IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III, Master in Equity and Special Circuit Court Judge

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Appellate Case No. 2020-001275

Westbury Park Residential Association, Inc.,……..…….Respondent,

v.

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

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This is a dispute between two homeowners' associations. The condominiums governed by Appellant Estate at Westbury Owners Association, Inc., ("the Estate") are accessible only by an easement over two private streets located on property within a residential neighborhood governed by Respondent Westbury Park Residential Association, Inc. ("Westbury Park"). The declaration that created the easement requires the Estate to pay an assessment for maintenance costs for the streets. The Estate maintains that its right to use the easement is perpetual but its obligation to pay expired. Westbury Park maintains that it validly renewed the declaration, including the Estate's obligation to pay the assessment.

On January 23, 2020, Westbury Park filed a complaint and a motion for a temporary injunction. (Cmplt.; Mot. Temp. Inj.) (R. pp. _). The complaint generally sought to collect back payments for the easement assessment and establish the Estate's obligation for future payments and, alternatively, to terminate the easement. (Cmplt. pp. 13-20) (R. pp. _). Westbury Park also asked the court to enjoin the Estate's residents from misusing the gate system for the streets and Westbury Park's amenities. (Mot. Temp. Inj.) (R. pp. _).

On March 18, 2020, the Estate filed an answer and counterclaims that generally sought a declaratory judgment establishing its easement rights and an accounting for its past easement assessment payments. (Ans.) (R. pp. _). On April 13, 2020, Westbury Park filed a reply to the Estate's counterclaims. (Reply) (R. pp. _).

On May 21, 2020, four months after Westbury Park filed the complaint, the Estate moved for partial summary judgment. (Mot.) (R. p. _).

The parties each filed memoranda and exhibits in support of their positions on Westbury Park's motion for a temporary injunction and the Estate's motion for partial summary judgment. (Pl.'s Am. Memo. in Opp.; Def. Mem. in Opp. to Temp. Inj.; Def. Memo. in Supp.; Pl's Supp. Memo. in Opp.) (R. pp. _). On June 8, 2020, the case was referred by consent to the Master-in-Equity. (Consent Order) (R. p. _).

On September 16, 2020, the Honorable Marvin H. Dukes, III, held a hearing on the motions. (Tr.) (R. p. _). On September 21, 2020, the court filed an order denying Westbury Park's motion for a temporary injunction and granting in part and denying in part the Estate's motion for partial summary judgment. (Order) (R. pp. _). The denial of Westbury Park's motion for a temporary injunction and the granting in part of the Estate's motion for partial summary judgment are not challenged on appeal.

The Estate filed a notice of appeal on September 22, 2020. (Not.) (R. p. _). Westbury Park filed a motion to dismiss the appeal as unappealable because the order on appeal is the denial of summary judgment. (Mot. to Dismiss). This Court denied the motion but specified that "[n]othing prevents the parties from raising the issue of appealability in their briefs." (Order).

FACTS

Westbury Park and the Estate are next to each other. Westbury Park is a residential neighborhood with 350 homes. (Tr. p. 92) (R. p. _). The Estate is a condominium complex with

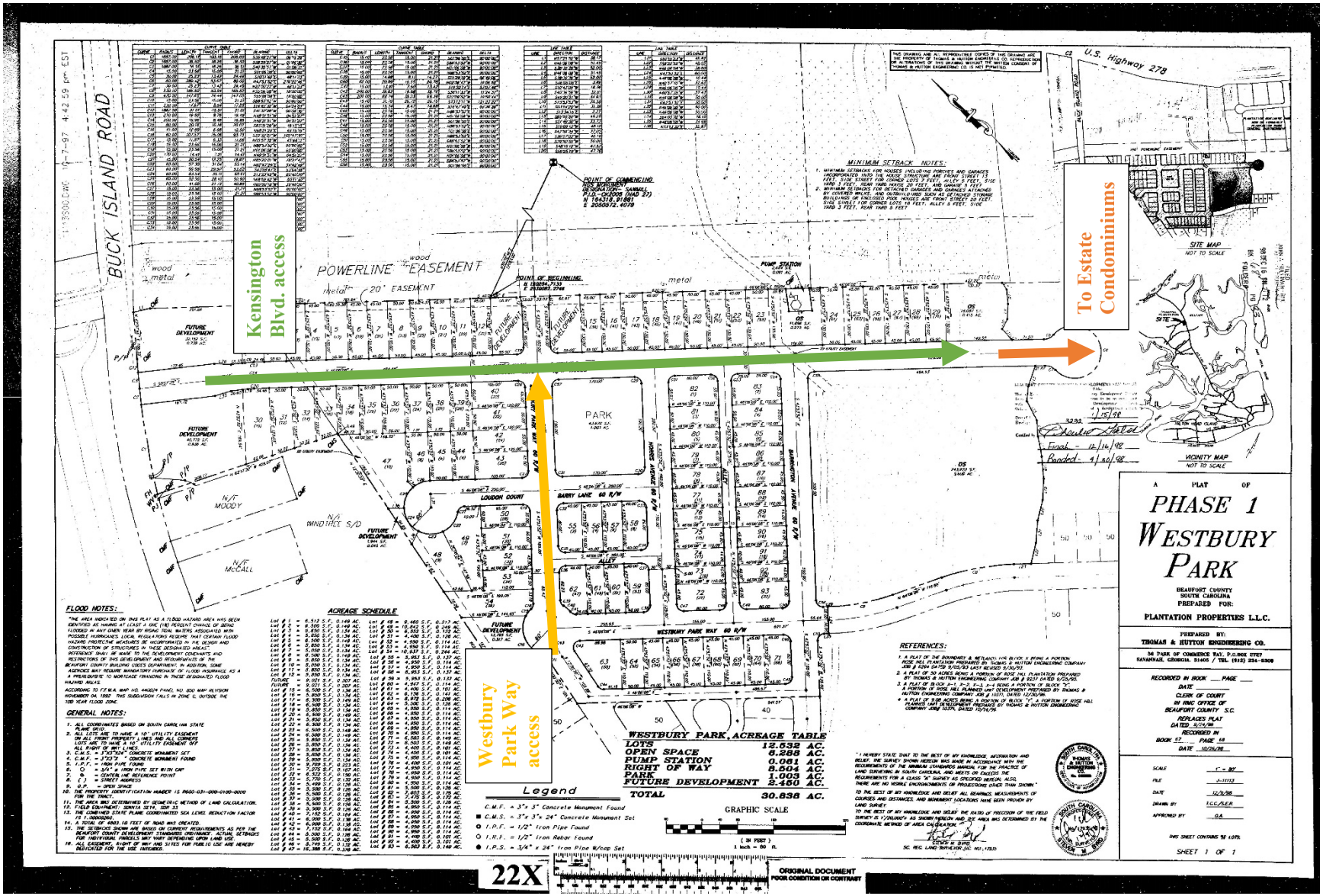
320 condos. *Id.* The only way to access the Estate condominiums is to drive through two streets in the Westbury Park gated residential community, as shown on the map on the following page. At issue is whether the Estate remains obligated to pay the assessment for maintenance costs of those streets as set forth in the declaration.

I. The creation of the easement and the Estate's continuing obligation to pay the assessment.

In 1998, an entity named Plantation Properties, LLC, began to implement a plan of development that included Westbury Park, the Estate, and a commercial area. (1998 Declarations) (R. pp. _). In November 1998, Plantation Properties recorded a Declaration of covenants, conditions, restrictions and easements for Palmetto Lakes Apartments at Westbury Park (now known as the Estate). ("Declaration") (R. pp. _). This Estate Declaration contains the main provisions at issue in this appeal.

The Declaration grants the Estate a "perpetual non-exclusive right for vehicular and pedestrian access" over two streets—Westbury Park Way and Kensington Boulevard—in the Westbury Park neighborhood. (Declaration, § 7.02(a)-(b)) (R. pp. _, § 7.02(a)-(b)). The easements are "[s]ubject to the provisions" of the Declaration. (Declaration, § 7.02) (R. p. _, § 7.02).

The Declaration requires the Estate to pay an assessment "as its share of the costs for maintenance of the Required Streets [Westbury Park Way and Kensington Boulevard] and landscaping along the required streets and around and within parks within the Westbury Park Residential Area and the Westbury Park Commercial Area." (Declaration § 8.01) (R. p. _). The maintenance of the streets is Westbury Park's responsibility. *Id.*


BUCK ISLAND ROAD
U.S. Highway 278
Kensington Blvd. access
To Estate Condominiums
Westbury Park Way access
POWERLINE EASEMENT
20' EASEMENT
POINT OF COMMENCING
POINT OF BEGINNING
PUMP STATION
PARK
LONDON COURT
BARRY LANE 60 R/W
WESTBURY PARK WAY 60 R/W
FUTURE DEVELOPMENT
N/F MOODY
N/F McCALL
WINDTREE S/D
SITE MAP
NOT TO SCALE
VICINITY MAP
NOT TO SCALE
MINIMUM SETBACK NOTES:
FLOOD NOTES:
GENERAL NOTES:
ACREAGE SCHEDULE
WESTBURY PARK, ACREAGE TABLE
LOTS 12.532 AC.
OPEN SPACE 6.288 AC.
PUMP STATION 0.061 AC.
RIGHT OF WAY 8.504 AC.
PARK 1.003 AC.
FUTURE DEVELOPMENT 2.450 AC.
TOTAL 30.838 AC.
Legend
C.M.F. = 3"x 3" Concrete Monument Found
C.M.S. = 3"x 3"x 24" Concrete Monument Set
I.P.F. = 1/2" Iron Pipe Found
I.R.F. = 1/2" Iron Rebar Found
I.P.S. = 3/4" x 24" Iron Pipe W/cap Set
GRAPHIC SCALE
REFERENCES:
A PLAT OF
PHASE 1
WESTBURY PARK
BEAUFORT COUNTY
SOUTH CAROLINA
PREPARED FOR:
PLANTATION PROPERTIES L.L.C.
PREPARED BY:
THOMAS & HUTTON ENGINEERING CO.
RECORDED IN BOOK ___ PAGE ___
DATE ___
CLERK OF COURT
FOR RMC OFFICE OF
BEAUFORT COUNTY S.C.
REPLACES PLAT
DATED 3/24/98
RECORDED IN
BOOK 57 PAGE 68
DATE 10/26/98
SCALE 1" = 80'
FILE 3-1113
DATE 12/9/98
DRAWN BY T.C.C./S.E.R.
APPROVED BY D.A.
THIS SHEET CONTAINS 18 LOTS.
SHEET 1 OF 1
22X
ORIGINAL DOCUMENT
POOR CONDITION OR CONTRAST

The Declaration continues "in effect" for a term of twenty years from the date of its recording "provided that rights and easements which are stated herein to have a longer duration shall have such longer duration." (Declaration, § 9.01) (R. p. _. § 9.01). The only right or easement with a longer duration are (1) the Estate's easement over the two required streets, (2) a directional sign easement, and (3) a storm drain easement. (Declaration § 7.02(a)-(d)) (R. pp. _, § 7.02(a)-(d)). In the same paragraph that sets the 20-year term, the Declaration says the Declarant (Plantation Properties) may unilaterally renew the Declaration.

> This Declaration may be renewed for an unlimited number of successive ten (10) year periods by the Declarant, its successors or assigns filing a notice of extension with the Office of the Register of Mesne Conveyances for Beaufort County, South Carolina prior to the expiration of any term.

(Declaration § 9.01) (R. p. _, § 9.01).

Immediately following the term and renewal provision is a paragraph addressing "Termination and Modification" of the Declaration. It says, in part, that the Declaration "may only be terminated, extended, modified or amended . . . by the Declarant and Owner jointly" in an executed and acknowledged writing that is recorded in the Office of the Register of Mesne Conveyances. (Declaration § 9.02) (R. p. _, § 9.02).

On the same day it recorded the Declaration, Plantation Properties sold the Estate property to Westbury Park Apartments, Ltd. (Deed, Cmplt. Exh. 2) (R. pp. _).

Seven years later, in 2005, Westbury Park Apartments sold the Estate property to Montecito Westbury, LLC, which then converted it into condominiums and created the Appellant Estate at Westbury condominium horizontal property regime. (Deed, Cmplt. Exh. 3) (R. pp. _). Because the Declaration prohibited condominiums, Plantation Properties and Montecito Westbury agreed to amend the Declaration to allow condominiums. (Declaration §§ 5.01-.02; Amendment) (R. pp. _).

The amendment complied with the Declaration modification provision by joint agreement of the Declarant and Owner in an executed and acknowledged writing recorded in the Office of the Register of Mesne Conveyances. (Amendment; Declaration § 9.02) (R. pp. _, _, § 9.02). Relevant to this appeal, the amendment increased the Estate's easement assessment from $17,500.00 per year to $86,400.00 per year and stated that the easement assessment provision in the Declaration "shall apply" to the condominiums. (Declaration § 8.01; Amendment ¶¶ 4, 6) (R. pp. _).

A few months after getting the right to use the property for a condominium horizontal property regime, Montecito Westbury filed a master deed for the Estate at Westbury Horizontal Property Regime and created the Estate entity that is the Appellant in this case. (Master Deed, Exh. 5 to Memo. in Opp. to Temp. Inj.) (R. pp. _). The master deed confirmed the validity and applicability of the Declaration, as amended. (Master Deed § 5.5, Exh. C Land Description, Exh. C Notes) (R. pp. _). The master deed also included "rules and regulations" consistent with the regulations in the Declaration. (Master Deed, Exh. F) (R. pp. _). Plantation Properties never assigned its Declarant rights to Montecito. The Declaration is referenced in and made a part of the Master Deed, and it still runs with the Estate property. (Master Deed, Exh. C, Land Description; Master Deed §§ 1.1.14, 1.1.15, 2.3) (R. pp. _).

About ten years later, in 2015, Plantation Properties, Westbury Park, and the Westbury Park Commercial Center property owners' association entered into an Estate Payment Division Agreement and Assignment ("the Assignment"). (Assignment) (R. pp. _). In the Assignment, Plantation Properties assigned to Westbury Park and the Westbury Park Commercial entity all of

its Declarant "rights, title and interest to" the Declaration and Amendment,[1] including its rights to the easement assessment payments from the Estate. (Assignment p. 1) (R. p. _).

Under the Assignment, the easement assessment is payable from the Estate to Westbury Park, which will then give 20% to Westbury Park Commercial. (Assignment p. 1) (R. p. _). For the next three years, the Estate paid the assessment to Westbury Park.

On October 15, 2018, the Estate sent notice that it would no longer pay the assessment based on its belief that the Declaration would expire on November 12, 2018, at the end of the initial twenty-year term. (Exh. 6 to Westbury Park's Supp. Memo. in Opp.) (R. pp. _).

On October 23, 2018, Westbury Park filed a notice of extension of the Declaration for a ten-year term. (Notice of Ext.) (R. pp. _). The notice complied with the Declaration provision on unilateral renewal by the Declarant, which requires the "filing [of] a notice of extension with the Office of the Register of Mesne Conveyances for Beaufort County, South Carolina prior to the expiration of any term." (Notice of Ext.; Declaration § 9.01) (R. pp. _, _, § 9.01).

Despite the renewed ten-year term of the Declaration, including the easement assessment provision, the Estate refuses to pay the assessment. (Exh. 7 to Supp. Memo. in Opp.) (R. pp. _).

II. The litigation and issues on appeal.

On January 24, 2020, after unanswered demands for assessment payments, Westbury Park filed a complaint against the Estate. (Cmplt.) (R. pp. _). Relevant to this appeal, Westbury Park sought a declaratory judgment that it validly renewed the Declaration and the Estate must continue to pay the easement assessment. (Cmplt. p. 13) (R. pp. _). It also filed alternative causes of action alleging the Estate terminated the easement by failing to pay the assessment, the type of easement

[1] The Assignment says it assigns the rights to "the Estate Agreement," which is defined as the Amendment, which ratified and confirmed the Declaration. (Assignment p. 1; Amendment p. 2) (R. pp. _).

is an easement in gross but terminated, no easement exists and the Estate must build an alternate access, the easement terminated due to the changed conditions, and unjust enrichment. (Cmplt. pp. 13-20) (R. pp. _).

Also on January 24, 2020, Westbury Park filed a motion for a temporary injunction to prohibit the Estate owners, residents, and guests from violating the rules and regulations for the access gates and from using Westbury Park's amenities. (Mot. for Temp. Inj.) (R. pp. _).

The Estate filed an answer and eight counterclaims. (Ans.) (R. pp. _). It denied the validity of Westbury Park's renewal of the Declaration based on the belief that the modification provision applies rather than the renewal provision. (Ans. p. 4) (R. p. _). The Estate alleged breach of contract, breach of fiduciary duty, quantum meruit, and an accounting of its past assessment payments. (Ans. pp. 20-22, 26-27) (R. pp. _). It also sought alternative declaratory judgments that it has an express appurtenant easement, easement by necessity, or easement by prescription. (Ans. pp. 23-25) (R. pp. _).

A few months later, in May 2020, the Estate filed a motion for partial summary judgment. (Mot.) (R. pp. _). The Estate sought summary judgment on its counterclaims for declaratory judgment of an easement and for an accounting, and on all of Westbury Park's causes of action except for the injunction. *Id.* The Estate essentially asked the court to find the Declaration was not renewed, it has a perpetual easement that it does not have to pay for, and it is entitled to an accounting of past assessment payments. (Memo. in Supp. Mot.) (R. pp. _).

On September 16, 2020, the court held a hearing on Westbury Park's motion for a temporary injunction and the Estate's motion for partial summary judgment. (Tr. p. 4) (R. p. _). Westbury Park called three witnesses to support its temporary injunction motion, and then the parties argued the Estate's summary judgment motion. (Tr. pp. 3-4, 188) (R. pp. _). Westbury

Park argued that the renewal provision allowing the Declarant to unilaterally renew the Declaration for a ten-year term by filing a "notice of extension" applies and it complied with that provision. (Tr. pp. 228-33, 238-40, 244-46) (R. pp. _). The Estate argued that the modification provision applies because the renewal document Westbury Park filed is titled a "notice of extension." (Tr. pp. 215-17) (R. pp. _). It also argued that the Assignment conveyed only Plantation Properties' right to receive the assessment payments and not its Declarant rights such as renewal of the Declaration. (Tr. pp. 248-49) (R. pp. _).

On September 21, 2020, the court filed an order ruling on the motions. (Order) (R. pp. _). It denied Westbury Park's motion for a temporary injunction, which Westbury Park did not appeal. (Order p. 1) (R. p. _). The court granted the Estate's motion for partial summary judgment on three causes of action—the Estate's counterclaim for a declaratory judgment that it holds an express appurtenant easement and Westbury Park's actions for declaratory judgments that an easement in gross terminated and the Estate must build an alternate access. (Order p. 2) (R. p. _). Westbury Park did not appeal any of those adverse rulings. The court denied the remainder of the Estate's motion for partial summary judgment. (Order p. 2) (R. p. 2).

The Estate filed a notice of appeal of the court's partial denial of its motion for summary judgment, which is now before this Court.

While a statement of facts in an appellate brief "may include contested matters", Rule 208(b)(1)(E), SCACR, there are two assertions in the Estate's facts section that cannot go unanswered. Both are an effort to taint the Court's view of Westbury Park as greedy rather than as acting responsibly in fulfilling its maintenance obligations for the required streets.

First, in its recitation of the "facts", the Estate tries to convince the Court that it already paid too much in assessments (presumably to imply that as a reason why it should not have to pay

anymore). It states as "fact", without citing a source, that it paid "exorbitant" amounts for street maintenance that was not "expensive."[2] (Br. of App. pp. _). To be clear, there is **no** evidence in the record of the actual cost of maintaining the streets at issue in the past, present, or future. *See* Rule 208(b)(1)(E), SCACR ("A party may also include a separate statement of facts relevant to the issues presented for review, with ***reference to the record*** on appeal . . . ." (emphasis added)). Therefore, there is no basis upon which this Court can judge whether the amounts paid were "exorbitant" or cover the actual past or future maintenance costs. Whether the Estate paid too little, too much, or just the right amount ultimately has no bearing on whether Westbury Park validly renewed the Declaration.

Second, the Estate argues that Westbury Park used the assessments as a "'slush fund'" to pay for "free" yard maintenance for all of its property owners and characterizes the Estate's refusal to pay the assessments as causing "financial shock" to Westbury Park when it could no longer pay for this service. (Br. of App. pp. 9-10). The Estate refers to this as the "gravy train." (Br. of App. p. 10). There is no basis in or citation to the record for this assertion.

The Declaration requires the Estate to pay "its share of the costs for maintenance of the Required Streets ***and landscaping*** along the Required Streets and around and within parks within" Westbury Park. (Declaration, § 8.01) (R. p. _, § 8.01) (emphasis added). In March 2020, Westbury Park stated that it would no longer provide as an option for residents a yard maintenance service available to them for "front lawn maintenance, mow, blow and edge" through its commercial

[2] For example, the Estate says, without reference to any evidence in the record, the following: the assessment "far exceeded any conceivable cost of maintenance and repair" (Br. of App. p. 8); the streets "simply need[] to be repaved every 10-20 years" and are "not particularly complex or expensive" (Br. of App. p. 9); and if the assessments "had been escrowed and managed properly, as intended, it would have paid for maintenance of Kensington Boulevard far, far into the realistic future" (Br. of App. p. 9).

landscape vendor but, instead, residents would "be individually responsible for the maintenance of all areas of their yards." (Exh. 1 to Def.'s Opp. to Temp. Inj.; Tr. p. 139) (R. pp. _). One reason for this change is the "operational challenges due to the loss of income from" the Estate's easement assessments.[3] *Id.* During the portion of the hearing on Westbury Park's motion for a temporary injunction, the treasurer for its board explained that yard maintenance was provided for the forty homes along the required streets and, for all other homes, was available if they "opted for it."[4] (Tr. pp. 139, 144) (R. pp. _). The homeowners paid for it in their dues. (Tr. p. 145) (R. p. _).

Nothing supports the Estate's "'slush fund'" assertion of free yard maintenance for "all" homeowners paid for with the easement assessments. No consideration of this argument is mentioned in the lower court's order. (Order) (R. pp.). How Westbury Park (or its predecessor in collecting the assessments) did or did not use the assessments ultimately has no bearing on whether Westbury Park validly renewed the Declaration.

STANDARD OF REVIEW

This Court decides the appealability and preservation issues without any applicable standard of review. As to the merits if the Court reaches them, "the appellate court applies the same standard that governs the circuit court under Rule 56(c), SCRCP." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 356, 628 S.E.2d 902, 910 (Ct. App. 2006). When "the underlying action is a declaratory action to declare whether the restrictive covenants are enforceable . . . the proper scope of review is de novo." *Hardy v. Aiken*, 369 S.C. 160, 165, 631 S.E.2d 539, 541 (2006).

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[3] Another reason is the difficulty of managing which owners opted into the service and which ones opted out, clearly indicating that not all residents received yard maintenance. *Id.*

[4] Recognizing that this evidence is from the temporary injunction and not the summary judgment portion of the hearing, Westbury Park uses it only to defend the Estate's characterization of Westbury Park and not in support of its arguments on the merits.

ARGUMENT

The Court should dismiss this appeal because the denial of summary judgment is never appealable. Alternatively, it should affirm because the Estate failed to preserve its appeal. If the Court considers the merits of the appeal, it should find that Westbury Park validly renewed the Declaration, the Estate must pay the easement assessment, and the Estate is not entitled to an accounting.

Westbury Park is responsible for the maintenance of the private streets at issue. The Estate wants its more than 320 residents and their guests and commercial vendors to use the streets for free while Westbury Park pays the bill and provides the maintenance. As this Court has previously recognized, "[t]here's no such thing as a free lunch," because when one person does not pay its share, the cost to others increases. *Citadel Dev. Foundation v. Cnty. of Greenville*, 279 S.C. 443, 447 n.1, 308 S.E.2d 797, 800 n.1 (Ct. App. 1983) (internal quotation marks omitted). Even absent a contractual covenant to pay its share of the maintenance costs, common law equity demands that a dominant estate pay for its share of easement maintenance. *Hayes v. Tompkins*, 287 S.C. 289, 294, 337 S.E.2d 888, 891 (Ct. App. 1985) (holding "the apportionment [between the dominant and servient estates] by the trial judge of the burden of maintenance and repair is equitable"). The Estate cannot simply refuse to pay for maintenance of the streets any more than Westbury Park may refuse to maintain them for the Estate's use, an obligation which, under the Estate's expiration theory ceased to exist as of November 2018.

The fact that the Declaration provides for unilateral renewal for successive ten-year terms demonstrates that the Declarant never intended for the Estate to get free use of the access streets and sidewalks, gates, and security at the expense of Westbury Park. All Estate property owners took ownership with knowledge of the easement assessment and the renewal provision.

I. The Court should dismiss this appeal because the denial of a motion for summary judgment is never appealable.

This Court should dismiss the appeal as unappealable.[5] The order on appeal is the denial of a motion for partial summary judgment. "[I]t is well settled that an order denying summary judgment is never reviewable on appeal." *Bank of N.Y. v. Sumter Cnty.*, 387 S.C. 147, 154, 691 S.E.2d 473, 477 (2010). An appellate court is "***prohibited*** from reviewing" the denial of a motion for summary judgment because it is "***never*** subject to review, not in an interlocutory appeal []or even after final judgment." *AJG Holdings LLC v. Dunn*, 392 S.C. 160, 167, 708 S.E.2d 218, 222 (Ct. App. 2011) (emphasis added). "A denial of a motion for summary judgment decides nothing about the merits of the case, but simply decides the case should proceed to trial." *Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994).

The Estate argued in opposition to Westbury Park's motion to dismiss that the lower court's order "makes substantive rulings that finally determine" whether it must pay the easement assessment and, therefore, involves the merits under S.C. Code Ann. § 14-3-330(1). (Return). The order partially denying summary judgment is not an order "involving the merits" under § 14-3-330 because it does not "finally determine[] some substantial matter forming the whole or part of some cause of action or defense." *Watson v. Underwood*, 407 S.C. 443, 458, 756 S.E.2d 155, 163 (Ct. App. 2014) (internal quotation and alteration marks omitted). It denies summary judgment and gives an explanation for the denial.

The Estate's appealability argument is based on the following language from the order:

> [T]he renewal of the term was intended to be unilateral under 9.01. I find that the term was properly extended by the filing of the extension as contemplated under 9.01. . . . Estate has no right of accounting and there is no right by Estate to direct how the funds are used.

[5] Westbury Park incorporates its motion to dismiss and reply to the Estate's return to the motion that are on file with the Court.

(Order p. 1) (R. p. _). This is merely an explanation of why the court partially denied the motion for summary judgment because, on the next page of the order, the court stated "I therefore: ***Deny***" the motion for summary judgment as to a declaratory judgment that the Declaration is renewed, termination of the easement by breach, unjust enrichment, termination of the easement by changed conditions, easement by necessity, and an accounting. (Order p. 2) (R. p. _) (emphasis added). The court did not grant summary judgment in Westbury Park's favor on any issue. Further, that an action involves the interpretation of contract language is not an exception to the rule that the denial of summary judgment is never appealable.

"A final judgment is one that ends the action and leaves the court with nothing to do but enforce the judgment by execution. An order reserving an issue, or leaving open the possibility of further action by the trial court before the rights of the parties are resolved, is interlocutory." *Tillman v. Tillman*, 420 S.C. 246, 249, 801 S.E.2d 757, 759 (Ct. App. 2017). The order left the inevitability (not mere possibility) of further action by the trial court before the rights of the parties are resolved or a prevailing party may enforce a judgment by execution because it denied summary judgment as to six causes of action. (Order p. 2) (R. p. _).

The order on appeal denies summary judgment. There is nothing for this Court to review, and it should dismiss the appeal.

II. <u>The merits of the Estate's appeal are not preserved.</u>

The Estate argues that the court "upheld" Westbury Park's notice of extension "despite the fact that Westbury Park had not filed a motion seeking such a ruling," and that "[w]ithout a motion so requesting, the Master in Equity *sua sponte* found that renewal of the assessment was intended to be unilateral under § 9.01 and that the assessment was properly extended." (Br. of App. p. 11).

The Estate argues this "was procedurally improper" and is "an independent ground" for reversal. (Br. of App. p. 11 n.3).

It is actually an independent ground to affirm because the Estate's appeal is unpreserved. "When a party receives an order that grants certain relief not previously contemplated or presented to the trial court, the aggrieved party ***must*** move, pursuant to Rule 59(e), SCRCP, to alter or amend the judgment in order to preserve the issue for appeal." *In re Estate of Timmerman*, 331 S.C. 455, 460, 502 S.E.2d 920, 922 (Ct. App. 1998) (emphasis added); *Van Ness v. Eckerd Corp.*, 350 S.C. 399, 403-04, 566 S.E.2d 193, 196 (Ct. App. 2002) (same). The Estate did not file a Rule 59(e), SCRCP, motion asking the court to alter or amend the judgment because it granted relief not requested. Instead, the Estate filed a notice of appeal the day after the court filed the order. (Not.) (R. p. _).

When the court grants relief that no party requested, the aggrieved party "***needed*** to raise the issue in a Rule 59(e) motion" to preserve it for this Court's review. *Bennett v. Rector*, 389 S.C. 274, 284, 697 S.E.2d 715, 720 (Ct. App. 2010) (emphasis added). Because the Estate failed to file a Rule 59(e) motion, its appeal is unpreserved and the Court should affirm on the merits.

III. Westbury Park validly renewed the term of the Declaration.[6]

Westbury Park, as the holder of the Declarant rights in the Declaration (as amended), validly renewed the Declaration for a ten-year term by strictly complying with all of the renewal requirements. The Estate's arguments to the contrary misapply the law and misconstrue the renewal. Further, its own conduct contradicts its arguments to this Court.

There are two main terms in the Declaration that are at issue in this appeal. Paragraph 9.01 is the term and renewal provision. It states the Declaration remains "in full force and effect" for

[6] Westbury Park restates and reorders the issues but fully responds to the Estate's arguments.

twenty years from the date of recording, except that "rights and easements" with a longer duration will have a longer duration. (Declaration § 9.01) (R. p. _, § 9.01). It then states the method for the Declarant to renew the Declaration "for an unlimited number of successive ten (10) year periods." *Id.* Stated plainly, paragraph 9.01 sets an initial term and the method of renewal for any future terms of the covenants. Setting a term and renewal for the covenants complies with the law that "[r]estrictive covenants will be enforced unless they are ***indefinite*** or contravene public policy." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 362, 628 S.E.2d 902, 913 (Ct. App. 2006) (emphasis added).

Paragraph 9.02 is the termination and modification provision. It states the method for the Declarant and Owner to terminate, extend, modify, or amend the Declaration. (Declaration § 9.02) (R. p. _, § 9.02). Reserving the right to amend and providing a method for amendment complies with the law that "when a developer fails to expressly reserve a right to amend the covenants, amendments are not allowed." *Queen's Grant*, 368 S.C. at 363, 628 S.E.2d at 914.

In this case, Westbury Park's filing of a "notice of extension" to renew the Declaration for a ten-year term falls under paragraph 9.01—not paragraph 9.02—and strictly complied with all of the requirements for renewal. The Court should find the renewal valid and the easement assessment covenant enforceable against the Estate.

A. Paragraph 9.01 applies to Westbury Park's renewal of the term of the Declaration.

At the outset it is important to establish what did and did not occur in this case. Westbury Park filed a notice of extension to ***renew*** the existing Declaration (as amended). It did not terminate, modify, amend, or change the existing covenants and did not add new covenants. It

merely renewed the status quo as expressly permitted. Under this scenario, paragraph 9.01's renewal provision applies.[7]

It states, in part, that the "Declaration may be ***renewed*** for an unlimited number of successive ten (10) year periods by the Declarant, its successors or assigns by filing a ***notice of extension***." (Declaration § 9.01) (R. p. _, § 9.01) (emphasis added). Westbury Park filed a "Notice of Extension" "to renew the term of the Declaration for an additional ten (10) years." (Not. of Ext.) (R. pp. _). The plain language of paragraph 9.01 applies to Westbury Park's renewal by a notice of extension.

The plain language of paragraphs 9.01 and 9.02 demonstrates that they serve two different purposes. Paragraph 9.01 allows the Declaration to be "renewed"—a word that does not appear in paragraph 9.02. (Declaration §§ 9.01-.02) (R. pp. _, §§ 9.01-.02). The renewal applies to "[t]his Declaration" in its entirety and not to separate or certain provisions. (Declaration § 9.01) (R. p. _, § 9.01). The Declarant alone has the power to renew and accomplishes renewal by filing a "notice of extension." *Id.*

In stark contrast, paragraph 9.02 allows "[t]his Declaration, ***or*** any provision hereof, or any covenant, condition or restriction" to "be terminated, extended, modified or amended" as to the whole property or a portion of it. (Declaration § 9.02) (R. p. _, § 9.02) (emphasis added). This requires agreement by the "Declarant and Owner jointly." *Id.* It is accomplished by a more formal procedure of "a proper instrument in writing" executed, acknowledged, and recorded. *Id.*

"Documents will be interpreted so as to give effect to all of their provisions, if practical." *Reyhani v. Stone Creek Cove Condo. II Horizontal Prop. Regime*, 329 S.C. 206, 212, 494 S.E.2d

[7] All of the Estate's arguments about whether Westbury Park complied with paragraph 9.02 are irrelevant because that paragraph does not apply.

465, 468 (Ct. App. 1997). Giving effect to both paragraphs, they apply to different actions and require different parties and procedures to accomplish those actions. Westbury Park's renewal for a ten-year term falls under paragraph 9.01 because it is a renewal of the exact, existing Declaration (as amended) and applies to the entire Declaration.

The Estate argues that the renewal failed because Westbury Park did not comply with paragraph 9.02, but it barely addresses why paragraph 9.01 is not the applicable provision. (Br. of App. pp. 17-20). It seems to mainly rely on the fact that paragraph 9.02 applies to an extension and the document Westbury Park filed is titled a "notice of extension." (Br. of App. pp. 17-20). This argument blatantly ignores that paragraph 9.01 expressly requires "filing a ***notice of extension***" to renew the Declaration. (Declaration § 9.01) (R. p. _, § 9.01) (emphasis added). The use of the word "extension" on the renewal does not bring it under paragraph 9.02 but, instead, strictly complies with the procedure for renewing the Declaration under paragraph 9.01. Any other interpretation would punish Westbury Park for strict compliance with paragraph 9.01 and lead to absurd results.[8] "An interpretation which establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided." *Koon v. Fares*, 379 S.C. 150, 155, 666 S.E.2d 230, 233 (2008). The Court should find that paragraph 9.01 applies to Westbury Park's renewal of the Declaration.

The Estate makes a number of incorrect and unsupported arguments to the contrary.

First, the Estate does not address what paragraph 9.01 means or applies to if it does not apply to this situation. The Estate makes only the following two statements about the applicability of paragraph 9.01: (1) it applied only when the Declarant "was the only stakeholder in the Westbury project" during the "formative years" of development, and (2) it allows renewal but

[8] For example, if it titled the document "Notice of Renewal" instead.

paragraph 9.02 explains "*how* any provision may be terminated, extended, modified or amended—by joint consent only." (Br. of App. p. 19). These contentions find no support in the plain language of the Declaration.

As to the first contention, there is nothing in the Declaration that states an intention for the renewal provision to apply only during the "formative years." The opposite is true and is stated right in the paragraph itself—"every provision hereof . . . shall continue in full force and effect for a period of twenty (20) years." (Declaration § 9.01) (R. p. _, § 9.01).

As to the second contention, it is also contradicted by the plain language of paragraph 9.01 because the paragraph specifies how renewal is accomplished—"filing a notice of extension with the Office of the Register of Mesne Conveyances for Beaufort County, South Carolina prior to the expiration of any term—", which is a different method than the one in paragraph 9.02. *Id.*

Second, the Estate argues that Westbury Park did not own the twenty acres of Estate condominium property and a developer that does not own the property cannot enforce covenants. (Br. of App. p. 13). The cases cited by the Estate—*AJG Holdings LLC v. Dunn*, 392 S.C. 160, 708 S.E.2d 218 (Ct. App. 2011), and *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 628 S.E.2d 902 (Ct. App. 2006)—discuss the requirement that a developer must own a property interest in the development "to amend . . . or impose new restrictive covenants." *Id.* at 350, 628 S.E.2d 902; *AJG*, 392 S.C. at 165, 708 S.E.2d at 221. This case does not involve an amendment to or a new restrictive covenant. It involves the renewal of existing covenants as to which Westbury Park (as the assignee Declarant) has a real property interest.[9]

[9] The Declaration expressly states that "[t]he purposes of these restrictions is to insure proper development and use of the Property to be in keeping with the community wide standards established for . . . the Westbury Park Residential Subdivision . . . which is contiguous to the Property." (Declaration, § 2.02) (R. p. _, § 2.02).

Third, the Estate argues the Declaration does not run with the land because it runs only with the twenty acres of Estate property (and presumably not the access streets on Westbury Park property). (Br. of App. p. 13). The Declaration, including the easement assessment, does run with the land. "Covenants that require property owners to pay to a developer or homeowners' association assessments that have a beneficial effect on the value of the owners' properties touch and concern land and therefore 'run with the land.'" *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 357 n.10, 628 S.E.2d 902, 911 n.10 (Ct. App. 2006). In *Queen's Grant*, this Court found it "undisputed that the assessments under the respective covenants to fund Greenwood Development's maintenance obligations of Palmetto Dunes [property outside of the Queen's Grant regime property] 'run with the land.'" *Id.* at 357 n.10, 628 S.E.2d at 911 n.10.

None of the Estate's argument remove Westbury Park's renewal notice of extension from falling under paragraph 9.01.

B. Westbury Park strictly complied with the renewal requirements in paragraph 9.01.

Paragraph 9.01 states, in part, that the "Declaration may be renewed for an unlimited number of successive ten (10) year periods [1] by the Declarant, its successors or assigns [2] by filing a notice of extension with the Office of the Register of Mesne Conveyances for Beaufort County, South Carolina [3] prior to the expiration of any term." (Declaration § 9.01) (R. p. _, § 9.01) (alterations added). Westbury Park strictly complied with the renewal requirements.

i. Westbury Park is the Declarant.

Westbury Park is the Declarant with the ability to renew the Declaration. The Declaration defines the Declarant as "the owner" of the twenty acres of Estate property. (Declaration § 1.01) (R. p. _, § 1.01). It also says that "[a]ny or all of the rights, powers and reservations of Declarant herein may be assigned to ***any*** person, corporation or association which will assume the duties of

Declarant pertaining to the particular rights." *Id.* at § 9.03 (R. p. _, § 9.03) (emphasis added). The assignment of Declarant rights must be in a writing where the assignee consents to the assignment. *Id.* Assignment is not dependent on ownership of the Estate property. *Id.*

In 2015, Plantation Properties "assign[ed], set over, transfer[red] and convey[ed] to" Westbury Park and Westbury Commercial all of its "rights, title and interest in and to the Estate Agreement . . . and to the Estate Funds" in the Assignment document. (Assignment) (R. pp. _). The "Estate Agreement" is defined as the 2005 Amendment to the Declaration, which ratified and confirmed the Declaration. (Assignment p. 1; Amendment p. 2) (R. pp. _).

The Assignment validly assigned Plantation Properties' Declarant rights in the Declaration, as amended, to Westbury Park. Therefore, Westbury Park, as a Declarant, may renew the Declaration under paragraph 9.01.

The Estate argues that Plantation Properties assigned only "the right to *collect* the assessment" and not all of the Declarant's rights. (Br. of App. p. 14) (emphasis in original). Significantly, this argument is a concession that Plantation Properties retained Declarant rights to assign. If it could assign the right to collect the easement assessment, then it could assign the right to renew the Declaration. This defeats a number of the Estate's appellate arguments. Nevertheless, the plain language of the Assignment states Plantation Properties assigned its rights in "the Estate Agreement," which is the 2005 Amendment (allowing a condominium horizontal property regime) that "ratified and confirmed" the Declaration. (Amendment) (R. pp. _). Plantation Properties assigned its Declarant rights in the Declaration, as amended.

The Estate argues that the Declarant rights are a real property interest and, therefore, if the Assignment conveyed the Declarant rights, it must be recorded under S.C. Code Ann. § 30-7-10. (Br. of App. pp. 14-15). This is incorrect. The Supreme Court found "persuasive" an Illinois

appellate court opinion it described as "noting developers' rights are generally personal in nature." *Peoples Fed. S&L Ass'n v. Res. Planning Corp.*, 358 S.C. 460, 479, 596 S.E.2d 51, 61 (2004) (citing *Bd. of Managers of the Medinah on the Lake Homeowners Ass'n v. Bank of Ravenswood*, 692 N.E.2d 402, 404-05 (Ill. App. Ct. 1998)). For brevity, § 30-7-10 is not quoted here, but a reading of its language demonstrates it does not apply to an assignment of Declarant rights.[10]

Finally, the Estate's argument that Westbury Park (or the prior Declarant) must own the Estate condominium property to be the Declarant is contradicted by its conduct and that of its creator, Montecito Westbury. Plantation Properties, the prior Declarant, sold the Estate property to Westbury Park Apartments, Ltd., on the same day that it created the Declaration. (Deed, Cmplt. Exh. 2) (R. pp. _). Under the Estate's argument, Plantation Properties ceased to be the Declarant on November 10, 1998. Contrary to that argument, for seventeen years the Estate paid Plantation Properties, as the Declarant, the easement assessment. Further, despite Plantation Properties' lack of ownership of the Estate property, on November 1, 2005, Montecito Westbury and Plantation Properties entered into the Amendment to the Declaration. (Amendment) (R. pp. _). The Amendment still identified Plantation Properties as the "Declarant" and amended the Declaration to permit condominiums, thereby allowing the creation of the Estate condominium horizontal property regime. *Id.* If Plantation Properties lost its Declarant rights when it sold the Estate property, then it had no right to amend the Declaration, and the Estate condominiums violate the covenants and should not have been built. The point is that the record plainly shows that all of the involved entities recognized that Plantation Properties still held the Declarant rights even after it sold the Estate Property.

[10] Regardless, the Assignment was recorded along with the Notice of Extension. (Not. of Ext.) (R. pp. _).

Westbury Park acquired the Declarant rights and properly exercised them to renew the Declaration.

ii. Westbury Park filed the renewal notice prior to the expiration of the term.

The remaining requirements for renewal are that the Declarant files "a notice of extension with the Office of the Register of Mesne Conveyances for Beaufort County, South Carolina prior to the expiration of any term." (Declaration, § 9.01) (R. p. _, § 9.01). There is no dispute that Westbury Park filed a "Notice of Extension" with the Beaufort County Register of Deeds on October 23, 2018, prior to the expiration of the initial twenty-year term on November 12, 2018. (Notice of Ext.) (R. pp. _).

Westbury Park strictly complied with the renewal requirements in paragraph 9.01. The renewal is valid, and the Estate must pay the easement assessment.

IV. Neither contract law nor property law affect the validity of the renewal.

The Estate's final arguments against the renewal are that it violates contract and property law. (Br. of App. pp. 20-24). Both arguments are incorrect.

As to contract law, Westbury renewed the existing terms of the Declaration. The Estate argues that a contract may only be "altered" by the parties and not unilaterally by one party such as a declarant. (Br. of App. pp. 20-21). It cites to authorities that prohibit unilateral modification or alteration of a contract. *See Lee v. Univ. of S.C.*, 407 S.C. 512, 518, 757 S.E.2d 394, 398 (2014) (referring to a "unilateral attempt to modify" and whether a party may "unilaterally alter its terms" (internal quotation marks omitted)); *Sauner v. Public Serv. Auth.*, 354 S.C. 397, 405, 581 S.E.2d 161, 166 (2003) (referring to whether a party may "alter the terms of a bilateral contract by unilateral modification"). These are neither applicable nor dispositive. They are not applicable because Westbury Park did not modify or alter the Declaration.

The authorities are not dispositive because they do not trump the freedom of parties to contract as they see fit. "Restrictive covenants are contractual in nature." *Hardy v. Aiken*, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006). The Declaration expressly provides for unilateral renewal in a public, recorded document. Every owner in the Estate took ownership with knowledge of the unilateral renewal provision. "The courts must construe and enforce contracts as written, in order to preserve the fundamental right of freedom of contract. In general, therefore, parties may bind themselves as they see fit by contract, unless the contract would violate the law or is contrary to public policy." *S.C. Dep't of Transp. v. M & T Enters. of Mt. Pleasant, LLC*, 379 S.C. 645, 657, 667 S.E.2d 7, 13-14 (Ct. App. 2008). A unilateral renewal option does not violate the law and is not contrary to public policy. The opposite is true. "The most common pattern . . . is to establish expiration on a date certain, but with automatic renewal." 17 S.C. Jur. *Covenants* § 67. Under the plain language of the Declaration, Westbury Park may unilaterally renew it.

As to property law, the Estate argues that the Declaration creates a real property interest held by the Estate condominium owners and that interest "cannot be unilaterally altered" and "cannot be divested" without due process. (Br. of App. pp. 22-24). This argument ignores that the Declaration—which the Estate alleges vests its owners with a real property interest—defines and conveys that property interest ***subject to*** a twenty-year term with ten-year renewals at the option of the Declarant. *See Erkes v. Kasparek*, 303 S.C. 70, 73, 399 S.E.2d 6, 8 (Ct. App. 1990) (stating that when interpreting restrictive covenant contracts "intent should be gleaned, as nearly as possible, from the instrument itself"); *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987) ("The rule of strict construction governing restrictive covenants does not preclude their enforcement. A restrictive covenant will be enforced if the covenant expresses the party's intent or purpose, and this rule will not be used to defeat the clear express language of the

covenant."). The Estate also, again, bases its argument on the incorrect premise that the renewal alters its property interests. It merely renews the term of the Declaration (as amended). The easement was granted subject to the renewal provision.

V. The Estate is not entitled to an accounting.

The Estate's accounting issue is abandoned because it makes only a conclusory, one-paragraph argument and does not cite legal authority. (Br. of App. pp. 14-15). *See Bryson v. Bryson*, 378 S.C. 502, 510, 662 S.E.2d 611, 615 (Ct. App. 2008) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."); *Glasscock, Inc. v. United States Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.").

On the merits, its position is incorrect. A cause of action for an accounting in this situation[11] is an equitable remedy. "[E]quity has jurisdiction where a fiduciary relation exists between the parties, and the duty rests upon the defendant to render an accounting." *Lee v. Lee*, 251 S.C. 533, 536, 164 S.E.2d 308, 309 (1968). Here, there is no fiduciary duty owed by Westbury Park, as either a Declarant or a servient estate, to the Estate.

"A fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence." *O'Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992). The Estate did not place special confidence in Westbury Park. It accepted an easement subject to the terms of the Declaration, which is silent as to an accounting.

[11] There is scant law on an action for an accounting outside of the business/partnership context.

Westbury Park owes the Estate a duty to keep the required streets in good repair, but does not owe a heightened fiduciary duty. *See, e.g.*, *id.* at 15, 416 S.E.2d at 632 ("We have never imposed the high standard of fiduciary duty on planned community organizations, such as the Board, which are vested with the discretion to ensure that proposed modifications to residential property enhance the entire community."). The Estate cites to no authority for a fiduciary relationship in the situation where a dominant estate agreed to pay money for maintenance costs of an easement over the servient estate. Equity already demands that a dominant estate pay for maintenance without the existence of a fiduciary duty. *See, e.g.*, *Hayes v. Tompkins*, 287 S.C. 289, 294, 337 S.E.2d 888, 891 (Ct. App. 1985) (holding "the apportionment [between the dominant and servient estates] by the trial judge of the burden of maintenance and repair is equitable").

The Court should find the Estate is not entitled to an accounting.

CONCLUSION

Because the order on appeal is not immediately appealable, this Court should dismiss the appeal. Alternatively, because the Estate failed to preserve its appeal, this Court should affirm on the merits. If the Court finds it appealable and properly preserved, then it should find that Westbury Park validly renewed the Declaration, the Estate must pay the assessment as stated in the Amendment, and the Estate is not entitled to an accounting.

Respectfully submitted,

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