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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Deandrea Gist Benjamin, Circuit Court Judge

Appellate Case No.: 2021-000641

Stonington Community Association, Inc,……………………………………… Respondent,

v.

Carl D. Taylor, Jonathan Stevens, Veronica Stevens, Lena M. Bretous, Vickie M. Wise, Gerald Maynard, Lisa Maynard, Reginald Dalton, Donna Dalton, Thomas Lafayette Brown a/k/a Thomas L. Brown, Sharline Brown, Derrick L. Taylor, Gaye S. Taylor, Syrecea Parker, Carolyn L. Austin, Richea G. House, Sr., Gayle D. House, Larkin Hancock, Jr., Katrina Hancock, Jeffery M. Farmer, Kelly S. Farmer, Anthony T. Reddish, Diann Reddish, Joel H. Daley, Syreta L. Daley, Judy Dove, Henry Faison, Dorothy Brisbon, George L. Lawrence, Annette M. Lawrence, Devinci L. Fulton, and John A Francis, Defendants,

of whom Carl D. Taylor, Lena M. Bretous, Vickie M. Wise, Gerald Maynard, Lisa Maynard, Derrick L. Taylor, Gaye S. Taylor, Syrecea Parker, Richea G. House, Sr., Gayle D. House, Devinci L. Fulton, and John A. Francis are the Appellants……………………………………………….Appellants

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FINAL BRIEF OF APPELLANTS

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STATEMENT OF THE ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN FINDING NO QUESTION OF MATERIAL FACT EXISTS REGARDING THE APPLICABILITY OF RESTRICTIVE COVENANTS TO THE APPELLANTS' PROPERTY BASED ON THE LEGAL THEORY OF RECIPROCAL NEGATIVE EASEMENTS?

II. DID THE TRIAL COURT ERR IN IN FINDING THAT APPELLANTS ARE JUDICIALLY ESTOPPED FROM DENYING HOA MEMBERSHIP AND OBLIGATIONS AND THEREFORE, STONINGTON'S RESTRICTIVE COVEANTS APPLY TO APPELLANTS PERSONALLY?

III. DID THE TRIAL COURT ERR IN FINDING THAT APPELLANTS' PROPERTY IS SUBJECT TO THE STONINGTON DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS, AND EASEMENTS (AMENDED)?

IV. DID THE TRIAL COURT ERRED IN FINDING THAT MANDATORY ASSESSMENTS CAN BE APPLICABLE BASED ON THE LEGAL THEORY OF RECIPROCAL NEGATIVE EASEMENTS?

V. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT REGARDING APPELLANTS' COUNTERCLAIMS?

STATEMENT OF THE CASE

The Respondent filed a Summons and Complaint on December 17, 2018 seeking Declaratory Judgment, Enforcement of Covenants, Specific Performance, and Quantum Meruit related to the Amended and Restated Declaration of Covenants, Conditions, Restrictions, Easements, Charges and Liens for Stonington. Appellants timely filed an Answer and Counterclaim against Respondent, raising numerous affirmative defenses and alleging a causes of action for Abuse of Process. Respondent filed a timely reply to the counterclaims. Since the filing of the action, various Defendants have been dismissed.

On July 22, 2020 Respondent filed its Motion for "Summary Judgment on Defendants' Counterclaim for Abuse of Process." On August 27, 2021, Respondent filed its Motion for Partial Summary Judgment on the applicability of Stonington's restrictive covenants to the subject lots owned by the remaining Appellants. A hearing was held January 4, 2021, where the matter was taken under advisement. On April 1, 2021 the court issued an Order Granting Plaintiff's Motion for Summary Judgment.[1]

On April 12, 2021, Appellants filed a Notice of Motion and Motion Pursuant to Rule 59(e), SCRCP, to Alter or Amend. On May 28, 2021, the court issued an Amended Order Granting Plaintiff's Motion for Partial Summary Judgment and Motion for Summary Judgment as to Defendants' Counterclaim. On June 7, 2021, Appellants filed a Notice of Motion and Motion Pursuant to Rule 59(e), SCRCP, to Alter or Amend regarding the Amended Order. Following the filing of Appellants' motion, and without the court ruling on the motion,

[1] This order also contained a ruling on "Plaintiff's Motion for Summary Judgment on Defendants' Counterclaim for Abuse of Process"

Appellants filed a timely Notice of Appeal on June 15, 2021.[2]

STATEMENT OF FACTS

Stonington Development, LLC was organized and purchased an approximately onehundred sixty-five acre (165) portion of land, comprised of multiple parcels, located in Richland County in 2000. On June 4, 2001, the Richland County Planning Commission approved preliminary plans for Phase I of Stonington. On June 10, 2001, Stonington Development, LLC recorded a "Bonded Plat of Stonington - Phase I" (R. p. 164) showing a portion of the property subdivided into fifty-five (55) residential lots and the various infrastructure articles necessary to support the lots. On November 5, 2002, Stonington Development, LLC recorded the Stonington Declaration of Covenants, Conditions, Restrictions, and Easements (Amended) (hereafter "original Stonington Declaration") with the Richland County Register of Deeds. (R. pp. 343-363). These original Stonington Declaration seeks to outline the various rights, restrictions, easements, etc. in which Stonington Development, LLC ("Declarant" in the Original Declaration) intended to subject the Property. On May 26, 2004, Associated E&S, Inc. created Bonded Plat of Stonington - Phase II-A & II-B for Stonington Development, LLC. On September 6, 2005, Stonington Development, LLC recorded Amended and Restated Declaration of Covenants, Conditions, Restrictions, Easements, Charges and Liens for Stonington (hereafter "Amended and Restated Declaration"). (R. pp. 364-407). On April 3, 2006 was recorded. On March 27, 2007, Stonington Development, LLC, and Stephen E. Lipscomb, it's sole member, executed a Promissory Note, Mortgage, and two (2) Guarant[ies] in favor of Carolina First Bank. (R. pp. 478-499). In 2008, Carolina First Bank, Stonington Development LLC's lender, brought a foreclosure action against a portion of the whole

[2] Following the filing and service of the notice of appeal, the court issued two (2) orders, both titled "Amended Order Granting Plaintiff's Motion for Partial Summary Judgment and Motion for Summary Judgment as to Defendants' Counterclaim" and issued on July 6, 2021 and July 7, 2021, respectively. (R. pp. 24-36, 37-49).

property owned by Stonington Development, LLC, which ultimately resulted in the transfer of a portion of the property to Carolina First Bank by way of Foreclosure Deed. (R. pp. 408-410).

STANDARD OF REVIEW

"[S]ummary judgment is a 'drastic remedy' which should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues" Schmidt v. Courtney, 357 S.C. 310, 592 S.E.2d 326 (S.C. App. 2003)(internal citations omitted).

“In reviewing a grant of summary judgment, our appellate courts have applied the same standard as the trial court under Rule 56(c), SCRCP.” Woodson v. DLI Properties, LLC, 406 S.C. 517, 528, 753 S.E.2d 428, 434 (2014). “[S]ummary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 219, 616 S.E.2d 722, 729 (Ct. App. 2005). “Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Id. “Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.” Id. At 220, 616 S.E.2d at 729. “Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferrences to be drawn from them, summary judgment should be denied.” Id. “However, when plain, palpable, and indisputable facts exist on which no reasonable minds cannot differ, summary judgment should be granted.” Id.

“In determining whether any triable issues of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party.” Blumenthal Mills, 365 S.C. at 219, 616 S.E.2d at 729. “If triable issues

exist, those issues must go to the jury." Id. Similarly, "[o]n appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferrences arising in and from the evidence in a light most favorable to the non-moving party below." Id.

"The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." Id. At 220, 616 S.E.2d at 730. "Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings." Id. "Rather the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." Id.

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." Blumenthal Mills, 365 S.C. at 220, 616 S.E.2d at 730. "Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues." Id. "In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

A declaratory judgment action is neither legal nor equitable per se. Rather, its character is determined by the nature of the underlying issue. Felts v. Richland County, 303 S.C. 354, 400 S.E.2d 781 (1991); Reyhani v. Stone Creek Cove Condominium II Horizontal Property Regime, 329 S.C. 206, 494 S.E.2d 465 (Ct.App.1997). Courts "look to the kind of action in which the issue involved would have been decided if there were no declaratory judgment procedure." Felts, 299 S.C. at 216, 383 S.E.2d at 263.

ARGUMENTS

The trial court erroneously granted Summary Judgment in favor of Respondent for both its prayer for declaratory judgment as well as Appellants' counterclaims against Respondent. The Order conflicts with existing precedent on both issues and in the analyses undertaken, creates novel issues for which no precedent exists. On each issue, the trial court's analysis is deeply flawed, and this Court after review of the issues should reverse.

I. The trial court erred in granting Summary Judgment in favor of Respondent based on the legal theory of reciprocal negative easements when question of material fact exists as to the applicability of restrictive covenants to the Appellants' property.

The trial court erroneously found that Appellants' are subject to the covenants set for in "the Stonington Declarations[3]" by way of reciprocal negative easements. In doing so, the court declines to find that the subject lots are expressly bound, despite Respondent's contention to the contrary. The record is quite clear that with respect to the properties at issue in this appeal, whatever portions of the larger parcel potentially subject to the "Original Declarations" were refined and restricted to the portions contained in Exhibit A to the "Amended Covenants;" which consists entirely of Phase I. (R. p. 407).

The trial court further holds that the provision contained at Article 1, Section 1(R) of the Amended Declarations does not bar the trial court from "applying a theory of implied reciprocal covenants." (R. p. 18). Article 1, Section 1(R) of the Amended Declarations states:

[3] The term "Stonington Declarations" is not defined in the Amended Order. The Amended Order styles the Stonington Declaration of Covenants, Conditions, Restrictions and Easements (Amended) as "Original Declarations" and the Amended and Restated Declaration of Covenants, Conditions, Restrictions, Easements, Charges and Liens for Stonington as "Amended Declarations". For the purposes of this Brief, Appellants will assume the trial court was referring to the "Declarations" collectively.

> "In addition to, no implied reciprocal covenants or obligation to develop shall arise with respect to lands that have been retained by the Developer for future development. The Developer shall not be bound by any master plan, use or restriction or use shown on any master plan, and may in its sole discretion at any time change or revise said master plan, develop or not develop the remaining undeveloped property or common area or amenities shown on any master plan."

(R. pp. 368-369). Appellants do, and can, rely on Section 1(R) of the Amended and Restated Declaration that "no implied reciprocal covenants…shall arise with respect to lands that have been retained by the developer for future development" but also that the Developer "may in its sole discretion at any time change or revise said master plan, develop or not develop the remaining undeveloped property." While the trial court finds that the language of the provision does not bar implied covenants, it ignores the plain and unambiguous language of the remainder of the provision, which serves to reserve the right to do with its property as it wishes to the Developer, and in doing so requires a closer examination of the restrictive covenants Respondent seeks to enforce in conjunction with the Developer's actions regarding the property. The discretion reserved for Developer creates an inherent ambiguity and questions as to the restrictive covenants and their applicability. "For a reciprocal negative easement to arise by implication, the implication must be plain and unmistakable." Shoney's, Inc. v. Cooke, 291 S.C. 307, 313, 353 S.E.2d 300, 304 (Ct. App. 1987). "[A] restriction [will not 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 seen by them at the time." Taylor v. Lindsey, 332 S.C. 1,498 S.E.2d 862 (1998)(citing Forest Land Co. v. Black, supra).

Further, as Plaintiff has done throughout this case and since 2010 at the latest, is to pick and choose when and to which properties the restrictions apply. The fact that numerous

Defendants have been excused from being a member in the Plaintiff or paying dues and assessments, violates both the mandatory membership provisions of the Amended and Restated Declaration but also raises questions of material fact as to whether a theory of implied reciprocal negative easement can be adopted by this court when to do so would mean that properties in the same community, on the same street, or even next to one another would be treated differently and subject to different rights and restrictions. See (R. pp. 419-422). To do so seems to fly in the face of the theory of implied reciprocal negative easement, who's general purpose is that all properties be subject to the same restrictions for the benefit of all.

a. Elements of Reciprocal Negative Easement

In order for restrictive covenants to bind property without express documentation in the chain of title, four elements must be satisfied to establish reciprocal negative easements: There must be a common grantor; There must be a designation of the land or tract subject to restrictions; There must be a general plan or scheme of restriction in existence for the designated land or tract; and The restrictive covenants must run with the land. Bomar v. Echols, 270 S.C. 676, 679, 244 S.E.2d 308 (1978).

Appellants concede that the land and lots derive from a common grantor, Stonington Development, LLC, who at one time owned approximately 165 acres. Appellants contend however, that in viewing the evidence in the light most favorable to the non-moving party, the trial court erred in ruling that "the second element, designation of land or tract subject to restrictions, is also indisputably satisfied." (R. p. 19). The trial court errs in that it conflates designating a parcel of land as associated with a neighborhood by plat, name, or lot number and designating land or tract **subject to restrictions** as discussed in Bomar, Id. (Emphasis added). In the case at hand there is no question that the broad strokes of a neighborhood known anecdotally as "Stonington." The trial court's reasoning fails though as it rests on the

assumption that Developer absolutely must complete a project, without deviation, once planning is approved. Between 2002 when the "Original Declarations" were recorded and 2006 when the "Amended Declarations" were recorded, certain events or concerns caused the Developer to "amend and restate" the restrictive covenants associated with its development. The Developer altered the language and terminology in the Amended Declararions and restricted the applicability of of the restrictive covenants to a specific portion of the property. *See* (R. pp. 343-363, 364-407).

Further, the Developer's further actions or conscious failure to act raises further question of material fact regarding the "designation of land or tract subject to restrictions," a crucial element in the trial court's finding. Developer maintened ownership and control of the subject properties until their transfer pursuant to Foreclosure Deed dated February 10, 2010. (R. pp. 408-410). In the interim between the recording of the Original Declarations and the foreclosure deed, the Developer mortgaged the subject property, (R. pp. 478-499), agreeing not to "permit any change in any license, restrictive covenant, or easement without Lender's prior written consent" and warranting that the Property is unencumbered, except for encumbrances of record," which do not include the Amended Covenants. (R. pp. 478-499). During the same period, while still in complete control of the subject lots, the Developer was involed in multiple lawsuits regarding both the neighborhood management, in which the Developer had notice by way of order of the court that the subject properties in Phase II were not subject to encumbrance, and drainage issues involving retention ponds affecting neighboring properties, issues which the developer had been previously instructed to address. (R. pp. 338-342, 157-158). While the trial court erroneously considered the affidavit of Stephen Lipscomb[4] filed March 15, 2021, over two (2) months after the January 4, 2021

[4] The trial court's July 7, 2021 Amended Order Granting Plaintiff's Motion for Partial Summary Judgment, filed

hearing, Mr. Lipscomb is a key witness and his **full** deposition testimony, not a unilateral four (4) page affidavit, signed three days prior to his scheduled deposition, would offer a great deal of insight into the "Developer's inent" that is referenced by the trial court. (R. p. 20). At worst, given the specific lands described as being bound, the affirmative steps needed to bind additional property, and the action or knowing inaction on behalf of the Developer, a question of fact arises that would require determination from the finder of fact as to the intent of the common grantor.

Appellants concede that at the time of its creation, Developer acted with the presense of a general plan or scheme of restriction. As often happens though, and certainly in the case at hand, plans change for one reason or another.

The final element required for reciprocal negative easements to exist is that the restrictive covenants must run with the land. The trial court errs when it finds that "the Stonington Declarations expressly announce Developer's intent that the covenants, restrictions, easements, charges and liens therein shall run with the land and be binding on all owners." First, although the Declarations contain language that they "run with the land," such language is limited to the expressly bound and encumbered properties of Phase I. For properties outside of Phase I, such as the subject properites of Phase II, there is no evidence in the record that a subsequent purchaser for value would be made aware that specific restrictive covenants run with to the property. No deeds or other document refererencing the Orignal Declarations or Amended Declarations specifically referenced have been made part of the record. This lack of evidence creates material question of fact as to the final element required.

II. The trial court erred in finding that Appellants are Judicially Estopped from Denying HOA Membership and Obligations and therefore,

after the court was divested of jurisdiction, makes a notation that the trial court did not consider the affidavit of Stephen Lipscomb. (R. pp. 37-49).

Stonington's restrictive coveants apply to [Appellants] personally.

The trial court found that Appellants, all of them, are judicially estopped from "Denying HOA Membership and Obligations and therefore, Stonington's restrictive coveants apply to [Appellants] personally." (R. p. 16). This finding is in error on several fronts.

First and foremost, because the purpose of the doctrine is to protect the integrity of the judicial process, it is 'invoked by a court at its discretion.' Quinn v Sharon Corp, 343 SC 411 540 S.E.2d 474 SC App 2000 (citation omitted in original). The question of Appellants' personal membership in the Home Owners' Association, was not a question before the court and such a ruling preferably follows a complete balancing of the equities. Plaintiff's Summons and Complaint, filed December 17, 2018 (R. pp. 58-71), alleges a cause of action for Declaratory Judgment, the cause of action subject to the Order. In its Complaint, Plaintiff alleges "that it is entitled to a declaratory judgment that the **properties** referenced in Exhibit A are encumbered by the governing documents, on the theory of reciprocal negative easements, that the Defendants, owners of the properties, are not exempt from paying assessments, and that the **subject lots** carry mandatory assessment obligations. (Emphasis added.) Essentially, Plaintiff asks for the answer to three (3) questions in its cause of action.

Second, the trial court, citing Hayne Federal Credit Union, finds "it is undisputed that the Defendants previously participated in the HOA by making past assessments payments, paying HOA fees, signing HOA ackowledgment forms, and even conduct pursuant to the restrictive covenants." (R. p. 17). This analysis is in error on several accounts. First, there is no evidence in the record of any of the activities or conduct the trial court purports to analyze. Respondent offered no evidence in the form of receipts, financial records, meeting minutes, deposition testimony, forms signed by any of the Appellants, or any other document specifically related to the actions of the Appellants.

Finally, while the trial court continues its analysis of Appellants to include prior legal action involving owners of lots in Stonington, including but not exhaustive of, some of the Appellants, it reaches the incorrect conclusion as it relates to Appellants. The South Carolina Supreme Court, in Cothran v Brown, 592 S.E.2d 629, 357 S.C. 210 S.C. 2004, adopted the "elements necessary for the doctrine to apply: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent. "The purpose of the doctrine is to ensure the integrity of the judicial process, not to protect the parties from allegedly dishonest conduct by their adversary." Cothran v. Brown , 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004). In South Carolina, the doctrine of judicial estoppel applies only to matters of fact, not conclusions of law. Hayne Fed. Credit Union v. Bailey , 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997).

Preliminarily, the trial court erred in finding that the prior legal actions constituted (1) two inconsistent positions taken by the same party or parties in privity with each other; (2) "the same or related proceedings involving the same party or parties in privity with each other"; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; and (4) the inconsistency must be part of an intentional effort to mislead the court. The previous actions involve a 2009 action regarding assessments on undeveloped lots owned by a successor developer and a 2015 action to gain control of the HOA management from a successor developer. Appellants', however, contend that Carrigg v. Cannon does not stand for position the trial court cites and in fact seems to limit privity.

"Privity" means one so identified in interest with another that he represents the same legal right. Carrigg v. Cannon, 347 S.C. 75, 552 S.E.2d 767 (Ct.App.2001). In Wade v. Berkeley County, 330 S.C. 311, 498 S.E.2d 684 (Ct.App.1998), the Court of Appeals discussed privity by stating "Privity deals with a person's relationship to the subject matter of the previous litigation, not to the relationships between entities. To be in privity, a party's legal interests must have been litigated in the prior proceeding. Having an interest in the same question or in proving or disproving the same set of facts does not establish privity. Nor is privity found when the litigated question might affect a person's liability as a judicial precedent in a subsequent action." Id. at 317, 498 S.E.2d at 687 (citations omitted).

In the case at hand, not only do the Defendants maintain that individual property owners cannot be said to be in privity with each other but that the applicability of the Amended and Restated Declaration of Covenants, Conditions, Restrictions, Easements, Charges and Liens for Stonington was not the subject matter of the prior litigation for the purposes of a privity analysis.

III. The trial court err in finding that appellants' property is subject to the Stonington Declaration of Covenants, Conditions, Restrictions, and Easements (Amended)?

Ultimately, the trial court's finding that the subject properties are bound by the Original Convenants is in error. As was reserved to Stonington Development, LLC as the "Declarant" in the Original Declaration, Stonington Development, LLC had the right and authority to amend, alter, or change both the restrictions and what property they covered. It did so when it executed and recorded the Amended and Restated Declaration in 2005, altering and

refining not only the restrictions and duties, but also the property designated as encumbered and subject to the restrictions. Any such designations made in the Original Declaration, unless contained in the Amended and Restated Declaration, were now not applicable.

The plain language of the Amended and Restated Declaration of Covenants, Conditions, Restrictions, Easements, Charges and Liens for Stonington (hereafter "Amended and Restated Declaration") is such that the provisions of the original Stonington Declaration of Covenants, Conditions, Restrictions, and Easements (Amended) (hereafter "original Stonington Declaration") are not applicable to the matter at hand and only serve as a guide to the intentions of Stonington Development, LLC regarding the properties. Page 1 of the Amended and Restated Declaration of Covenants, Conditions, Restrictions, Easements, Charges and Liens for Stonington states "WHEREAS, the Developer desires to amend and restate the Original Declaration as follows." (R. p. 72). Stonington Development, LLC even went so far as to use completely different terminology when referring to itself in the Amended and Restated Declaration as Developer versus Declarant in the original Stonington Declaration.

IV. **The trial court erred in finding that mandatory assessments can be applicable based on the legal theory of reciprocal negative easements.**

The trial court's Amended Order is mostly silent in ruling that restrictions apply to the subject properties by way of implication extends beyond just the restriction, but to imposing assessments and liens on these properties. To the extent that the trial court's Amended Order finds that Appellants' are subject to mandatory assessments based on the application of the legal theory of negative reciprocal easement, that finding constitutes error. Making such a leap on top of a leap is too far for its request for summary judgment. As Plaintiff points out in its memorandum, this represents a novel issue for South Carolina courts. While, "[t]he mere fact

that a case involves a novel issue does not render summary judgment inappropriate," Houck v. State Farm Fire Cas. Ins. Co., 366 S.C. 7, 11, 620 S.E.2d 326, 329 (2005), it seems clear that it is far more appropriate to grant summary judgment against a plaintiff's claims on a novel issue than to grant summary judgement on a novel issue in favor of a party bringing a claim without any guidance from the appellate courts of this state.

To the extent that the trial court's silence on the issue is intentional, Appellants assert that Respondent has waived the issue for appeal by failing to properly address the omission in the appropriate time period following the issuance of the trial court's Amended Order.

V. **The trial court erred in granting Summary Judgment in favor of Respondent regarding Appellants' counterclaims**.

In response to Respondent's Complaint, Appellants filed an Answer and Counterclaim alleging a cause of action for Abuse of Process. Respondent had collected due and assessments from some of the defendants in this matter, while being on notice since 2010 at the latest that Phase II was not subject to the Amended and Restated Declaration. It was only after these Appellants discovered that their properties were not in fact bound, that Respondent filed not only its Complaint, but also filed a lis pendens against these properties. While the trial court found that the filing of a lis pendens is a standard procedure in a matter involving real property, the filing of such under these circumstances is only meant to punish and harass the Appellants. Respondent has maintained throughout this matter that the subject properties are now and have always been bound by the Amended and Restated Declaration so the property rights would not be affected if Respondent is successful.

Appellants, when purchasing their homes, were relying on Respondent 's knowingly false documents and were paying dues and assessments that they believed were required. When the Appellants, not the Respondent, discovered that their properties were not bound,

they quit paying the dues they didn't actually owe and this suit, and the lis pendens followed. The retaliation is the abuse as the action could have been brought at any time prior. "The jurisdictions are in agreement that the proper action against a maliciously filed [notice of] lis pendens is under abuse of process or malicious prosecution." Pond Place Partners, Inc. v. Poole, 351 S.C. 1, 16, 567 S.E.2d 881, 889 (Ct. App. 2002) (quoting S.C. Nat'l Bank v. Cook , 291 S.C. 530, 532, 354 S.E.2d 562, 562 (1987)). The totality of the circumstances and the disparity in timing of the actions of Respondent are what give rise to the abuse and cannot be viewed in a vacuum.

As the Order acknowledges, Appellants' filed numerous affirmative defenses, based both on the passage of time and the actions or knowledge of Respondent. Should the court find that any one of Appellants' affirmative defenses valid, such a ruling would ultimately affect the legal reasoning of the court's Order. A lawful act can be determined unlawful given different circumstances. By way of example, if the court were to hold that Respondent's claims were barred by waiver or the statute of limitations/repose, and that Respondent was, or should have been, aware of the bar; the Respondent's actions in filing a lis pendens would not be viewed as legitimate, but as retaliatory and malicious as contended in Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment as to Defendants' Counterclaims. As Appellants' affirmative defenses as well as Respondent's remaining causes of action will still require a trial, there will be ample opportunity for the finder of fact to reach conclusions which very well may affect whether the filing of the lis pendens was legitimate or abusive.

CONCLUSION

The findings and conclusions by the trial court should be reviewed by this Court. On all issues presented, the trial court deviated from binding precedent and created novel issues and

analyses. The Appellant therefore respectfully requests that this Court grant the relief sought herein, inquire further into these matters, and reverse the trial court.

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May 11 2022
SC Court of Appeals

CERTIFICATE OF COUNSEL FOR APPELLANTS

Counsel for appellant certifies that this Final Brief of Appellants complies to the best of my ability with Rule 211(b) and the South Carolina Court of Appeals letter dated March 16, 2022.

Respectfully submitted,

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