance with the contract at issue;
- that the contract requires Estate at Westbury to pay the Assessment in perpetuity;
- that the contract gives to Estate at Westbury no rights with regard to the Assessment funds, and no rights to an accounting of the use of the Assessment funds.

In sum, and as discussed above, the Assessment issue has been fully and finally determined by the trial court; there is nothing remaining for a trier of fact to decide on that issue. Instead, the inevitable next step is for this Court to review whether the trial court's rulings were erroneous. This falls squarely within the language of S.C. Code § 14-3-330(1), which identifies matters that this Court "shall review upon appeal".

## CONCLUSION

For these reasons, Westbury Park's Motion to Dismiss should be denied.

Respectfully submitted,

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**PROOF OF SERVICE**

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I certify that on October 16, 2020, I have served the Return to Respondent's Motion to Dismiss on Respondent Westbury Park Residential Association, Inc., by sending the same to its attorneys of record, Benjamin T. Shelton and Kathleen C. Barnes, at their email addresses of record with AIS, pursuant to the Supreme Court's Amended Order on the Operation of the Appellate Courts During the Coronavirus Emergency (As Amended May 29, 2020).

Respectfully submitted,

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October 16, 2020
Charleston, South Carolina

FORD WALLACE THOMSON LLC

ATTORNEYS AT LAW

October 16, 2020



The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

Re: *Westbury Park Residential Association, Inc., Respondent, v. Estate at Westbury Owners Association, Inc., Appellants*
Appellate Case No. 2020-001275

Dear Ms. Kitchings:

Enclosed for filing is a Return to Respondent's Motion to Dismiss in the above-referenced case, as well as Proof of Service thereof.

I am filing the same via email, pursuant to the Supreme Court's Amended Order RE: Operation of the Appellate Courts During the Coronavirus Emergency (As Amended May 29, 2020).

With kind regards, I am,

Yours very truly,

FORD WALLACE THOMSON LLC

Ainsley F. Tillman

cc: Benjamin Shelton, Esquire
Kathleen C. Barnes, Esquire