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SC Court of Appeals

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

Circuit Court Case No. 2015-CP-07-02722
Appellate Case No. 2020-001309

Colleton River Plantation Club, Inc.,……………………………….Respondent-Appellant,

v.

Joel S. Lee,……………………………………………………….Appellant-Respondent.

APPELLANT-RESPONDENT'S FINAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES....................iii

STATEMENT OF THE ISSUES ON APPEAL....................iv

STATEMENT OF THE CASE....................1

STANDARD OF REVIEW....................7

ARGUMENT....................7

I. The Master-in-Equity erred in attaching perpetual, ongoing, post-conveyance liability to Lee, in violation of real property law in South Carolina. 8

a. The terms of the contract are clear that it runs with the land 9

b. When he conveyed his Lot, Lee literally severed his bond with the Club....................11

II. The Master-in-Equity erred in attaching perpetual, ongoing, post-conveyance liability to Lee, in violation of the contract. 15

a. It was error to assign liability to Lee for the acts of Bluffton Properties 15

b. Section 7.1(c) of the Covenants does not support perpetual liability post-conveyance. 16

i. The Club had notice of the lot's transfer 18

ii. Lee's pre-transfer obligations were discharged in full. 20

III. Alternatively, Section 7.1(c) of the Declaration is void or invalid. 22

a. Section 7.1(c) is an unreasonable restraint on the alienation of property and therefore void....................23

b. Personal obligations do not run with the land....................26

c. Section 7.1(c) is ambiguous and invalid....................26

d. The trial court's order finding that Section 7.1(c) imparts perpetual, personal, and ongoing liability renders the contract void as against public policy. 28

IV. The trial court made numerous errors pertaining to Bluffton Properties, LLC. 29

V. The trial court's order overlooks evidence going to Lee's defenses of accord and satisfaction, estoppel, and violation of the South Carolina Nonprofit Corporation Act. 31

VI. The relief granted is not properly measured under the facts and law......33

CONCLUSION....34

TABLE OF AUTHORITIES

South Carolina State Cases

Batchelor v. American Health Ins. Co.,
234 S.C. 103, 107 S.E.2d 36 (1959) 28

Berkebile v. Outen,
311 S.C. 50, 426 S.E.2d 760 (1993) 28

Callawassie Island Members Club, Inc. v. Dennis,
425 S.C. 193, 821 S.E.2d 667 (2018) 7, 8

Carolina Cable Network v. Alert Cable TV, Inc.,
316 S.C. 98, 447 S.E.2d 199 (1994) 28

Cedar Cove Homeowners Ass'n v. DiPietro,
628 S.E.2d 284, 368 S.C. 254 (S.C. App. 2006) 21

Childs v. City of D.C.,
87 S.C. 506, 70 S.E. 296 (1911) 28

Crossman Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.,
395 S.C. 40, 717 S.E.2d 589 (2011) 7

Epps v. McCallum Realty Co.,
139 S.C. 481, 138 S.E. 297 (1927) 18

First Presbyterian Church of York v. York Depository,
203 S.C. 410, 27 S.E.2d 573..19

Hammond v. Tilghman Lakes, Inc.,
367 S.E.2d 446, 295 S.C. 152, 154 (Ct. App. 1987) 20

Hannah v. United Refrigerated Serv.,
312 S.C. 42, 430 S.E.2d 539 (Ct.App.1993), *cert. denied*, (December 7, 1993)......19

Hardy v. Aiken,
631 S.E.2d 539, 369 S.C. 160 (2006) 21

Kinard v. Richardson,
407 S.C. 247, 754 S.E.2d 888 (Ct. App. 2014) 10, 21

Lee v. Univ. of S.C.,
407 S.C. 512, 757 S.E.2d 394 (2014) 15, 20

Lowcountry v. Charleston Southern Univ.,
656 S.E.2d 775, 376 S.C. 399 (S.C. App. 2008) 21

PCS Nitrogen, Inc. v. Cont'l Cas. Co.,
429 S.C. 30, 837 S.E.2d 662 (S.C. App. 2019) 21

Proctor v. Steedley,
398 S.C. 561, 730 S.E.2d 357 (Ct. App. 2012) 15

Progressive Max Ins. Co. v. Floating Caps, Inc.,
405 S.C. 35, 747 S.E.2d 178 (2013) 16

Seabrook Island Property v. Berger,
616 S.E.2d 431, 365 S.C. 234 (2005) 15

Sprouse v. Winston,
212 S.C. 176, 46 S.E.2d 874 (1948) 21

Strother v. Lexington County Recreation Commn.,
479 S.E.2d 822, 826 (Ct. App. 1996), *aff'd as modified*, 504 S.E.2d 117 (1998).....19

Queen's Grant v. Greenwood Development,
628 S.E.2d 902, 368 S.C. 342 (Ct. App. 2006) 10, 12, 25

Ward v. West Oil Co.,
387 S.C. 268, 692 S.E.2d 516 (2010) 27

Webb v. Reames, 326 S.C. 444,
485 S.E.2d 384 (Ct. App. 1997) 24

White v. JM Brown Amusement Co., Inc.,
360 S.C. 366, 601 S.E.2d 342 (2004) 28

Other Caselaw

McMullen v. Hoffman,
174 U.S. 639, 19 S. Ct. 839, 43 L. Ed. 1117 (1899) 28

Rosenfeld, In re,
23 F.3d 833 (4th Cir. 1994) 12-13

Leh v. Burke,
331 A.2d 755 (Pa. Super. Ct. 1974) 13

Burgess v. JHM Hotels, LLC,
2010 WL 1493129, at *6 (D.S.C. Mar. 18, 2010),
report and recommendation adopted in part,
2010 WL 1493132 (D.S.C. Apr. 13, 2010) 20

Statutes

S.C. Code § 33-31-610....................33

S. C. Code § 27-30-120....................2

Miscellaneous

17A Am.Jur.2d Contracts § 507 20

61 Am.Jur.2d Perpetuities and Restraints on Alienation § 6 (2005)....................25

26 C.J.S. Deeds § 163 (1996)....................21

R. Cunningham, W. Stoebuck, & D. Whitman,
The Law of Property § 3.18, at 132 (2d ed. 1993)....................24

STATEMENT OF ISSUES ON APPEAL

I. Whether the Master-in-Equity erred in attaching perpetual, ongoing post-conveyance liability to Lee, in violation of real property law in South Carolina?

II. Whether the Master-in-Equity erred in attaching perpetual, ongoing post-conveyance liability to Lee, in violation of the contract?

III. Alternatively, whether Section 7.1(c) of the Declaration is void or invalid?

IV. Whether the trial court made numerous errors pertaining to Bluffton Properties, LLC, which is not a party to this action?

V. Whether the trial court's order overlooks evidence going to Lee's defenses of accord and satisfaction, estoppel, and violation of the South Carolina Nonprofit Corporation Act?

VI. Whether the relief granted was not properly measured under the facts and law?

STATEMENT OF THE CASE

This appeal presents the question of whether a homeowners' association can continue to bill its former member for ongoing dues, fees, and assessments, long after the member has conveyed his property within the development — particularly when the member's obligations run with title to the land. Of course, it cannot.

I. Statement of the Facts

There are certain undisputed facts that control this case. Because the trial court did not correctly apply the law to those facts, this Court should reverse.

In 1993, Appellant Joel Lee paid $129,000 for Lot A02, which is a small and now nearly-worthless parcel of land[1] within the Colleton River Plantation development, in Beaufort County, South Carolina. (R. p. 351). Twenty years after buying Lot A02, Lee conveyed it to Bluffton Properties, LLC ("Bluffton Properties"). (R. p. 348). Significantly, Bluffton Properties is not a party to this litigation.

Colleton River Plantation is a master-planned community, designed around two golf courses, a tennis complex, and a nature preserve. As is typical with these sorts of communities, the "master planner" was a developer, Colleton River Development Company, LLC, which once owned a large tract of land. The developer had a vision for the property, which it implemented by subjecting the entire tract to certain covenants and restrictions that were to touch and concern the property and run with the land. (R. p. 270, "Preamble").

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[1] Similar lots (of which there are many) typically sit on the market untouched, even when listed for as low as $10,000.

The community's governing body is the Respondent Colleton River Plantation Club, Inc. ("Colleton" or the "Club"), a nonprofit corporation. The purpose of the Club is to manage and maintain the development's extensive common property, which it holds for the benefit of all those who live and own property in the community. (R. p. 270). The Club is essentially a homeowners' association, and it is the sole entity governing property owners in the development.[2]

Joel Lee bought Lot A02[3] subject to the *Colleton River Plantation Declaration of Covenants and Provisions for Membership in Colleton River Plantation Club, Inc.* (the "Declaration") (as amended). (R. p. 351; p. 262). The Declaration is the statement of covenants, conditions, and restrictions that binds all the property within the development with reciprocal servitudes that touch and concern the land. (R. p. 262). To comply with South Carolina's recording statute, the Declaration was recorded with the Beaufort County Register of Deeds. The Declaration states that it "shall run with the title to such property." (R. p. 270). **This link between the covenants and the land is the key to the trial court's error.**

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[2] Accordingly to the recently enacted South Carolina Homeowners' Association Act:

> "Homeowners association" or "association" means an entity developed to manage and maintain a planned community or horizontal property regime for which there is a declaration requiring a person, by virtue of his ownership of a separate property within the planned community or horizontal property regime, to pay assessments for a share of real estate taxes, insurance premiums, maintenance, or improvement of, or services or other expenses related to, common elements and other real estate described in that declaration.

S.C. Code § 27-30-120, Definitions.

[3] It is important, somewhat later on in this brief, that Lee did not buy his lot from the developer. His deed reflects that title to Lot A02 had changed hands at least twice before he acquired it. (R. p. 351).

The covenants contain a rubric for levying assessments against each lot. The assessments are the primary source of funding for Colleton Club. (R. pp. 299-303). The owner of each lot is responsible for the payment of assessments and, in return, the owner receives the benefit of the common property. Because they touch and concern the land, the assessments constitute a lien against each lot. (R. p. 301).[4]

For almost twenty years, Joel Lee—as the owner of Lot A02—paid significant dues and assessments to the Club, amounting to more than $1,000/month and totaling more than $300,000 over the course of the years. (R. p. 213). However, sometime in the summer of 2012, Lee began to fall behind on his assessment payments for Lot A102. On October 9, 2012, the Club filed suit against Lee for collection of several months of past due assessments. The Club got a default judgment against Lee for $21,503, representing "the amount due and owing pursuant to the Covenants . . . as of **July 31, 2013**." (R. p. 355) (emphasis added). The Club then turned the judgment over to a debt collection company called Tek-Collect. Tek-Collect ultimately settled with Lee, on behalf of the Club, for $8,977 on August 27, 2014. (R. p. 371). Less than a month later, the Club filed a Satisfaction of Judgment. (R. p. 359).

As the reader may recall, in the meantime (while the Club was pursuing Lee for unpaid dues through July 2013), Lee conveyed Lot A02 to Bluffton Properties, LLC, on December 31, 2012. (R. p. 13, ¶ 27; p. 348). The property transfer was expressly subject to the Colleton Declaration. (*Id.*). The deed from Lee to Bluffton Properties was duly recorded in the Office of the Register of Deeds for Beaufort County, South Carolina on

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[4] Most of these terms—like "lot," "owner," and "common property"—are defined by the Declaration, as this Court will learn in the Arguments, *infra*. (*See* R. pp. 270-271).

May 28, 2013. (R. p. 11, ¶ 23; p. 348). Based on the Club's governing documents, Lee understood that responsibility for assessments, which runs with title to the lot, transferred to Bluffton Properties upon conveyance.

At the time it filed its Satisfaction of Judgment, Colleton Club had actual and constructive notice of Lee's conveyance of the lot to Bluffton Properties. It is no surprise, then, that the Club thereafter looked to Bluffton Properties for the payment of assessments, in accordance with its own covenants. Indeed, a month after it filed the Satisfaction of Judgment as to Lee, the Club filed a lawsuit against Bluffton Properties for unpaid dues related to Lot A02. The Club told the court in those pleadings that "Defendant [Bluffton Properties], at all material times hereto, was the owner of Lot A02, Colleton River Plantation, Bluffton, South Carolina, as evidenced by a deed dated December 31, 2012 and recorded in the Office of the Register of Deeds for Beaufort County, South Carolina . . . ." (R. p. 361, ¶ 8); (*see also* R. p. 348). The Club ultimately got a default judgment against Bluffton Properties on May 12, 2015. (R. p. 360).

Despite its knowledge that Joel Lee had not owned Lot A02 for about three years,[5] the Club nonetheless filed the lawsuit which is the subject of this appeal, against Joel Lee on November 17, 2015. In the subject lawsuit, the Club sought dues, fees, and assessments that had accrued long after Lee was divested of title to the lot. The theory of the Club's case was that Lee was liable for breach of covenants (i.e. the Declaration). The Club chose not to make Bluffton Properties a party to the action; the Club did not seek to

[5] Note from the undersigned counsel: The final brief is slightly altered here from the initial brief to remove the statement: "and despite having a judgment against Bluffton Properties—the undisputed owner of the lot—". Colleton Club pointed out in its brief that this statement is inaccurate, since the Club's judgment was against a different entity with the same name.

pierce Bluffton Properties' corporate veil; the Club did not state any sort of cause of action to set aside the deed to Bluffton Properties, nor did the Club bring a Statute of Elizabeth Claim against Lee. Instead, the Club—as the architect of the lawsuit—elected to pursue Joel Lee alone.

In the Order on appeal, the Master in Equity found that Lee was liable to the Club for dues and assessments beginning on January 1, 2014 (two years after Bluffton Properties took title), which are "ongoing" and apparently perpetual, in the amount of at least $218,000. (R. p. 16).

It might help the Court to see the above paragraphs in sequential order:

1. Joel Lee buys Lot A02 in 1993.
2. The Club sues Mr. Lee for several months of unpaid dues in October 2012.
3. Joel Lee conveys Lot A02 to Bluffton Properties in December 2012.
4. Bluffton Properties records its deed in May 2013.
5. The Club gets a judgment against Lee for delinquent dues through July 2013.
6. Lee settles with the Club, and the judgment is satisfied in September 2014.
7. The Club sues Bluffton Properties for unpaid dues in October 2014.
8. The Club gets a judgment against Bluffton Properties in May 2015.
9. The Club sues Lee for dues (accruing from 2014), on November 15, 2015.

Although the Club will point to a lot of red herrings, the simple question for this Court is whether this case, as the Club elected to plead it, and the Club's governing documents, which unambiguously run with title, permit the Club to recover against an owner for obligations that arise long after that owner no longer holds title to a lot.

II. Procedural History

On November 15, 2015, Colleton Club filed a debt-collection Complaint against Joel Lee. (R. p. 25). Lee filed his responsive pleading on February 9, 2016, moving to dismiss the Complaint because he was not a proper party, and raising other affirmative defenses. (R. p. 35). On July 29, 2016, Colleton Club filed an Amended Complaint, alleging causes of action for: (1) breach of covenants; and (2) breach of covenants accompanied by fraud. (R. p. 41). The matter was referred by consent to the Master-in-Equity for Beaufort County on September 8, 2016. Lee filed his Answer to the Amended Complaint on October 4, 2016, asserting numerous affirmative defenses, including Accord and Satisfaction, Void Covenants and Contracts, Estoppel, Set-off and/or Limitation on Damages, and Violation of the Nonprofit Corporation Act. (R. p. 52).

The case proceeded to trial before the Honorable Marvin H. Dukes, III, Master-in-Equity for Beaufort County, on December 5, 2018. The parties filed a Joint Stipulation of Exhibits. (R. p. 59).

On February 13, 2020, the Master filed a Trial Order, after giving the parties opportunity to comment on a proposed draft order. (R. p. 4, R. p. 61). Both sides filed Motions to Alter or Amend the Judgment. (R. p. 73, R. p. 92). The Master denied both Motions on September 1, 2020. (R. p. 1).

On September 29, 2020, Lee served his Notice of Appeal. Colleton Club filed its Notice of Cross-Appeal on October 1, 2020.

STANDARD OF REVIEW

This appeal is about the trial court's errors of law in construing a clear and unambiguous contract. The construction of an unambiguous contract is a question of law, which is to be reviewed de novo by this Court. *See Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 198, 821 S.E.2d 667, 669 (2018) ("We review questions of law de novo.").

This Court's review of the trial court's decisions on questions of law "is plenary and without deference to the trial court." *Crossman Cmtys. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011).

ARGUMENT

This Court should reverse the trial court's order, which attaches perpetual, ongoing, personal liability to Joel Lee. As it stands, the order adjudges Lee liable for $218,999.33 in dues, fees, and assessments that accrued <u>after</u> Lee divested himself of his lot in Colleton River Plantation. The trial court's order errs as a matter of law for at least three reasons—all which stem from the clear and unambiguous terms of the contract at issue, which is bound to the land. First, the judgment has no basis in the law of real property, which controls the contract. Second, the judgment has no basis in the contract. Finally, and alternatively, the contract's sections on which the judgment relies are void under the law and public policy. This Court should reverse the trial court's judgment, which does not conform to the law of real property in South Carolina nor to the plain language of the covenants at issue.

I. The Master-in-Equity erred in attaching perpetual, ongoing post-conveyance liability to Lee, in violation of real property law in South Carolina.

This Court should reverse the portions of the lower court's order which hold Joel Lee liable for dues accruing after Lee no longer owned any property within Colleton River Plantation. The Club's cause of action against Lee is one for breach of covenants in the nature of contract. The contract the Club seeks to enforce is the *Declaration of Covenants for Colleton River Plantation* (the "Declaration"), which encumbers certain real property in Beaufort County, South Carolina.[6] The unambiguous terms of the Declaration bind it to the land. This Court should find that, by its own terms and under the law of South Carolina, the Declaration could not bind Joel Lee after he divested himself of his lot, in 2012.

This is a big picture argument, which is ripe for an appellate decision. While the supporting law is already in place, no appellate court in South Carolina has yet directly examined the question of whether real covenants can bind a property owner, in a planned community like Colleton River Plantation, to obligations that survive divesture by the owner of the bound property. The Supreme Court of South Carolina has suggested that such covenants would be severed upon conveyance. *See Dennis* at 202-203, 821 S.E.2d at 672 (2018) ("First, the Dennises' membership in the Club—and thus their obligation to pay membership dues, fees, and other charges—is tied to their ownership of a lot and house on Callawassie Island. If the Dennises truly wish to avoid paying membership

[6] The Club is charged with administration and enforcement of the Declaration. (Trial Ex. 1, Preamble) (R. p. 262).

dues, they may sell their house."). This Court should find that when Joel Lee conveyed his lot, his ongoing obligations to Colleton River Plantation Club ended.

a. The terms of the covenants are clear that it runs with the land.

Real covenants are bound to the land, not to the person. To construe the Club's Declaration of Covenants, this Court should look to the instrument's provisions, which are unambiguous that the covenants it contains touch and concern the land:

- The Declaration states that it shall "run with the title to such property . . . ." (R. p. 262).
- The Declaration has "a legal and binding effect on all owners and occupants of property in the Community." (R. p. 272, § 1.1, Scope and Applicability).
- An "Owner" is defined by the Declaration as a person who holds "record title to a Lot." (R. p. 274, 275, § 2.3).
- A "Lot" is defined as a parcel of land within Colleton River Plantation. (R. p. 277, § 3).

The Declaration is clear that the covenants go with title. "By accepting a deed or entering into a recorded contract to purchase any Lot, each Owner covenants and agrees to pay all assessments authorized in the Governing Documents . . . ." (R. p. 300, § 12.6).

In other words, under the law of South Carolina, Colleton's Declaration (and the terms it contains) is a real covenant.[7] "Restrictive covenants, sometimes referred to as 'real covenants,' are agreements 'to do, or refrain from doing, certain things with respect

[7] The Club does not actually dispute this, having brought a cause of action for breach of covenants.

to real property.'" *Kinard v. Richardson*, 407 S.C. 247, 754 S.E.2d 888, 893 (Ct. App. 2014) (*quoting Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 361, 628 S.E.2d 902, 913 (Ct. App. 2006) (citation and quotation marks omitted)). "Restrictive covenants affecting real property cannot be properly and fully understood without resort to property law. **Restrictive covenants differ from contracts in that they 'run with the land**,' meaning that they are enforceable by and against later grantees." *Id.* (emphasis added).

Membership in the Colleton River Plantation Club is—by design of the Declaration—an appurtenant servitude. The obligation to pay assessments is bound to the land, for the benefit of the land. *See* R. p. 300, § 12.5 ("The obligation to pay assessments shall commence *as to each Lot* on the date on which the Lot is made subject to this Declaration")); ("The primary source of funding is the assessments which this Chapter *authorizes the Club to levy against the Lots* and collect from the Owner of each lot.") (emphasis added). Assessments are levied against each lot by the Club so that it can maintain the common areas of the property, which are exclusively for the benefit of lot Owners. (R. p. 11, ¶ 22). The Club itself acknowledges that the rights and obligations of its members are appurtenant to the property. (R. p. 542, "Property ownership is the only form of membership that we have.").

In 1993, Lee became the title holder of a Lot subject to the Declaration. (R. p. 351). During the time that he owned the Lot, Lee was bound by the covenants, including the obligation to pay assessments. However, in 2013, Lee divested himself of title to the lot

by conveying it to Bluffton Properties, LLC. (R. p. 348). Bluffton Properties, LLC is not a party to this action.

b. When he conveyed his Lot, Lee literally severed his bond with the Club.

Because the Declaration is a covenant running with the land, the relationship between Lee and the Club is inextricably bound to Lot A02 in Colleton River Plantation. This is by design of the covenants themselves, which are systematically drafted to go with the land, rather than the person. So long as Lee owned property in Colleton Plantation burdened by the Declaration, he was obligated to pay the assessments tied to the land. However, once Lee divested himself of the property, he also divested himself of the obligations bound to, levied against, and running with the property.

The problem with the Order on appeal is not that Judge Dukes found Lee liable for unpaid assessments during the time of his ownership of the bound land. Lee does not dispute that he was obligated to pay those amounts, for so long as he was the holder of record title to the Lot. (R. p. 275, § 2.3) ("Each Person that holds record title to a Lot . . . is referred to in the governing documents as an **Owner**.") (emphasis in original). Instead, the error lies in the Order's judgment that Lee continued to owe ongoing assessments—for the benefit of the burdened property—accruing after Lee conveyed the property to a corporation that is not a party to this lawsuit. *See* R. pp. 18-19, ¶ 18 ("Lee remains liable for the ongoing Assessments owed to Colleton under the Covenants despite the transfer of Lot A02 to Bluffton Properties, LLC . . . ". **As a matter of law, Lee could not have had any *ongoing* obligation for assessments running with land that he no longer owns.**

In order to enforce any contract, including covenants running with land, privity must exist. Pursuant to the Declaration, Lee and Colleton Club were in privity as common owners of bound land.[8] Upon Lee's conveyance of the lot, the privity between Lee and the Club was severed. The Declaration expressly acknowledges this legal truth in Chapter 8, § 8.1, which delineates the Club's enforcement power, which is tied to the land: "Every **Owner, occupant, and visitor** to a Lot must comply with the Governing Documents and shall be subject to sanctions for violations as described in this chapter." (R. p. 290) (emphasis added). The Declaration defines an Owner as the record title holder to a lot. (*Id.*). Once Lee conveyed his Lot, he was no longer an "Owner" subject to the covenants; at that point, he no longer had a contractual or covenant relationship with the Club.

This conforms with the law in South Carolina and in other states. "Restrictive covenants, sometimes referred to as 'real covenants,' are agreements 'to do, or refrain from doing, certain things with respect to real property.'" *Queen's Grant*, 368 S.C. 342, 361, 628 S.E.2d 902, 913 (Ct.App.2006). "Restrictive covenants that require grantees to pay assessments for the upkeep of a particular parcel of property are held to be real covenants which 'touch and concern' land, **and therefore, run with the land**." *Id.; see also, Rosenfeld, In re*, 23 F.3d 833 (4th Cir. 1994) ("Under the Declaration, the obligation to pay assessments is a function of owning the land with which the covenant runs. Thus,

[8] Since this was a real covenant, the privity flowed through the land. Colleton Club, which owns the common property bound by the Declaration, can enforce the Declaration against other bound owners. Similarly, Owners have standing to enforce the covenants against other bound owners. *See* Declaration, § 8.2 (R. p. 290) ("The Club and every affected Owner shall have the right to file suit at law or in equity to enforce the Governing Documents.")

Rosenfeld's obligation to pay the assessments arose from his continued post-petition ownership of the property and not from a pre-petition contractual obligation. The post-petition assessments were for the upkeep of common areas and other common expenses during Rosenfeld's post-petition ownership. River Place's right to payment for post-petition assessments did not arise pre-petition and was not extinguished by Rosenfeld's bankruptcy discharge."); *Leh v. Burke*, 331 A.2d 755 (Pa. Super. Ct. 1974) ("When a promise to do an affirmative act, such as in this case to make a monetary payment, is found to run with the land, the person in possession at the time the obligation matures is responsible for discharging it. Conversely, prior or subsequent owners of the property, including the original covenantor, are relieved of responsibility not arising contemporaneously with their interest in the land. 'It has long been the law of this Commonwealth that the covenantor of . . . an easement or a benefit attached to land is not liable after parting with his title, for a breach occasioned by subsequent possessors of the land subject to the covenant.' As the Supreme Court stated, 'while on the land both covenantor and covenantee, with their respective assigns, had a substantial interest in the life of the covenant. When either parted with the title he parted with that interest. The one thus separating himself from the land could not enter the aliened premises to prevent a breach, he could enjoy no benefit from it, nor could he perform the covenant. It was so intended by the parties and was effective alike on covenantor and covenantee. The interest thus created was centered in or attached to the land itself, for the benefit of the other parcel. When the person divested himself of title, he transferred to his grantee the same right in the covenant that he possessed, with the same obligation imposed. There

was never any intention to impose personal responsibility apart from privity of estate or to enter into an engagement on personal credit. On the contrary, there was set up a contract operative and binding upon owners and future owners of the land as long as privity of estate lasted between them.'") (internal citations omitted).

Moreover, Colleton Club is the drafter of the Declaration and the architect of its relationship with its members. Hypothetically, the Club could (although it chose not to) have established an independent, personal contractual relationship with Lee, which could have endured apart from the property and beyond conveyance. Instead, the Club elected a relationship controlled by a Declaration of Covenants that runs with the land and terminates upon transfer of title.

This Court should reverse the portions of the trial court's judgment which impose "ongoing," post-conveyance liability on Lee, for the obligation to pay ongoing assessments appurtenant to property in which he holds no fee interest. Accordingly, the judgment against Lee should be reduced to an amount that only contemplates liability for the time-period in which Lee was an Owner, as defined by the Declaration. The Declaration defines an Owner as the record title holder to a lot. The deed from Lee to Bluffton Properties, LLC was duly recorded on May 28, 2013, at which point Lee no longer was the record title holder to any lot burdened by the Declaration. (R. pp. 274-75).

Because the trial court erred under the law of real property, this Court should reverse. Moreover, as discussed in the next section, the governing documents themselves do not support ongoing, post-conveyance liability for Lee.

II. The Master-in-equity erred in attaching perpetual, ongoing, post-conveyance liability to Lee, in violation of the contract.

The trial court found Lee liable for breach of covenants in the nature of contract. As discussed above, this was error under real property law. In addition to the lack of any privity between the Club and Lee, as well as Lee's lack of any ownership of burdened land, the covenants themselves do not support judgment against Lee subsequent to the Club's receipt of notice that Lee was no longer Owner of the burdened Lot. "Restrictive covenants are contractual in nature and bind the parties thereto in the same way as any other contract." *Seabrook Island Property v. Berger*, 616 S.E.2d 431, 365 S.C. 234 (2005) (internal citations omitted). The construction of a clear and unambiguous contract is a matter of law for the court. *Lee v. Univ. of S.C.*, 407 S.C. 512, 757 S.E.2d 394 (2014). Similarly, the determination of the grantor's intent when reviewing a clear and unambiguous deed is a question of law for the court. *Proctor v. Steedley*, 398 S.C. 561, 730 S.E.2d 357 (Ct. App. 2012).

a. It was error to assign liability to Lee for the acts of Bluffton Properties.

At the outset, as a matter of law, the Order errs in attaching liability to Lee for any breach by Bluffton Properties. The trial court improperly conflated Lee's actions with those of Bluffton Properties, finding Lee liable for "associated non-compliance by Bluffton Properties, LLC." (R. pp. 17-18). Without legal basis, the court appears to have disregarded the corporate entity entirely. However, Colleton Club did not bring any sort of claim to pierce the corporate veil as to Bluffton Properties, LLC. Regardless of whether or not Bluffton Properties may have breached the covenants, and regardless of whether or not Lee was one of Bluffton Properties' members (which is disputed, unproven, and

not the subject of this lawsuit), the law considers a corporation to be a wholly separate legal entity from its members. The Club chose not to include Bluffton Properties as a party to this action, and the trial court erred as matter of law by imputing the corporation's conduct to Lee.

b. Section 7.1(c) of the Covenants does not support perpetual liability post-conveyance.

The crux of the trial court's error is this flawed conclusion of law:

> Lee remains liable for the ongoing Assessments owed to Colleton [Club] under the Covenants despite the transfer of Lot A02 to Bluffton Properties, LLC of Nevada due to Lee's noncompliance with the Covenants regarding the transfer of same. Covenants Section 7.1(c).

(R. pp. 18-19, ¶ 18). This attachment of post-transfer liability to Lee was a misconstruction of the plain language of Section 7.1(c) of the Declaration. "In construing a contract, it is axiomatic that the main concern of the court is to ascertain and give effect to the intention of the parties." *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 46, 747 S.E.2d 178, 183 (2013). "If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required, and the contract's language determines the instrument's force and effect." *Id*. (internal citations omitted).

The plain terms of Section 7.1(c) restrict liability to the amount of assessments that is outstanding **prior to conveyance—** they do not provide any basis for ongoing liability:

> Section 7.1(c) *Transfer of Title*. Subject to Section 19.2,[9] an Owner desiring to sell or otherwise transfer title to his or her Lot shall give the [Club] Board

[9] The trial court failed to construe the contract in the context of its four corners. Section 19.2, to which notice is subject, gives the Club a right of first refusal in certain circumstances not applicable to the transfer at issue (*i.e.* when the lot is offered for sale on the real estate market), and which the evidence shows the Club never actually exercised as a practical matter. (*e.g.*, R. pp. 159-160); *see infra, Section III*, arguing alternatively this section did not apply and is void as an unreasonable restraint on alienation.

> at least 30 days' prior written notice of the name and address of the purchaser or transferee, the date of such transfer of title, and such other information as the Board may reasonably require. The Person transferring title shall continue to be jointly and severally responsible with the Person accepting title for all obligations of the Owner, including assessment obligations, **until the date upon which the Board receives such notice and all amounts outstanding prior to transfer are paid in full** notwithstanding the transfer of title.[10]

(R. p. 286) (emphasis added).

By its plain terms, when read in the context of the Declaration as a whole, this Section operates to do nothing more than (1) purport to give the Club a right of first refusal in certain circumstances;[11] and (2) impose joint liability on a grantor for assessment obligations, running with the title to the lot, accrued **prior to transfer**. The trial court erred when it found that this section inflicts ongoing, personal liability on Lee for assessments appurtenant to a lot that he does not own.

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[10] This clause is a companion to, and intended to mirror, Declaration § 12.6, which states "Upon a transfer of title to a Lot, the grantee shall be jointly and severally liable for any assessments and other charges **due at the time of conveyance**." (R. p. 300) (emphasis added). Read together, in context with the law of real property, it is clear that the intended joint and several liability is as to *outstanding* amounts as of the date of conveyance/record notice. In other words, it does not extend to amounts accrued post-conveyance.

[11] As to the right of refusal, no damages rightfully spring from that breach because the Club testified that the Club never actually exercises that right. Assuming, *arguendo*, that but for Lee's failure to give notice, Colleton would have elected to exercise its right of first refusal in this instance, the measure of damage would be the value of the lot, less assessments running with the lot, beginning at the time of conveyance. However, the burden was on the Club to prove such damages, which it has failed to do. In fact, the Club did not argue at all that it was damaged by its lost opportunity to exercise the rights found in Section 19.2, and the trial court did not make any findings of such damages.

Assuming, *arguendo*, that Section 7.1(c) validly reaches beyond the land to attach personal obligation,[12] the section identifies two prerequisites which must be satisfied to extinguish an Owner's liability for assessments: (1) the Club must have notice of transfer of title to a new Owner, and (2) the Owner must bring his account current with the Club. (R. p. 286) (the "Person transferring title shall continue to be jointly and severally responsible with the Person accepting title for all obligations of the Owner, including assessment obligations, until the date upon which the Board receives such notice and all amounts outstanding <u>prior to transfer</u> are paid in full") (emphasis added).

The trial court improperly ignored that both of Section 7.1(c)'s prerequisites were satisfied in this case.

i. The Club had notice of the lot transfer.

First, there is no dispute that Colleton Club had notice of Lee's transfer of title to Bluffton Properties. In fact, the Club had both actual and constructive notice that Bluffton Properties was title holder of Lot A02. The Club received constructive notice of the transfer as of the date that the deed from Lee to Bluffton Properties, LLC was recorded (May 28, 2013). (R. p. 348). *See, Epps v. McCallum Realty Co.*, 139 S.C. 481, 138 S.E. 297 (1927) (holding a deed, once recorded, charges subsequent purchasers or incumbrancers with notice). This Court will recall from the facts, above, that the Club had a lawsuit pending against Joel Lee at the time of conveyance. Judgment in that suit was entered several months after Bluffton Properties recorded its deed with the Beaufort County Register of Deeds. In the Judgment, the outstanding amounts were tabulated through

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[12] *But see* Section III, *infra*, arguing that any attempt to attach personal, perpetual liability renders the provision void or invalid.

July 31, 2013—two months after record of transfer—as set forth in the August 8, 2013 Order of Judgment against Lee. (R. p. 355). The Club was therefore a subsequent encumbrancer of the property, with constructive notice of transfer.

Moreover, the evidence is unequivocal—and the trial court **found as fact**—that Colleton Club had ***actual*** notice by July 2014 that Lee had transferred title to Bluffton Properties. (R. p. 14, ¶ 29). Indeed, the Club turned around and <u>sued</u> Bluffton Properties LLC for dues associated with Lot A02—which it obviously did because it had actual knowledge that the entity held title to the Lot. Case law is clear that when a party actually knows about an event, notice has been provided. "Generally, actual notice is synonymous with knowledge." *Strother v. Lexington County Recreation Commn.*, 479 S.E.2d 822, 826 (Ct. App. 1996), *aff'd as modified*, 504 S.E.2d 117 (1998) (*citing Hannah v. United Refrigerated Serv.*, 312 S.C. 42, 430 S.E.2d 539 (Ct.App.1993), *cert. denied*, (December 7, 1993)).

The circuit court was wrong to find that because Lee did not give notice in the specified manner, he should be perpetually obligated to pay ongoing assessments. Having conveyed the property years before the Club filed the subject lawsuit, it was impossible for Lee to give Colleton Club "at least 30 days' **<u>prior</u>** written notice of the name and address of the purchaser or transferee, the date of such transfer of title, and such other information as the Board may reasonably require." The law says that any breach stemming from this oversight by Lee was cured once the Club had actual notice of the transfer. S*ee First Presbyterian Church of York v. York Depository*, 203 S.C. 410, 27 S.E.2d 573 (1943) (one having actual notice of an instrument that affects title to property is bound by

such notice regardless of whether the instrument is recorded); 66 C.J.S. Notice § 14, at 653 (1950) ("Actual notice may dispense with required constructive notice."). Numerous cases show that, when actual notice is given, additional written notice is not required, even if additional written notice is specified by a writing; similarly, such circumstances can show that a written notice requirement was waived by a defendant. *See Hammond v. Tilghman Lakes, Inc.*, 367 S.E.2d 446, 295 S.C. 152, 154 (Ct. App. 1987) ("If the contract itself prescribes the manner of giving notice, the parties are bound to comply with its terms . . . However, notice in a prescribed manner is not required **where a party has actual notice** and has not suffered prejudice by the other's failure strictly to follow the contract.") (emphasis added); *cf. Burgess v. JHM Hotels, LLC*, 2010 WL 1493129, at *6 (D.S.C. Mar. 18, 2010), *report and recommendation adopted in part*, 2010 WL 1493132 (D.S.C. Apr. 13, 2010) ("As far as the Court can tell, the defendant's actual notice is prima facie evidence that sufficient notice was, in fact, given. At worst, though, it would seem that actual notice would at least absolve any deficiencies in an employee's attempted but otherwise legally wanting notice.").

Because, as the trial court found as fact, Colleton Club had actual and constructive notice that Bluffton Properties was the title holder to Lot A02, the first component of Section 7.1(c) was satisfied.

ii. Lee's pre-transfer obligations were discharged in full.

As to the second prerequisite of Section 7.1(c), the evidence is undisputed that "all amounts outstanding **prior to transfer** [were] paid in full" on or about September 23, 2014. (R. pp. 355-359, proving satisfaction of judgment against Lee for all amounts owed

prior to transfer). Again, Colleton Club drafted the governing documents, and it authored the rubric contained in Section 7.1(c). Because both elements of the section (notice and payment in full) were fulfilled, the trial court had no legal basis to find breach of covenants under this section—nor to assign perpetual liability to Lee after he conveyed his lot. "The Court is to construe any ambiguity in favor of limited duration and against restricting property." *Hardy v. Aiken*, 369 S.C. 160, 631 S.E.2d 539, 542 (2006). "[T]he settled principle is that '[r]estrictive covenants are to be construed most strictly against the grantor and persons seeking [to] enforce them, and liberally in favor of the grantee, all doubts being resolved in favor of a free use property and against restrictions.'" *Cedar Cove Homeowners Ass'n v. DiPietro*, 628 S.E.2d 284 n.3, 368 S.C. 254 n.3 (Ct. App. 2006) (quoting and citing *Sprouse v. Winston*, 212 S.C. 176, 184, 46 S.E.2d 874, 878 (1948), and 26 C.J.S. Deeds § 163).

The trial court erred by interpreting Section 7.1(c) to impose ongoing, post-conveyance liability on Lee, when Colleton Club had notice of the transfer and when the Club had itself filed a Satisfaction of Judgment indicating that all amounts that Lee owed prior to transfer had been paid in full. (R. p. 359). "Succinctly stated, a court has no authority to rewrite a contract and impose unwanted obligations and terms under the guise of specific performance or judicial construction." *Lowcountry v. Charleston Southern Univ.*, 656 S.E.2d 775, 781, 376 S.C. 399 (Ct. App. 2008). "When a contract is unambiguous a court must construe its provisions according to the terms the parties used; understood in their plain, ordinary, and popular sense. . . . Thus, [t]his court is without authority to alter an unambiguous contract by construction or to make new contracts for the parties."

PCS Nitrogen, Inc. v. Cont'l Cas. Co., 429 S.C. 30, 39, 837 S.E.2d 662, 667 (Ct. App. 2019) (internal citation and quotations omitted).

Once Colleton Club had constructive and actual notice of Lee's conveyance to Bluffton Properties, and once all amounts outstanding prior to transfer had been paid, then the requirements of the Declaration's § 7.1(c) had been fulfilled, any alleged breach was cured, and no further damages could arise thereunder.[13] The trial court was wrong to award damages to the Club for "ongoing" assessments arising in 2014 (and continuing into perpetuity), because the Club (1) had notice of the transfer, and (2) Lee's obligations were satisfied. Correctly, pursuant to the clear terms of § 7.1(c), the Club's damages against Lee are limited to the amount of unpaid assessments (if any) accruing prior to Lee's transfer of Lot A02.

This Court should reverse the trial court's judgment, which does not to conform to the plain language of the covenant at issue and the law in this regard, and remand for a determination of any unpaid amounts accruing prior to transfer, as the proper measure of damages.

III. Alternatively, Section 7.1(c) of the Declaration is void or invalid.

Lee raised the defense that the covenants were void. (R. p. 6). If the trial court's determination as to the force and effect of the Declaration's § 7.1.(c), (which the trial court found perpetually binds a former lot owner to "ongoing" payment obligation for assessments levied against a lot), is given credence, then this Court should strike the

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[13] (Assuming, *arguendo*, that this section of the Declaration is not void or invalid as a matter of law, as set forth in Section III, *infra*).

Section as void or invalid. Indeed, the Declaration itself provides for such a remedy: "If there are conflicts between any of the Governing Documents and South Carolina law, South Carolina law shall control." (R. p. 273, § 1.3).

a. **Section 7.1(c), as interpreted by the trial court, is an unreasonable restraint on the alienation of property and therefore void.**

Section 7.1(c) states that it is subject to Section 19.2 of the Declaration. Section 19.2 sets forth Colleton Club's option to purchase any lot offered for sale in the community. (R. p. 318) ("The Club shall have the exclusive option to purchase any Lot offered for sale in the Community at the price and on the terms and conditions of any bona fide offer for such Lot."). Properly, the trial court should not have given any weight to Section 19.2 for at least two reasons. First and foremost, because the section was not invoked by Joel Lee's transfer of the property in this instance, which he testified was for estate-planning purposes and did not involve an offer of sale sufficient to trigger Section 19.2. (R. p. 203-205). Second because **if**—as the trial court improperly found—Section 7.1(c) and Section 19.2 work together to prevent a fee simple owner from conveying his property as he sees fit, then those provisions of the Colleton River Declaration are void as unreasonable restraints on the alienation of real property.

Joel Lee held fee simple title to Lot A02. (R. p. 351). Under the public policy of this State, he has the right to freely convey his property. *See*, e.g. S.C. Code § 27-1-70 ("[T]he public policy of this State favors the transferability of interests in real property free from unreasonable restraints on alienation and covenants or servitudes that do not touch and concern the property."). It was Lee's right to transfer Lot A02 as he saw fit. Every day in South Carolina, property is transferred by gift, or into trusts, or in probate,

or by any other number of perfectly valid means of transfer in addition to those effected by real estate listing and sale. The testimony at trial was that Lee transferred Lot A02 to Bluffton Properties for estate planning purposes, on the advice of his attorney. (R. pp. 184-185; 195-196; 203-204). As such the preemptive right by Colleton Club, which by the express provisions of Section 19.2 is not triggered unless a Lot is "offered for sale," was not triggered by Lee's private transfer to Bluffton Properties.

But the trial court wrongly found that the Section somehow operated to prohibit Joel Lee from effectively transferring his lot, because the section contemplates a preemptive right of first refusal, which Colleton Club testified **it never invoked and the terms of which did not apply to Lee's transfer to Bluffton Properties**. (R. pp. 159:19 - 160:16). The trial court's interpretation of the Declaration is in error because such an interpretation would violate the law and policy of South Carolina.

This Court has held that a "pre-emptive right is a contingent, nonvested interest in that the grantee or the grantee's heirs might never choose to sell the property. It is an interest not conditioned on an event certain to occur." *Webb v. Reames*, 326 S.C. 444, 485 S.E.2d 384 (Ct. App. 1997), *citing* R. Cunningham, W. Stoebuck, & D. Whitman, *The Law of Property* § 3.18, at 132 (2d ed. 1993) ("A pre-emptive right merely requires the owner, when and if he decides to sell, to offer the property first to the holder of the pre-emptive right so that he may ... buy at a price set out in the pre-emption agreement."). The *Webb* Court found that because a preemptive right of repurchase "was one that might not vest either within a life in being at the time of the creation of the interest or until later than 21 years thereafter, the interest violates the rule against perpetuities and is therefore void."

Webb at 446, 485 S.E.2d at 385 (numerous citations omitted). "Nonvested property interests tend to restrain the free alienability of property and interfere with its beneficial use." *Queen's Grant*, 628 S.E.2d at 917 (examining a similar provision within covenants but declining to rule on the question) *citing* 61 Am.Jur.2d Perpetuities and Restraints on Alienation § 6 (2005).

Moreover, Colleton Club testified that, in practice, it **never** exercised its preemptive right. (R. pp. 159:19—160:16). The Declaration itself provides very little specific information on how such a right might be carried out, and the terms of the provision are vague and ambiguous as to whether such a right would arise upon a transfer of the property by means other than sale by listing. Such a vague right would deter potential purchasers, who would have no certainty of whether they could actually obtain the property. Moreover, if the trial court was correct that the right was triggered under the facts of this case, then it would unquestionably operate to restrict the free alienability of fee simple title. One of the attributes of fee simple ownership is the ability to freely transfer it, without restraint.

Put another way, if Sections 7.1(c) and Section 19.2 of the Declaration truly have the power to prevent the transfer of property by gift, or by will, or in trust, or for the valuable consideration of love and affection, or to a corporation, then those sections are void as against public policy and this Court should so hold.

As the trial court construed it, Section 7.1(c) of Colleton Club's Declaration is void as against public policy and the rule against perpetuities. This Court should reverse the

trial court's interpretation because such an unreasonable restraint on alienation is void as a matter of law.

b. Personal obligations do not run with the land.

At least three entities had passed along title to Lot A02 before Joel Lee purchased it. (R. p. 351). Joel Lee took title to the land and all its appurtenances, but he did not take it subject to the personal obligations of previous owners. The Declaration is itself bound to the land. To get extremely technical, this Court should find as a matter of law that any language in the Declaration that purports to attach personal liability, outside of and apart from ownership of land (§ 7.1, for example), did nothing further than create a mere obligation in gross as between the Declarant and original owner of the property, which did not run with the land and was extinguished by operation of law when Lot A02 changed hands years before Lee ever owned it. In other words, Joel Lee did not take title to the personal, in gross obligations contained in Section 7.1.[14]

c. Section 7.1(c) is ambiguous and invalid.

Third, the trial court improperly construed Section 7.1(c) to attach ongoing personal liability to a former owner. This construction is in conflict with other sections of the Declaration, which otherwise make it clear that the obligation to pay assessments is appurtenant to the land, including but not limited to:

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[14] In other words: The developer once owned a large tract, and it subjected the land to the Declaration. It then subdivided the land into lots, and it began to sell them off. The Developer conveyed Lot A02 to another entity, which may have been bound by personal, in gross obligations such as that contained in Section 7.1(c). However, when that entity conveyed Lot A02 to yet another entity, the in gross obligations did not run with the title. By the time Joel Lee purchased the lot, any in gross obligations contained in the Declaration had long been extinguished.

- the Declaration of Covenant: The Declaration "run[s] with the title to such property . . . and shall be binding upon the future owners of any portion of the property . . ." (R. p. 270, Declaration of Covenant);
- Section 1.1 ("Scope and Applicability"): the governing documents "have a legal and binding effect on all owners and occupants of property in the community, as well as on anyone else that may now or in the future have an interest in any portion of the property comprising the Community." (R. p. 272).
- Chapter 12 ("this Chapter authorizes [Colleton] to levy [assessments] against the Lots and collect from the Owner of each Lot. Assessments are secured by a lien on each Lot"). (R. p. 299).
- Section 12.5 ("The obligation to pay assessments shall commence as to each Lot on the date on which the Lot is made subject to this Declaration"). (R. p. 300).

Section 7.1(c), as the trial court wrongly construed it, diverges from other sections of the Declaration which unequivocally link the covenants' applicability to the landowners of bound property. The construction by the trial court thus renders the section ambiguous. The question of whether a contract is ambiguous is one of law for the Court. *Dennis* at 198, 821 S.E.2d at 669. A contract is ambiguous when its terms are reasonably susceptible to more than one interpretation. *Id.* This Court should reverse the trial court's judgment, and it should construe the covenants against Colleton Club and in favor of limiting Lee's personal liability for assessments to the time period in which he was the record Owner Lot A02.

d. The trial court's order finding that Section 7.1(c) imparts perpetual, personal, and ongoing liability is void as against public policy.

The trial court's decision wrongly gives life to an inescapable, perpetual obligation for Joel Lee. A court should "not lend its assistance to carry out the terms of a contract that violates statutory law or public policy." *Ward v. West Oil Co.*, 387 S.C. 268, 692 S.E.2d 516 (2010). "The authorities from the earliest time to the present unanimously hold that no court will lend its assistance **in any way** towards carrying out the terms of an illegal contract. In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract." *McMullen v. Hoffman*, 174 U.S. 639, 654, 19 S. Ct. 839, 43 L. Ed. 1117 (1899) (emphasis added); *see also White v. JM Brown Amusement Co., Inc.*, 360 S.C. 366, 601 S.E.2d 342 (2004) ("courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions."), *citing Berkebile v. Outen*, 311 S.C. 50, 53–54, 426 S.E.2d 760, 762 (1993) (stating "[a]n illegal contract has always been unenforceable") *and Batchelor v. American Health Ins. Co.*, 234 S.C. 103, 107 S.E.2d 36 (1959) (noting that contracts violating public policy—as expressed in constitutional provisions, statutes, or judicial decisions—are void).

Perpetual contracts are against public policy. *See, e.g., Carolina Cable Network v. Alert Cable TV, Inc.*, 316 S.C. 98, 101, 447 S.E.2d 199, 201 (1994) ("Historically, perpetual contracts have not been favored in South Carolina and are generally upheld only where the perpetual nature of the agreement is an express term of the contract."); *see also Childs v. City of D.C.*, 87 S.C. 506, 70 S.E. 296 (1911) (holding "it would be unreasonable to impute

to the parties an intention to make a contract binding themselves perpetually" and noting "courts hold with practical unanimity that the only reasonable intention that can be imputed to the parties is that the contract may be terminated by either, on giving reasonable notice of his intention to the other.").

This Court must reverse the trial court's decision because it supports and animates a perpetual obligation.

IV. The trial court made numerous errors pertaining to Bluffton Properties, LLC, although it is not a party to this action.

Another significant and improper basis for the trial court's judgment was its failure to distinguish between Joel Lee and Bluffton Properties. Colleton Club based its case on any number of legally immaterial red herrings, to which the trial court erroneously gave credence. For example, the Club argued that Joel Lee was a member of Bluffton Properties, LLC (although this was not proven at trial,[15] and testimony showed that there were several other members, including a now-deceased attorney named Thomas Burke). The Club made much of the fact that Bluffton Properties was a Nevada entity.[16] The Club protested that it asked Mr. Burke to comply with the covenants on behalf of Bluffton Properties, but that Burke did not do so. The Club protested that Bluffton Properties did not pay assessments. The Club claimed that Bluffton Properties

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> Q: Okay. You do not have any evidence setting forth Mr. Lee having a membership or ownership interest in Bluffton Properties, LLC, do you?
>
> A: I don't have any documentation that verifies that, no.

(R. p. 147:16-21, Testimony of Club's CFO, Stephanie Kerr).

16 There is nothing particularly nefarious about Nevada.

did not submit a "Designated User" form, as required by the covenants. Regardless of whether there was any merit at all to these arguments, the trial court was wrong to find that the alleged actions by Bluffton Properties could somehow be imputed to Joel Lee, under the Complaint as it was plead. (*See* Order, R. pp. 13-15).

Colleton Club was the architect of this lawsuit. Although it could have done so, it made the conscious decision not to make Bluffton Properties or Thomas Burke a party to the lawsuit. Although it could have done so, the Club made the conscious decision not to attempt to pierce the corporate veil as a method of holding Lee liable. Although it could have done so, the Club made the conscious decision not to seek to have the deed from Lee set aside as void. Although it could have done so, the Club made the conscious decision not to pursue Lee under a Statute of Elizabeth claim.

The trial court was wrong to cobble together an order that essentially pierced the corporate veil and set aside the deed, when those causes of action had not been plead, their elements not argued, and Bluffton Properties was not made a party to the action. For example, the trial court erroneously found:

- After having been the Owner since 1993 of Lot A02, Lee executed a deed to Bluffton Properties, LLC, Series I, bearing date of December 31, 2012, and not recorded in the Office of the Register of Deeds for Beaufort County until May 28, 2013 (going on to list various circumstances which by no means and under no legal theory render the deed invalid). (R. p. 13, ¶ 27).

- Colleton requested of Burke and Bluffton Properties, LLC submit to Colleton a proposed Designated User, on a Colleton form, to comply with the Colleton Governing Documents. (R. p. 14, ¶ 29).
- Burke refused to have Bluffton Properties LLC so comply and propose a Designated User to be financially responsible for the obligation of Bluffton Properties, LLC, of whatever organizational vintage, to Colleton. (R. p. 15, ¶ 31).
- Despite Colleton's demand, Lee has failed and/or refused to pay the amounts owed for his and Nevada Bluffton Properties, LLC's past-due Assessments, accrued interest, and attorney's fees and/or costs no part of which has been paid by Nevada Bluffton Properties, LLC, either, or otherwise. (R. p. 15).

None of these purported failures by Burke or Bluffton Properties had any legal bearing on Joel Lee. This Court should reverse and hold that the trial court had no legal basis to ascribe personal liability to Lee for the alleged wrongful acts of a corporation.

V. The trial court's order overlooks evidence going to Lee's defenses of accord and satisfaction, estoppel, and violation of the South Carolina Nonprofit Corporation Act.

The trial court erroneously disregarded voluminous evidence showing that Colleton Club unfairly targeted Lee by virtue of suing him over alleged unpaid assessments in the subject action, after having already: (1) obtained two prior judgments (one against Lee and one against Bluffton Properties, LLC); (2) negotiated and settled an alleged ongoing debt which encompassed more than the first judgment against Lee; and (3) satisfied a judgment with Lee – ***all of which pertain to assessments for the same Lot***

A02. As set forth above, the plain language of the Declaration binds liability for assessments to ownership of property within Colleton River.

The Club filed the subject action in July, 2016, asserting that it had not received notice of transfer of title of the property – while contemporaneously in the Complaint admitting and asserting that Lee conveyed the lot three and a half years before (December 31, 2012), and admitting and asserting that the deed and title had been recorded in the Office of the Register of Deeds for Beaufort County on May 28, 2013 in Book 03242 at Pgs. 2923-2924-A, which was more than three years prior to this suit.

The evidence is clear that Lee has already paid for liability for his time-period as record owner of Lot A02.[17] Yet, the Club filed the present lawsuit subsequent to Lee's negotiation and payment to it in complete satisfaction of its judgment against him for all obligations. As such, Lee maintained that by being sued a second time and after a negotiated payment for his liability under the plain meaning of the language in the Declaration, he is being treated disparately and unfairly—particularly as related to other current and prior lot owners at Colleton River:

> "Well, we had settled. There were all of these issues that have been raised after I made the payment, and I just thought the activities of Colleton River were amounting to malicious prosecution at this time, and I said I'm fighting back." (R. p. 211: 13-18).

In the face of Lee's defense, the Club failed to demonstrate that it has any sort of practice of suing similarly-situated former individual property owner of Colleton River for a

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[17] It is undisputed that this payment of $8,977.46 by Lee on September 11, 2014 satisfied the 2013 judgment and covered Lee's liability during his period as record owner of Lot A02. (R. p. 359). As such, the Club was estopped from asserting any liabilities against Lee accruing post-conveyance, or at a minimum, post-notice of conveyance.

breach of covenants covering a damages period beyond that grantor's divestment of his interest. *See*, R. p. 536-537. The trial court was wrong to discount this defense by Lee.

Moreover, the claims brought by the Club in the subject 2016 lawsuit, and the damages sought therein, should have been barred by the doctrines of accord and satisfaction, estoppel (issue/claim preclusion), and a statutory violation of the South Carolina Nonprofit Corporations Act for disparate treatment of its members.[18]

VI. The relief granted was not properly measured under the facts and law.

Finally, this Court should reverse the trial court's judgment, which erroneously measures the damages it awarded to the Club. The trial court found Joel Lee liable for "ongoing" (presumably perpetual) assessment obligations, accruing years and years after Lee no longer held title to Lot A02. Not only is the trial court's decision noxious from a public policy standpoint, but it is wrong under the law and the contract—both of which limit Joel Lee's obligation to pay assessments to his ownership of the lot.

As a matter of law, the judgment against Lee should be reduced so as to encompass only those assessments that were levied against lot A02 **prior** to Lee's conveyance of the land on December 31, 2012. Alternatively, as a matter of law and in conformance with the Declaration, the judgment against Lee should be reduced so as to encompass only those assessments that were levied prior to the recording of the deed by Bluffton Properties, on May 28, 2013, whereupon Colleton Club had constructive notice of the new ownership of the lot, and Lee was no longer an "Owner" under the definition and terms of the Declaration. Alternatively, as a matter of law based upon the facts found by the

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[18] *See*, S.C. Code § 33-31-610, Differences in rights and obligations of members.

trial court, the judgment against Lee should be reduced so as to encompass only those assessments that were levied prior to the Club's undisputed actual notice of Lee's conveyance to Bluffton Properties, LLC in July of 2014, at which point all of Lee's obligations prior to transfer were satisfied. (R. p. 14, ¶ 29).

This Court should reverse the trial court's judgment and find Lee's liability to Colleton Club ceased when Bluffton Properties took title to Lot A02.

CONCLUSION

For the reasons set forth above, this Court should reverse the trial court's decision, which is contrary to the law of real property, the plain language of the contract, and the public policy of this State.

Respectfully submitted,

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