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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Mikell R. Scarborough, Master-in-Equity

Case No. 2016-CP-10-1560
Appellate Case No. 2017-002546

CARPENTER BRASELTON, LLC,Appellant,

vs.

ASHLEY ROBERTS, JEREMY COOK, and
SALAHEDDINE EZZAUDI, Respondents.

REPLY TO RETURN TO PETITION FOR REHEARING *EN BANC*

Daniel F. Blanchard, III (SC Bar No. 65342)
ROSEN HAGOOD, LLC
151 Meeting Street, Suite 400
Charleston, SC 29401
(843) 577-6726

John E. Rosen (SC Bar No. 72625)
J. ROSEN LAW, LLC
Post Office Box 1880
Folly Beach, SC 29439
(843) 633-0917

Liam D. Duffy (SC Bar No. 102234)
YARBOROUGH APPLGATE, LLC
291 East Bay Street, Second Floor
Charleston, SC 29401
(843) 972-0150

ATTORNEYS FOR THE APPELLANT

Appellant Carpenter Braselton, LLC (“Appellant”) respectfully submits this reply in support of its Petition for a Rehearing *En Banc*.

In Respondents’ Return, they argue (1) extrinsic evidence was properly considered to add to, subtract from, vary, or explain the unambiguous terms on the recorded subdivision plat (the “Plat”) because the “origin” of those unambiguous terms is supposedly ambiguous, (2) the terms on the Plat stating the properties are to be utilized “for agricultural use only” and “not to be used for building purposes” are purportedly ambiguous (despite the fact this Court held those same terms are unambiguous), and (3) Appellant allegedly waived its argument that the notes which the County added to the Plat as conditions to its approval of the owners’ subdivision plan constitute enforceable restrictive covenants running with the land.

First, no South Carolina case has ever held that extrinsic evidence is admissible to explain or add to an unambiguous notation on a recorded plat because the “origin” of the notation is ambiguous. See Return p.6. Although Appellant has read the Return several times, Respondents conspicuously fail to cite a single case from South Carolina or any other jurisdiction adopting such a rule. To the contrary, as noted in Appellant’s Petition, in Hamilton v. CCM, Inc., 274 S.C. 152, 263 S.E.2d 378 (1980), our Supreme Court held the circumstances surrounding the origin of a plat restriction may be considered in construing that restriction *when the language of the restriction is ambiguous*. Id. at 157, 263 S.E.2d at 381. However, when the language of the restriction is unambiguous, as is the case here, it is improper to “construe” the restriction or to inquire into the circumstances surrounding the restriction’s origin.

As stated in an oft-cited legal treatise:

If the language of a restrictive covenant is clear and unambiguous, the covenant is given effect according to its terms, and ***if the plain terms of restrictive covenants are sufficiently clear, the court interprets them without reference to any attendant facts and circumstances or extrinsic evidence.*** That is, when there is

no ambiguity, there is no need to inquire into the intention of the parties to a restrictive covenant. In fact, *when the language of a restrictive covenant is clear and unambiguous, it is improper to inquire into surrounding circumstances or objects and purposes of restrictions for aid in its construction.*

21 C.J.S. Covenants § 25 (emphasis added); see also Linder Corp. v. Pyeatt, 264 S.W.2d 619, 622 (Ark. 1954) (“The cases uniformly hold (a) that when the language of the restrictive covenant is clear and unambiguous, the parties will be confined to the meaning of the language employed; and (b) that if the language is plain and unambiguous, it is unnecessary and improper to inquire into the surrounding circumstances or the objects and purposes of the restriction for aid in its construction, because when the language is clear and unambiguous it needs no evidence to explain it.”); de Castro v. Durrell, 671 S.E.2d 244, 250 (Ga. Ct. App. 2008) (“As the recorded documents are unambiguous, we may not consider either parol evidence or surrounding circumstances to interpret them.”).

This Court correctly held in its initial Opinion that the notation on the Plat stating the properties are to be used “for agricultural use only” and “not to be used for building purposes” is unambiguous. See Opinion p.3. As such, the Court’s task is to enforce those terms “according to their plain and obvious meaning.” Hanold v. Watson’s Orchard Prop. Owners Ass’n, Inc., 412 S.C. 387, 396-97, 772 S.E.2d 528, 533 (Ct. App. 2015). It was error to engage in construction or to admit extrinsic evidence to explain those terms.

Second, despite the fact this Court held the restrictions on the Plat are unambiguous, Respondents now ask this Court to reverse course and to modify its Opinion to find the restrictions are ambiguous, thus justifying the consideration of extrinsic evidence. The Plat in this case clearly states: “THESE LOTS, C-2, C-3, C-4, & C-5 FOR AGRICULTURAL USE ONLY, NOT TO BE USED FOR BUILDING PURPOSES.” R. p.688. There is no dispute this

restriction applies to Respondents' properties.

Courts in other jurisdictions applying similar plat restrictions have rejected claims they were ambiguous. In Perrige v. Horning, 654 A.2d 1183 (Pa. Sup. Ct. 1995), a subdivision plat contained a note stating: "LOT NO. 4 (RESIDUE) WILL BE USE [sic] FOR AGRICULTURAL USE ONLY." The Court held the restriction was unambiguous and that subdivision owners could enforce it to limit the use of the Lot 4 property to "agricultural use only." Id. at 1187. Similarly, in Gibson v. Huffman, 540 S.E.2d 222 (Ga. Ct. App. 2000), the Court held that a deed allowing property to be used for "agricultural or recreational purposes only" was not ambiguous. Id. at 223 ("The deed at issue is not ambiguous.").

In Green v. Lawrence, No. RE-03-23, 2004 WL 6241302 (Me. Super. Ct. Oct. 01, 2004), the subdivision plat contained a note stating that "Lots 8, 9, 10, and 11 are restricted to use as wood lots only." Id. at *2. The Court held "there is no ambiguity in the 'wood lots only' language and it is not necessary to consider extrinsic evidence for purposes of interpretation of the contract." Id. In Defeo v. Cmty. Servs. Assocs., Inc., No. 2007-UP-357, 2007 WL 8327948 (S.C. Ct. App. July 24, 2007), this Court held the following plat restriction was unambiguous: "RESERVED FOR FUTURE USE FOR GOLF COURSE." Id. at *2. This Court held the plat unambiguously restricted the use of the property to golf course purposes only. Id.

Respondents again conspicuously fail to cite a single case from South Carolina or any other jurisdiction holding the Plat restriction in this case is ambiguous. Respondents nevertheless attempt to manufacture or create an ambiguity where none exists. They first argue the restriction must be ambiguous because the Respondents interpret it differently than does the Appellant. "But a contract is not ambiguous merely because a party to it, often with a rearward glance colored by self-interest, disputes an interpretation that is logically compelled." Muskat v. United

States, 554 F.3d 183, 190 (1st Cir. 2009).¹ Rather, a “contract is ambiguous when *the terms of the contract* are *reasonably susceptible* of more than one interpretation.” S.C. Dep’t of Nat. Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) (emphasis added); see also 17A AM. JUR. 2D Contracts § 326 (“A contract is not ambiguous simply because the parties urge varying or competing interpretations. Terms of a contract are not ambiguous simply because one party seeks to endow them with a different interpretation according to his or her own interests. A mere disagreement between the parties as to the meaning of a disputed contractual provision is not enough to support a claim that the contractual language is ambiguous, as any ambiguity in a contract must emanate from the language used in the contract rather than from one party’s subjective perception of its terms.”).

The terms of the restriction on the Plat are not reasonably susceptible of more than one interpretation. They clearly and emphatically state that Lots C-2, C-3, C-4, and C-5 are “for agricultural use only” and “not to be used for building purposes.” R. p.688.

Respondents next argue that the above-quoted note on the Plat referring to Lots C-2, C-3, C-4, and C-5 does not really mean those lots are “for agricultural use only” and “not to be used for building purposes” because a separate note that does not even refer to Lots C-2, C-3, C-4, and C-5 at all—but which is expressly directed to Lot C-1 and only to that lot—states that Lot C-1 “meets current minimum health department standards for a modified conventional sub-surface disposal system only.” Respondents claim this note involving Lot C-1 must mean that “if sewer or a modified conventional sub-surface disposal system would [ever] become available [for Lots C-2, C-3, C-4, and C-5 at some point in the future], then [those] lots could be used for building

¹ “Restrictive covenants upon real estate are contractual in nature and bind the parties thereto just like any other contract.” Hynes Fam. Tr. v. Spitz, 384 S.C. 625, 629, 682 S.E.2d 831, 833 (Ct. App. 2009).

purposes” and they would no longer be restricted to agricultural use. See Return p.8.

Of course, no such meaning or intent is expressed anywhere on the face of the Plat. Instead, to reach such a conclusion, the Court must accept extrinsic evidence showing that Respondents *secretly or subjectively intended* for Lots C-2, C-3, C-4, and C-5 to no longer be restricted to “agricultural use only” and for them to be used “for building purposes” if sewer or a modified conventional sub-surface disposal system became available for those lots. It is exactly this type of extrinsic evidence of secret or subjective intentions the law rejects. Our courts have repeatedly said that the “[i]nterpretation of a contract is governed by *the objective manifestation of the parties' assent at the time the contract was made*, rather than the subjective, after-the-fact meaning one party assigns to it.” Rodarte v. Univ. of S.C., 419 S.C. 592, 603, 799 S.E.2d 912, 917–18 (2017) (emphasis in original).

In construing a restrictive covenant, the Court “is without authority to consider parties’ secret intentions, and therefore words cannot be read into a contract to impart an intent unexpressed when the contract was executed.” Matsell v. Crowfield Plantation Cmty. Servs. Ass'n, Inc., 393 S.C. 65, 71, 710 S.E.2d 90, 93 (Ct. App. 2011); see Defeo, 2007 WL 8327948 at *3 (testimony of owner and lawyer offered to explain why unambiguous label was used on a plat and what it meant was inadmissible as extrinsic evidence); Northpark Assoc. No. 2 v. Homart Dev. Co., 414 S.E.2d 214 (Ga. 1992) (developer’s and county’s subjective intent in recording a plat inadmissible where plat is unambiguous); Kepler-Fleenor v. Fremont Cty., 268 P.3d 1159 (Idaho 2012) (Engineer’s affidavit regarding his intent when drafting subdivision plat was inadmissible parol evidence in action for declaratory judgment as to whether unnamed road in subdivision was public by common law dedication, as plat unambiguously dedicated the disputed road to the public.).

If the County or owners had wanted to place a caveat on the Plat stating that Lots C-2, C-3, C-4, and C-5 will no longer be restricted to “agricultural use only” if sewer or a modified conventional sub-surface disposal system becomes available in the future, they could have easily stated such on the Plat. They did not do so. Respondents are asking the Court to construe the Plat to include language the owners should have added to the Plat, not the actual language on the Plat. It is not the Court’s function to add language to the restrictions which the owners may have desired if they had thought about it more carefully, but which they did not in fact include on the recorded Plat. Arcadian Shores Single Fam. Homeowners Ass’n, Inc. v. Cromer, 373 S.C. 292, 299, 644 S.E.2d 778, 782 (Ct. App. 2007) (“The court may not limit a restriction, nor will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms, even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written.”); Steffenson v. Olsen, 360 S.C. 318, 322, 600 S.E.2d 129, 131 (Ct. App. 2004) (“Had the parties intended to limit the award to those benefits accrued during the marriage, they could have so provided, and it is not for the trial court or this court to change the terms the parties agreed upon.”).

Respondents are now unabashedly inviting this Court to distort or rewrite—not interpret—the restrictions on the Plat. The Court obviously cannot accept their invitation. “The judicial function of a court of law is to enforce a contract as made by the parties, and not to rewrite or to distort, under the guise of judicial construction, contracts, the terms of which are plain and unambiguous.” Hardee v. Hardee, 355 S.C. 382, 387, 585 S.E.2d 501, 503 (2003). Courts “are without authority to alter a contract by construction or to make new contracts for the parties.” C.A.N. Enterprises, Inc. v. S.C. Health & Hum. Servs. Fin. Comm’n, 296 S.C. 373, 378,

373 S.E.2d 584, 587 (1988) (citing Gilstrap v. Culpepper, 283 S.C. 83, 320 S.E.2d 445 (1984)). The Court's "duty is limited to the interpretation of the contract made by the parties themselves '... regardless of its wisdom or folly, apparent unreasonableness, or failure to guard their rights carefully.'" Id.

The mere fact that Lots C-2, C-3, C-4, and C-5 could meet the standards for a sub-surface disposal system at some point in the future does not mean the restrictions placed on those lots simply vanish. The Court rejected this same claim in Green. There, the defendant owned a parcel of property that it intended to subdivide into 18 lots. After the defendant applied for subdivision approval with the town's planning board, it was discovered that lots 8-11 did not have soil conditions suitable for construction of a wastewater septic system. As a result, the town required that lots 8-11 be limited to "wood lot use only." The subdivision plan that the town approved included notes for each of the four lots stating "Lot_ Not Suitable For Subsurface Sewerage Disposal" and also stating: "No more than one single-family dwelling shall be maintained on lots 1, 2, 3, 4, 5, 6, 7, 12, 13, 14, 15, and 16. ***Lots 8, 9, 10, and 11 are restricted to use as wood lots only.***" Green, 2004 WL 6241302 at *1 (emphasis added).

Twenty years later, after soil requirements for subsurface disposal systems had changed so that lots 8-11 could qualify for residential development, the defendant sought to develop the lots and to use them for residential purposes because they then had suitable soil conditions. However, in a lawsuit by other property owners in the subdivision to prevent the defendant from developing the lots, the Court ruled that the "wood lots only" language in the subdivision plan constituted a restrictive covenant enforceable by those owners. Id. at *2. The Court further found that "there is no ambiguity in the 'wood lots only' language and it is not necessary to consider extrinsic evidence for purposes of interpretation of the contract." Id. The Court enforced the

notations on the subdivision plan as written and entered a judgment declaring that lots 8-11 “are limited to wood lot use only as provided in the provisions of the ... restrictive covenants unless this restriction is removed by those property owners benefiting from this restriction.” Id. at *3.

Respondents’ Return spends considerable effort trying to explain why it was irrational or nonsensical for the owners to have placed *permanent* restrictions on Lots C-2, C-3, C-4, and C-5. They argue the owners should be given a break and treated differently under the law because they may not have subdivided the property with the intent to “develop” it. See Return p.11.² Of course, Respondents cite no law for the proposition that restrictive covenants should be enforced differently or not as stringently against individual owners who subdivide property with no intent of developing it. There is simply no such law or rule.

Respondents further claim there was “no incentive or reason” for the owners to “voluntarily restrict four of the lots while one of the lots remained unrestricted.” See Return p.12.³ The fact that the owners may have made a poor or ill-considered decision in recording permanent restrictions against the property is immaterial. The Court’s “duty is limited to the interpretation of the contract made by the parties themselves ‘... regardless of its wisdom or folly,

² Respondents cite no evidence in the record to support this assertion. It appears to be speculation.

³ Respondents again fail to cite any evidence in the record supporting this assertion. For all the record shows, there could have been very good reasons why the owners placed the restrictions on the property. F. Elliotte Quinn, III, the surveyor who prepared the Plat, offers his subjective intent as to reasons why the restrictions were placed on the Plat. Even ignoring the fact that his affidavit is inadmissible extrinsic evidence, he states the restrictions were placed on the Plat so the owners could obtain approval to subdivide their larger tract of property into smaller lots. R. p.687-89. This certainly was a benefit to the owners. It is not “illogical” to think the owners were willing to agree to the County’s restrictions on the property to obtain permission to subdivide their larger property into smaller lots and to obtain approval to record their subdivision plat even though they had not been given any assurance that Lots C-2, C-3, C-4, and C-5 could ever be used for any purpose other than agricultural use. Respondents are asking this Court to engage in speculation and conjecture as to what the owners may have intended.

apparent unreasonableness, or failure to guard their rights carefully.” C.A.N. Enterprises, Inc., 296 S.C. at 378, 373 S.E.2d at 587.

Finally, Respondents claim that Appellant cannot enforce the restrictions if the County (and not the owners or their surveyor) put them on the Plat because Appellant allegedly waived this issue by not specifically arguing that the County’s notes on the Plat are enforceable as restrictive covenants. Respondents altogether ignore the fact that Appellant has consistently argued in the trial court and in this Court that the restrictions on the face of the Plat are enforceable against Respondents. See Appellant Brief pp. 15-20; Reply Brief pp. 1-2; R. p.341-42, 672-75. At every stage, Appellant has repeatedly quoted the actual note on the Plat (which was apparently placed there by the County) and specifically argued that this same note (the one apparently placed there by the County) “create[s] a valid restrictive covenant that requires the Lots C-2, C-3, C-4, and C-5 to be used for agricultural purposes only.” See Appellant Brief p.20; Reply Brief pp.3-4 (pointing out Appellant relied upon the note placed on the Plat by the County in purchasing its property and it would be unfair to deny it the benefit of the restriction); R. p.341-42 (quoting the note on Plat and stating it “create[s] a valid restrictive covenant that requires the Lots C-2, C-3, C-4, and C-5 to be used for agricultural purposes only”); R. p.672-75.

Appellant’s position is that it does not matter *who* placed the restrictions on the Plat. Rather, the important fact is *what* restrictions were placed on the Plat which the owners recorded with the Register of Deeds. As discussed in Appellant’s Petition, plat restrictions are enforceable even if they were placed there by a governmental entity as part of its approval of the subdivision plan for the properties. This is not some radical holding, but is in keeping with the “well-settled principle that when lands are granted according to an official plat of the survey of such lands, the plat itself, with all its notes, lines, descriptions, and land-marks, becomes as much a part of the

grant or deed by which they are conveyed, and controls, so far as limits are concerned, as if such descriptive features were written out upon the face of the deed or the grant itself.” Cragin v. Powell, 128 U.S. 691, 696 (1888).

Although Appellant’s prior briefs did not specifically say the restrictions on the Plat are enforceable *regardless of who placed them there*, that assertion was subsumed in its arguments to the trial court and this Court. It was unnecessary to make a more nuanced argument to preserve the fundamental issue of whether the restrictions on the Plat are enforceable against Respondents as restrictive covenants running with the land, which is the argument that Appellant has consistently made from the outset of this litigation. The cases cited in Appellant’s Petition simply reinforce the same argument that Appellant has been making all along, which is that the restrictions on the Plat are restrictive covenants running with the land and they can be enforced against Respondents (even assuming it was the County who placed them on the Plat). Appellant has not waived any argument.⁴

In conclusion, Appellant respectfully submits that the Court’s holdings are erroneous, a rehearing should be granted, and the trial court’s order should be reversed.

⁴ “[I]ssue preservation is not a ‘gotcha’ game.” State v. Bowers, 428 S.C. 21, 29, 832 S.E.2d 623, 627 (Ct. App. 2019). “Instead of being hyper-technical, [the appellate courts] approach preservation with a practical eye.” Id. Issue preservation rules “are designed to give the trial court a fair opportunity to rule on the issues.” Queen’s Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006); see also Bartles v. Livingston, 282 S.C. 448, 463, 319 S.E.2d 707, 716 (Ct. App. 1984) (“The standard which guides [this Court] is whether, despite the improperly framed exception, the issue sought to be raised is reasonably clear to this Court and the adverse party.”).

Respondents cannot seriously contend that Appellant failed to make it reasonably clear that its position is the restriction on the Plat (even if put there by the County) is enforceable against the Respondents as a restrictive covenant running with the land. Respondent also cannot claim that Appellant failed to give the trial court a fair opportunity to rule on the question of whether the restriction (even if put there by the County) is enforceable against Respondent as a restrictive covenant. That is all that is required.

Respectfully submitted,

By: Daniel F. Blanchard, III

Daniel F. Blanchard, III
ROSEN HAGOOD, LLC
151 Meeting St., Suite 400
P.O. Box 893
Charleston, SC 29402
(843) 577-6726

By: John E. Rosen

John E. Rosen (SC Bar No. 72625)
J. ROSEN LAW, LLC
Post Office Box 1880
Folly Beach, SC 29439
(843) 633-0917

By: Liam D. Duffy

Liam D. Duffy (SC Bar No. 102234)
YARBOROUGH APPEL GATE, LLC
291 East Bay Street, Second Floor
Charleston, SC 29401
(843) 972-0150

ATTORNEYS FOR APPELLANT

Charleston, South Carolina
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CARPENTER BRASELTON, LLC, Appellant,

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PROOF OF SERVICE

I hereby certify that on the date referenced below, a true and correct copy of the Reply to Return to Petition for Rehearing *En Banc* in the above-captioned action was e-mailed and deposited in the U.S. mail with sufficient first-class postage affixed thereto and addressed to:

Demetri K. Koutrakos, Esquire
Callison Tighe, & Robinson, LLC
P.O. Box 1390
Columbia, SC 29202

John E. Rosen, Esquire
J. ROSEN LAW, LLC
Post Office Box 1880
Folly Beach, SC 29439

Liam D. Duffy, Esquire
YARBOROUGH APPLGATE, LLC
291 East Bay Street, Second Floor
Charleston, SC 29401

This the 27th day of August, 2021.

ROSEN HAGOOD, LLC

By: /s/ Daniel F. Blanchard, III

Daniel F. Blanchard, III (SC Bar No. 65342)

151 Meeting Street, Suite 400

Charleston, SC 29401

(843) 577-6726 telephone

dblanchard@rosenhagood.com

ATTORNEYS FOR APPELLANT

Frank Blanchard

From: Frank Blanchard
Sent: Friday, August 27, 2021 2:01 PM
To: ctappfilings@sccourts.org
Cc: jimkoutrakos@callisontighe.com; John Rosen; Liam Duffy; Ifalin@sccourts.org; Debbie Hill; Kathy Romero; Harry Dixon
Subject: Carpenter Braselton, LLC v. Ashley Roberts, 2017-002546
Attachments: Carpenter.Reply in Support of Petition for Rehearing.pdf; Carpenter.Proof of Service.pdf

Dear Ms. Kitchings:

Good afternoon. Please find attached a Reply to Return to Petition for Rehearing *En Banc* and Proof of Service that we are hereby filing in the above-referenced appeal. We are simultaneously copying all counsel of record on this e-mail. We are also mailing paper copies of the attachments to them via ordinary U.S. mail.

Thank you in advance for your assistance in this matter. Of course, please do not hesitate to contact me if you have any questions about the above or need any additional information.

With best regards,

Frank Blanchard

[Attorney at Law]

151 Meeting Street, Suite 400
Charleston, SC 29401

Office: (843) 577-6726 | Fax: (843) 724-8036

Direct Phone: (843) 266-8123 | Direct Fax: (843) 266-2232

dblanchard@rosenhagood.com

www.rosenhagood.com



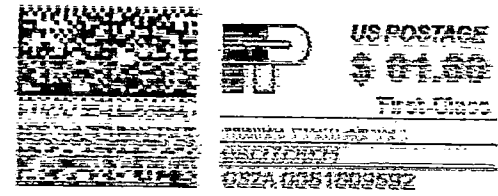
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ROSEN | HAGOOD

151 Meeting Street, Suite 400
Charleston, South Carolina 29401

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201