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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

Appellate Case No. 2021-000641
Civil Action Case No. 2018-CP-40-06557

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.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This is an appeal from an Order of the Honorable DeAndrea Gist Benjamin granting Plaintiff/Respondent Stonington Community Association, Inc.'s (hereinafter "Stonington") dispositive motions. Judge Benjamin granted Stonington's motion for partial summary judgment as to the applicability of Stonington's restrictive covenants to residential lots ("Lots") owned by Appellants. In the same Order, Judge Benjamin also granted Stonington's motion for summary judgment as to Plaintiffs' counterclaim for abuse of process.

Stonington filed this action for a declaration as to whether certain lots within the Stonington subdivision are subject to Stonington's restrictive covenants. Stonington also seeks the collection of unpaid assessments. On December 17, 2018, Stonington filed a Lis Pendens, Summons and Complaint against Appellants and other defendants, seeking Declaratory Judgment, Enforcement of Covenants, Specific Performance, and Quantum Meruit in the Court of Common Pleas for Richland County. (R. pp. 50-115). The lawsuit was filed in response to a group of homeowners, residing in phase two of a three phase subdivision, contesting their membership in the Stonington homeowner association and refusing to pay assessments to Stonington (hereinafter "Homeowners"). (R. pp. 521-523).

On January 16, 2019, by and through the same counsel, a group of Appellant Homeowners filed their Answer and Counterclaim of Abuse of Process. (R. pp. 116-126). On March 14, 2019, the remaining Homeowners filed their Answer and Counterclaim of Abuse of Process ("Second Answer"), identical to the First Answer and by and through the same counsel. (R. pp 116-126). The counterclaims allege that the *lis pendens* was filed in this action for the improper purpose of harassing the Homeowners and coercing them into

signing agreements to be bound by the Stonington restrictive covenants and paying assessments to Stonington.

Since the filing of the action, various Homeowners settled with Respondent and were dismissed from the action. Appellants constitute twelve of the remaining defendant Homeowners.

On July 22, 2020, Stonington filed its Motion for Summary Judgment on Defendants' Counterclaim for Abuse of Process ("Motion"). (R. pp. 127-129). On August 27, 2020, Stonington filed its Notice Motion for Partial Summary Judgment on its claim for Declaratory Judgment ("Partial Motion"). (R. pp. 130-131). (collectively, the "Motions"). On October 19, 2020, Stonington filed its Memorandum in Support of its Motion for Partial Summary Judgment ("First Memo"). (R. pp. 132-294). On October 20, 2020, Stonington filed its Memorandum in Support of its Motion for Summary Judgment Against Counterclaim of Defendants ("Second Memo"). (R. pp. 295-305). On December 31, 2020, Stonington filed its Memorandum in Support of its Motion for Summary Judgment Against Counterclaim of Defendants ("Third Memo"). (R. pp. 306-320).

A hearing was held on the Motions on January 4, 2021. (R. pp. 503-570). Three minutes prior to the hearing, Homeowners filed their Memorandum in Opposition to Plaintiff's Motion for Summary Judgment ("First Memo in Opp"). (R. pp. 321-422). On January 8, 2021, the Honorable Judge DeAndrea Gist Benjamin (hereinafter, "Judge Benjamin") issued a FORM 4 Order taking the Motions under advisement ("FORM 4 Order"). (R. pp. 423-425). On January 13, 2021, Stonington filed a Supplemental Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment ("Fourth Memo"). (R. pp. 426-431). On March 15, 2021, Stonington filed its Second Supplemental

Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment ("Fifth Memo"). (R. pp. 432-440). On March 31, 2021, Homeowners filed their Supplemental Memorandum in Opposition to Plaintiff's Motion for Summary Judgment ("Second Memo in Opp"). (R. pp. 441-453).

On April 1, 2021, Judge Benjamin granted Stonington's Motions in an Order Granting Plaintiff's Motion Partial Summary Judgment ("First Order"). (R. pp. 1-12). That Order granted Stonington's motion for partial summary judgment and also dismissed the Homeowners' counterclaims.

On April 12, 2021, Homeowners filed their Notice of Motion and Motion Pursuant to Rule 59(e), SCRCP, to Alter or Amend the Order Granting Summary Judgment ("59e Motion"). (R. pp. 454-458). On May 6, 2021, Stonington filed its Memorandum in Opposition to Defendants' Motion to Alter or Amend ("Memo in Opp to 59e"). (R. pp. 459-467). On May 10, 2021, Homeowners filed their Reply Memorandum in Support of Defendants' Motion Pursuant to Rule 59(e), SCRCP, To Alter or Amend the Judgment. (Reply to Memo in Opp to 59e). (R. pp. 468-472).

On May 28, 2021, Judge Benjamin issued an Amended Order Granting Plaintiff's Motion for Partial Summary Judgment and Motion for Summary Judgment as to Defendants' Counterclaim ("Amended Order"). (R. pp. 13-23). This is the only Order from which this appeal was taken.

On June 7, 2021, Homeowners filed a Notice of Motion and Motion Pursuant to Rule 59(e), SCRCP to Alter or Amend regarding the Amended Order ("Second 59e Motion"). On June 15, 2021, and before Stonington could respond to the Second 59e

Motion and before Judge Benjamin could rule on it, Homeowners filed a Notice of Appeal, prematurely divesting the trial court of jurisdiction.

STATEMENT OF FACTS

Stonington was planned as a phased residential development by the "Developer," Stonington Development, LLC. (R. p. 134). The Developer organized on or about January 13, 2000, as a South Carolina limited liability company. (R. pp. 134-135). Shortly thereafter, Developer acquired title to approximately one-hundred and sixty-five (165) acres of land in Richland County by separate deeds recorded in the Richland County Register of Deeds Office. (R. p.135). Each deed's property description refers to a plat prepared for and recorded by the Developer in the Richland County Register of Deeds Office. (R. p. 156).

Stonington's residential development was approved as a planned-unit development (PUD) by the Richland County Planning Commission in 2000, pursuant to the Developer's application to the Planning Commission. (R. pp. 157-162). On June 10, 2002, the Developer recorded a "Bonded Plat of Stonington – Phase I" ("Phase I Plat") showing portions of Developer's Property subdivided into fifty-five (55) residential lots, rights-of-way for ingress and egress, open space designated as "Common Area", and contiguous parts of Developer's Property designated for "Future Development." (R. p. 164). On November 5, 2002, the Developer recorded the Stonington Declaration of Covenants, Conditions, Restrictions and Easements (Amended) *(sic)* (the "Original Declaration") with the Richland County Register of Deeds, which set forth the various use restrictions, easement rights, and other obligations of ownership for subsequent grantees. (R. pp. 165-184). On May 26, 2004, the Developer created a subdivision plat for Stonington Phase II-

A and Phase II-B entitled "Bonded Plat of STONINGTON – PHASE II-A & II-B." (R. p. 185). On September 6, 2005, the Developer recorded the Amended and Restated Declaration of Covenants, Conditions, Restrictions, Easements, Charges and Liens for Stonington (the "Amended Declaration"). (R. pp. 187-230). Both the Original Declaration and the Amended Declaration referenced only a Phase I Plat. (R. pp. 165-184, 187-230).

In 2008, in the wake of the "Great Recession," the Developer's lender, Carolina First Bank brought a foreclosure action against a portion of the land owned by the Developer, which included most of the Phase II lots which had not already been sold. (R. pp. 408-410, 439). This suit resulted in the transfer of a portion of the land to Carolina First Bank by way of a Foreclosure Deed. (R. p. 408-410). Thereafter, the Wade Corporation acquired title to 8 of the 9 Phase II lots subject to this appeal. (R. p. 237-238). The Wade Corporation acted as the successor developer in that it continued the development of the residential neighborhood, as originally planned and intended. (R. pp. 233-236). All of the Appellants took title to real property located in the Stonington residential subdivision ("Lots") with notice of the restrictive covenants. (R. p. 539, line 21-p. 540, line 2; p. 553, line 4-p. 554, line 4; and *See* R. p. 325).

On December 16, 2009, a group of homeowners (which included six of the original Defendants) filed a lawsuit against the Developer and others, asserting that "all of the lots, common areas, and roads in the Stonington Subdivision [...] are subject to the provisions of the [Stonington] Covenants and Restrictions and the By-Laws. (R. p. 153). On January 15, 2010, the Honorable G. Thomas Cooper, Jr. issued a Consent Order Withdrawing Injunction, Dismissing Parties and Confirming Partial Settlement in favor of the plaintiffs in that action. (R. pp. 338-342).

On November 18, 2015, a group of homeowners (which included seven of the original Defendants) filed a lawsuit against the Developer, Stonington, its management company, and other entities/persons, asserting that the plaintiffs in that suit were members of the Stonington homeowner association and desirous of control of the Stonington homeowner association. (R. pp. 285-290). The plaintiffs in that action obtained all of the requested relief, to include control over and management of Stonington, seats as interim directors of Stonington, a court ordered member meeting/election, and also reimbursement for their attorney's fees and costs via a Consent Order Confirming Settlement Agreement. (R. pp. 291-294).

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard of review as the trial court; summary judgment is proper when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP; *Zurich Am. Ins. Co. v. Tolbert*, 378 S.C. 493, 496, 662 S.E.2d 606, 607 (Ct. App. 2008). In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 404, 581 S.E.2d 616, 165 (2003).

A trial court may grant summary judgment "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 in entitled to summary judgment as a matter of law." Rule 56(c), SCRCP. "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact

finder. *Dawkins v. Fields,* 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003). Summary judgment should be granted when it is perfectly clear that no genuine issue of material fact exists and inquiry into facts is not desirable to clarify application of the law. *See Wortman v. Spartanburg*, 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992). When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. *Ellis v. Davidson*, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004).

A party opposing summary judgment may not rest upon the mere allegations or denials of his pleadings. *SSI Medical Services, Inc. v. Cox*, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990). Rule 56(e) requires a party opposing summary judgment "to come forward with affidavits or other supporting documents demonstrating the existence of a genuine issue for trial." *Doe v. Batson*, 345 S.C. 316, 320-21, 548 S.E.2d 854, 856 (2001). Although only a scintilla of evidence is required, a party must present some evidence to avoid summary judgment. *Hoard v. Roper Hosp., Inc.*, 387 S.C. 539, 694 S.E.2d 1 (2010). Moreover, a party may not avoid summary judgment by asserting that a jury may disbelieve uncontradicted evidence. *Id.* at 549, 694 S.E.2d at 6.

This Court exercises *de novo* review of questions of law. *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009).

ARGUMENT

The trial correctly granted Summary Judgment in favor of Stonington for both its prayer for declaratory judgment as well as Homeowners' counterclaims against Stonington, because there is no genuine issue of material fact to be determined by the trier of fact and Stonington is entitled to judgment as a matter of law. The trial court's order is not in conflict with existing precedent and does not rule on novel issues for which no precedent exists.

I. The trial court correctly held that no genuine issue as to any material fact exists as to the applicability of restrictive covenants to the Homeowners' Lots in Stonington by reciprocal negative easements.

The Court correctly found that Homeowners' Lots within Stonington are subject to the restrictive covenants in the Original Declaration and Amended Declaration by way of reciprocal negative easements (hereinafter, "RNE"). "Restrictive covenants, sometimes referred to as 'real covenants,' are agreements 'to do, or refrain from doing, certain things with respect to real property.'" *Kinard v. Richardson*, 407 S.C. 247, 257, 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)). "Restrictive covenants on the use of property may be created in express terms or by implication." *Bomar v. Echols*, 270 S.C. 676, 679, 244 S.E.2d 308, 310 (1978) (citing *Edwards v. Surratt*, 228 S.C. 512, 90 S.E.2d 906 (1956)). Restrictive covenants are frequently imposed on land by implication. *Queen's Grant*, 368 S.C. at 362, 628 S.E.2d at 913. "When they arise by implication, a reciprocal negative easement has been created." *Bomar*, 270 S.C. at 679, 244 S.E.2d at 310 (1978). There are four elements that must be satisfied to establish RNE: 1. There must be a common grantor; 2. There must be a designation of land or a tract of land

subject to restrictions; 3. There must be a general plan or scheme of restriction in existence for the designated land or tract; and 4. the restrictive covenants must run with the land. *Id.* at 679-680.

Homeowners do not contest the first and third elements: that there was a common grantor and a general plan or scheme of restriction in existence, respectively. (Initial Br. of Appellants, pp.10, 12.) Homeowners challenge the trial court's ruling as to the second and fourth elements: that there was a designation of land subject to the restrictive covenants and that the restrictive covenants run with the land, respectively. (Initial Br. of Appellants, pp. 11-12, 13.) On both of these challenges, Homeowners conflate the requirements of an implied application of restrictive covenants with an express application of restrictive covenants.

A. Designation of land

The trial court found the element that there be a designation of land subject to the restrictive covenants was "indisputably satisfied." (R. p. 19). This ruling is supported by all the evidence in the record. The evidence indisputably shows the land shown on the Stonington Phase I plat, recorded in the Richland County Register of Deeds at Book 672 at Page 1194, was designated as land subject to the restrictive covenants applicable to Stonington. (R. p. 164). First, the Original Declaration designated land subject to the restrictive covenants contained therein in the initial recitals; Article I, Section 3; and Article I, Section 12. (R. pp. 166, 167). Second, the Amended Declaration designated land subject to the restrictive covenants contained therein in the initial recitals; Article I, Section 1(W), Exhibit A; as well as various other places within the Amended Declaration. (R. pp. 187-230). Third, Homeowners concede Stonington Phase III property was also designated as

land subject to the restrictive covenants. (R. pp. 326-327, 330). There is no evidence in the record to rebut these clear designations of land made in the Declarations. Indeed, Homeowners concede land was designated as subject to the restrictive covenants in the Declarations. (Init. Br. of Appellants, pp. 11-12, 13.)

Homeowners argue that these designations of land do not include the Homeowners' Lots. (Init. Br. of Appellants, pp. 11-12.) Homeowners' argument fails because a designation of Homeowners' Lots is not required to meet this element of RNE. If such a designation was made, there would be no need for RNE to apply because the restrictive covenants would apply by *express* terms. In order to prove RNE, it is only necessary that *some* land within the general plan of development was designated as subject to the restrictive covenants.

Although designation of Homeowners' Lots is not necessary to prove this element of RNE, the trial court did find that Homeowners' Lots were designated as Lots with consecutive, identifying numbers on plats bearing the name "Stonington." (R. p. 19). Homeowners do not dispute the fact that their Lots appear on the plats of record entitled "Bonded Plat of Stonington – Phase II-A & II-B" and "Resubdivision of Lots 7-10, Lots 12-16 and Lots 21-28 in Stonington, Phase II-A & II-B." Rather, they argue these Stonington plats do not constitute a designation of Homeowners' Lots as subject to the restrictive covenants and thus, the trial court erred in its ruling. Even if this undisputed fact does not support the trial court's findings on this particular element of RNE, it does support the trial court's finding as to the third, uncontested element of RNE—whether there was a general plan or scheme of restriction. *See Kinard*, 407 S.C. at 260, 754 S.E.2d at 895

(Court considered consecutive lettering on plat and same subdivision name in finding common scheme of development for RNE).

Homeowners argue that the Developer's alleged actions or inactions during its ownership and development of Stonington land, specifically Homeowners' Lots, create a "question of material fact regarding the 'designation of land or tract subject to restrictions' [...]." (Init. Br. of Appellants, p. 11.) Again, Homeowners' argument is inherently flawed because it conflates which *land* was designated. The Developer's alleged actions or inactions, cited by Homeowners, concern Homeowners' Lots, which were not required to be designated as subject to the restrictions in order for RNE to arise. These alleged actions or inactions have *no* bearing on the trial court's finding, nor do they call into dispute the fact, that Developer designated land subject to the restrictive covenants at issue. In fact, these alleged actions or inactions would only have a bearing, if any, on the third element - whether there was a general plan or scheme of restriction—which Homeowners have conceded exist at the time Developer created Stonington. (Init. Br. of Appellants, p. 12.)

Lastly, Homeowners argue the trial court erroneously considered an affidavit by a principal of Developer, Stephen Lipscomb, because "Mr. Lipscomb is a key witness and his full deposition testimony" would offer more meaningful insight into the Developer's intent than an affidavit. (Init. Br. of Appellants, p. 12.) Homeowners did not, however, offer any actual evidence, such as a rebuttal affidavit, admissions, deposition testimony, which would dispute Lipscomb's sworn statements made under oath. Homeowners filed three separate pleadings after Stonington submitted Lipscomb's affidavit, none of which proffered actual evidence to rebut Lipscomb's sworn statements or create a *genuine issue of material fact* with regard to the issue of RNE. Instead, Homeowners proffer speculation

and what-if conjecture to argue to this honorable Court that there is a genuine issue of material fact on whether restrictive covenants apply to Homeowners' Lots. It is worth noting that this case had been pending in the trial court for over two years before Stonington's Motions for summary judgment were heard and two years, three and half months before any substantive ruling was made. In that time, Stonington deposed many of the thirty-four (34) original defendants at much expense to Stonington. Homeowners deposed one "witness"—one of Stonington's attorneys, D. Ryan McCabe, Esq. It defies credulity that Appellants now want to emphasize the importance of Lipscomb's deposition testimony that it failed to elicit in the 27.5 months prior to the trial court's ruling.

B. Restrictive covenants run with the land

Homeowners argue the trial court erred in its finding on this fourth element required to prove RNE. (Init. Br. of Appellants, p. 13.) In granting partial summary judgment to Stonington on the applicability of the Stonington restrictive covenants to Homeowners' Lots under RNE, the trial court found, "the Stonington Declarations indisputably run with the land." The evidence in the record supports the trial court's findings and no evidence exists that would create a genuine issue of material fact as to this finding.

A covenant may run with the land where there is "an indication that the parties intended for the covenant to run with the land." *Cedar Cove Homeowners Ass'n, Inc. v. DiPietro*, 368 S.C. 254, 270, 628 S.E.2d 284, 292 (Ct. App. 2006). Both of the Stonington Declarations expressly state the restrictive covenants run with the land and are binding on all owners, present and future. The Original Declaration states:

> NOW, THEREFORE, in consideration of said benefits to be derived by Declarant and subsequent owners of lots within the Property, the undersigned does hereby establish, publish and declare that the covenants and restrictions hereinafter set forth shall apply to the Property, become effective immediately and running

with the land, to be binding upon all persons now claiming or hereafter owning or claiming an interest in any portion of the Property.

(R. p. 165). The Amended Declaration states,

> 5. The Developer desires to subject the real property described in Exhibit A to the covenants, conditions, restrictions, easements, charges, and liens, hereinafter set forth and to the guidelines, policies, procedures, rules and regulations adopted by the Developer or the Association, When Empowered, for each Neighborhood, if and when designated, or the Community as a whole. Each and all of which is and are binding upon and for the benefit of the Developer, the Community and each Owner and ***shall run with the title to the land***.
>
> [...]
>
> NOW, THEREFORE, The Developer declares that the real property described in Exhibit A, annexed hereto and forming a part hereof, and any additions thereto which the Developer may incorporate from time to time in the Community is and shall be held, transferred, sold, conveyed, and occupied subject to the covenants, restrictions, easements, charges, and liens hereinafter set forth which ***shall run with the title to the Property and all Lots therein and which shall be binding on all Owners***. (emphasis added).

R. pp. 188-189). These express statements conclusively establish the Developer's intent. Homeowners offer no evidence to create a genuine issue of material fact as to this element. Homeowners mistakenly argue that "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" and not applicable to Homeowners' Lots. (Init. Br. of Appellants, p 13.) Homeowners assert no deeds or other written documents specifically stating that the restrictive covenants in the Declarations run with Homeowners' land. Again, not only is this not a requirement to prove RNE, but such evidence would negate the need to apply the implied theory of RNE altogether.

C. Article I, Section 1(R) of the Amended Declaration does not bar reciprocal negative easements.

Homeowners rely on Article I, Section 1(R) in the Amended Declaration (hereinafter, "Section R") to argue RNE do not apply to Homeowners' Lots. Article I, Section 1 of the Amended Declaration includes various "Definitions" for terms used throughout the Amended Declaration. (R. pp. 189-194). Section R specifically defines, "Master Plan." (R. pp. 191-192). Declarations contain language that states,

> "MASTER PLAN" shall mean and refer to the drawing, sketch, map, or Planned Unit Development plan that represents the conceptual land plan for the future development of the Community. Since the concept of the future development of the undeveloped portions of the Community, including without limitation the Lots, streets or road right-of-ways and any Common Area, are subject to continuing revision and change at the discretion of the Developer, present and future references to the "Master Plan" shall be references to the latest revision thereof. In addition, 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 OF 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.**

Id. (emphasis in original). The trial court found Section R did not preclude the application of RNE to Homeowners' Lots. Homeowners argue Section R creates an "inherent ambiguity and questions as to the restrictive covenants and their applicability." (Init. Br. of Appellants, p. 9.) However, Section R is not ambiguous at all, nor does it create "questions as to the restrictive covenants and their applicability." *Id.* In no clearer words, it states "no implied reciprocal covenants or obligation ***to develop***" land retained by Developer for future development. (R.. p. 191-192). (emphasis added). The following emboldened, capitalized provision further makes clear that the ***Developer*** was not bound by the Stonington Master Plan and could diverge from that plan at any time. The

undisputed fact is that Developer and his successor did in fact finish the Stonington development according to the Master Plan. (First Memo, Ex. K, pp. 2-3; Fifth Memo, Ex. A, pp. 3-4). (R. pp. 233-234, 437-440). Section R was exclusively meant to protect the ***Developer***, not future Lot Owners of Lots within the finished Stonington "Planned Unit Development." (R. pp. 191-192). If the Developer changed course during the development and decided to use the Phase II land in a manner inconsistent with the Master Plan, Section R served to protect the Developer's right. It would be inequitable to allow later Lot Owners, who took title to Stonington residential lots, as delineated on Stonington subdivision plats, with knowledge of both the Master Plan and the Declarations, to now argue this Developer protection provision precludes restrictive covenants from applying to their Lots (and negates their obligation to pay assessments like all other Lot Owners in Stonington).

Even if Section R was ambiguous on its face, such ambiguity was clarified by the evidence in the record. In Lipscomb's sworn statement, he stated that Developer's intent was not that Section R would prevent RNE from arising as to future "Lot Owners" in Stonington subdivision and that Developer's intent was to have all developed phases within Stonington be bound by the Declarations. (R. p. 439). Homeowners have offered no evidence to rebut these sworn statements, despite the more than two years Homeowners had to develop such evidence.

Though not expressly cited in the trial court's ruling, its ruling is supported by precedent from our state Supreme Court. In *Finucan v. Coronet Homes, Inc.*, 259 S.C. 142, 191 S.E.2d 5 (1972), the Supreme Court of South Carolina found the purpose of a

similar provision[1] contained in recorded covenants expressly declaring that the covenants shall not affect other land of the developer was to protect *the developer* from any claim that its remaining land had become burdened with restrictions by his inauguration of the development. In that case too, identical restrictive covenants applied to later phases of the same subdivision developed by the developer. Here, the only rational interpretation of Section R was a means to protect the Developer, and ***Developer's*** remaining land, in the event it did not complete the Stonington development according to the Master Plan. Therefore, the trial court did not err, and Section R does not create a genuine issue of material *fact* as to the issue of whether restrictive covenants apply to Homeowners' Lots.

D. Allegation that Stonington "picks and chooses" when restrictive covenants apply

Appellants argue, albeit confusingly, that settlements with other defendants somehow create a genuine issue of material fact as to whether the theory of RNE applies to subject Homeowners' Lots to the restrictive covenants contained in the Declarations. (Init. Br. of Appellants, p. 10.) Homeowners' allegations that "Plaintiff (*sic*) [...] throughout this case and since 2010 at the latest, [...] pick[s] and choose[s] when and to which properties the restrictions apply" is not supported by any facts in the record. *Id.* Stonington respectfully submits that any settlements made with defendants in this matter have been made in a genuine, good faith effort to resolve this matter as efficiently and economically as possible, irrespective of Stonington's belief that all Stonington Lots are bound by the restrictive covenants of the Declarations. Such settlements should have no

[1] "The twentieth paragraph limited the application of the covenants to the platted lots and expressly declared that they should not affect other land of the developer." *Finucan,* 259 S.C. at 144, 191 S.E.2d at 6.

bearing on this Court's, or the trial court's, legal determination whether the theory of RNE acts to restrict Homeowners' Lots per the terms of the Declaration. As has been stated by Stonington in multiple pleadings filed with the trial court, the affirmative defenses and equitable issues raised by Homeowners will be appropriately tried in the trial of this case as to the enforceability of the restrictive covenants against Homeowners.

The trial court's ruling that Homeowners' Lots are bound by the Stonington restrictive covenants contained within the Declarations is fully supported by the evidence and no genuine issue of material fact exists as to this issue. Therefore, summary judgment was appropriate.

II. The trial court correctly held Homeowners are judicially estopped from adopting a position in conflict with a position taken in a prior proceeding, to wit: denying membership in the Stonington homeowner association and the application of the Stonington restrictive covenants to Homeowners and their Lots.

The trial court correctly held Homeowners are judicially estopped from arguing they, and their Lots, are not subject to the restrictive covenants in the Stonington Declarations because certain Homeowners were involved in prior lawsuits in which they took positions contrary to the positions they take in the instant action. Judicial estoppel precludes a party from adopting a position inconsistent with, or in conflict with, one earlier taken in the same or related litigation. *Cothran v. Brown*, 357 S.C. 210, 215, 529 S.E.2d 629, 631 (2004). Our Supreme Court has expressly adopted the doctrine of judicial estoppel as it relates to matters of fact. *Hayne Federal Credit Union v. Bailey*, 327 S.C. 242, 489 S.E.2d 472 (1997). The doctrine of judicial estoppel is not to be confused with the doctrines of res judicata (claim preclusion) or collateral estoppel (issue preclusion).

In *Carrigg v. Cannon*, 347 S.C. 75, 83, 552 S.E.2d 767, 772 (Ct. App. 2001), this Court noted that the Supreme Court has not articulated the requirements for judicial estoppel to apply, but noted "five circumstance are ***generally*** necessary[.]" *Id.* at 83, 552 S.E.2d at 771–72. Those five general elements are:

> (1) two inconsistent positions must be taken by the same party or parties in privity with each other; (2) the positions must be taken in the same or related proceedings involving the same parties or parties in privity with each other; (3) the party taking the position must have been successful in maintaining the first position and must 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.

Id. "However, '[b]ecause judicial estoppel is an equitable concept, depending upon the facts and circumstances of each individual case, application of the doctrine is discretionary.' *Id.* at 83–84, 552 S.E.2d at 772 (*citing Hawkins v. Bruno Yacht Sales, Inc.*, 342 S.C. 352, 368, 536 S.E.2d 698, 706 (Ct. App. 2000)).

While this Court noted South Carolina law does not specifically address whether judicial estoppel may be invoked against one in privity with another who has taken a prior inconsistent position in litigation, the Court acknowledged "authority exists for extending the concept of judicial estoppel to parties in privity". *Id.* In *Carrigg*, this Court refrained from ruling on that issue because privity did not exist for purposes of applying judicial estoppel in that case, for the same reason this Court found it did not exist for purposes of collateral estoppel. *Id.* In its discussion of privity in the context of collateral estoppel, this court wrote,

> '[T]he term "privity," when applied to a judgment or decree, means one so identified in interest with another that he represents the same legal right.'" *Id.* at 80, 552 S.E.2d at 770 (citing *Ex parte Allstate Ins. Co.*, 339 S.C. 202, 207, 528 S.E.2d 679, 681 (Ct. App. 2000)). [...] 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.

Carrigg, 347 S.C. at 80-81, 552 S.E.2d at 770.

In this case, it is undisputed six of the defendants in the trail court action filed a lawsuit against the Developer in Richland County in a matter identified by Docket Number 2009-CP-40-7819.[2] In that case, these six defendants actually asserted in their complaint:

1. The six Certain Defendants "are property owners in the Stonington Subdivision."
2. "All of the lots, common areas, and roads in the Stonington Subdivision… are subject to the provisions of the Covenants and Restrictions and the By-Laws. This includes all lots, common areas, and roads which are the subject of this action."
3. A demand for the Developers to establish a homeowners association for Stonington for the management of the Subdivisions affairs.
4. The six certain defendants were induced into purchasing Stonington properties by representations made by the Developers with the intent to induce them to purchase Stonington property.

(R. pp. 153, 338-342).

It is also undisputed seven of the defendants in the trial court action filed a lawsuit against the Stonington, the Stonington Developers, both in their corporate capacity and as individuals, and the Stonington's property management company, which bears Richland County Docket Number 2015-CP-40-6957.[3] These defendants actually asserted in their complaint:

1. The seven defendants "are lot owners within a residential subdivision in Richland County called Stonington ("the Subdivision").
2. "Under [the Declaration], [the seven defendants] are members of the Association by virtue of their lot ownership."

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[2] George Lawrence, Annette Lawrence, Jeffrey Farmer, Kelly Farmer, Thomas Brown, and Sharline Brown, none of whom are an Appellants in this appeal.

[3] **Carl Taylor**, Carolyn Austin, **Derrick Taylor**, **Gaye Taylor**, Judy Dove, **Syrecca Parker**, and **Vickie Wise** – of whom the five embolden names are Appellants in this appeal.

3. The seven defendants "desire to control the management and operation of the Association."
4. The seven defendants attended informal member meetings of the Association.

(R. pp. 285-290). Not only did the seven defendants obtain everything they requested in the aforementioned lawsuit, to include control over and management of Stonington, seats as interim directors of Stonington, and a court ordered member meeting/election, but they also obtained reimbursement for their attorney's fees and costs via a Consent Order Confirming Settlement Agreement. (R. p. 291-294). Therefore, the trial court's discretionary application of this equitable concept, based upon the facts and circumstances of this case, was sound and was not error.

Homeowners argue that because membership in a homeowners association is not technically the issue pled in Stonington's complaint, that question was not before the trial court. (Init. Br. of Appellants, p. 13.) This hyper-technical argument loses sight of the issues raised by this action. It is the restrictive covenants in the Stonington Declarations that create mandatory membership in the Stonington homeowner association, by virtue of owning a Lot within Stonington. (R. p. 192 (Article I, Section 1(S) & (U), p. 203 (Article III)). Membership in the Stonington homeowner association is inextricably intertwined with the restrictive covenants. You cannot have one without the other – either the Declarations apply to the Phase II property or they do not. As such, the allegations made by certain Homeowners, under oath, in prior legal actions that they are members of Stonington by virtue of their ownership of a Lot in Stonington are effectively allegations that they, by virtue of their ownership of a Lot in Stonington, are subject to the Stonington Declarations. Appellants' attempt at distinguishing the two – membership in the Stonington homeowner association and whether the Declarations apply to their Lots—is an attempt to

take a position in one legal proceeding to Homeowners' benefit and then take the opposite position in this proceeding to gain another, different benefit. Judicial estoppel does not allow Homeowners to have their cake and eat it too.

Homeowners also argue that they are not in privity with each other because they are individual property owners and therefore, applying judicial estoppel to those Homeowners who were not involved in the prior lawsuits is error. (Init. Br. of Appellants, p. 15.) However, privity exists between Homeowners because they are "so identified in interest with [the] [...] other[s] that [t]he[y] represent [...] the same legal right." *Carrigg,* 347 S.C. 75, 80, 552 S.E.2d at 770. Further, because "privity deals with a person's relationship to the subject matter of the previous litigation, not to the relationships between" the parties, it is undisputed that all Homeowners have a relation to the Phase II properties subject to the Declarations by virtue of their Lot ownership within Phase II.

To the extent the above explanation of privity is unique to collateral estoppel, rather than judicial estoppel, Stonington submits that privity exists by virtue of the relationship between the Homeowners as well. All Homeowners have acted in concert and as a group in this litigation. Homeowners have always maintained the same counsel[4], filed identical answers to Stonington's complaint, filed identical motions and/or responsive pleadings, and argued that *all* Phase II Lots in Stonington were neither expressly restricted by the Declarations, nor implicitly restricted by operation of reciprocal negative easements. They have, by their own actions and admissions, created privity amongst one another with regard to the issue of whether the restrictive covenants apply to their Lots. Either Phase II was or

[4] Appellants terminated their original counsel as a group and retained current counsel as a group.

was not restricted—and Homeowners, as a group, insist that it was not. The trial court's ruling on that narrow issue does not preclude the individual Homeowners from pursuing their own respective arguments and legal interests in the trial on the issue of enforceability.

Homeowners further argue that because the previous litigation did not involve the same "subject matter"—the applicability of the Declarations—that judicial estoppel cannot apply. (Init. Br. of Appellants pp. 15-16.) This argument is flawed because the prior lawsuits do not have to involve the same parties, subject matter or issues for judicial estoppel to apply. *See Carrigg,* 347 S.C. at 83, 552 S.E.2d at 771-72 (reciting general elements of judicial estoppel). Homeowners conflate judicial estoppel with res judicata (claim preclusion) and collateral estoppel (issue preclusion). Judicial estoppel is neither claim nor issue preclusion, but rather, it is "position preclusion." And, the position taken by certain Homeowners in previous litigation was that they are members of the Stonington homeowner association by virtue of their Lot ownership and were entitled to the management and control of Stonington. As a result of that suit, *all* members of Stonington obtained control of their community from the acting developer.

Lastly, Homeowners argue the trial court erred in its finding that Homeowners "previously participated in HOA by making past assessment payments, paying HOA fees, signing HOA acknowledgment forms, and even conduct pursuant to the restrictive covenants." (R. p. 17). Respondent concedes that evidence in the form of "receipts, financial records, meeting minutes, deposition testimony, forms signed by any of the Appellants, or any other document [...]" as to those facts has not *yet* been made part of the trial court record. (Init. Br. of Appellants, p. 14.) As stated multiple times in the pleadings filed in the trial court and at the hearing on the Motions, a trial can and should be had on

the equitable issues to be considered in the *enforcement* of the restrictive covenants against Homeowners personally. Evidence proving past conduct, payments, and acknowledgments will be submitted at that time. Such evidence is not necessary to the summary judgment granted to Stonington on the narrow issue of whether Homeowners are judicially estopped from taking a position in conflict with one earlier taken in another legal proceeding. *However,* it is worth noting that while documentary evidence was not admitted, and not necessary, for the Motions, those facts have *always* been undisputed between the parties and even uncontested in Homeowners' pleadings and at the hearing on the Motions. (R. pp. 325, 415, 416-418, p. 520, line 14-p. 522, line 6, p. 539, line 21-p. 540, line 3, p. 549, line 8-p. 550, line 1, p. 551, lines 12-16, p. 553, line 4-p. 555, line 12). To use the absence of documentary evidence to call into question a fact conveyed to the trial court as uncontested is, at a minimum, disingenuous.

III. The trial court correctly held Homeowners' Lots are subject to the original Stonington Declaration of Covenants, Conditions, Restrictions, and Easements.

The trial court correctly held that Homeowners' Lots are bound by the Original Declaration. As more thoroughly outlined in Section I above, no genuine issue of material fact exists as to the four elements required to prove RNE apply to the Phase II properties. Homeowners have erroneously asserted that any "designations made in the Original Declaration, unless contained in the Amended and Restated Declaration [are] now not applicable." However, Homeowners conflate the concept of releasing property from restrictive covenants with amending the actual contents of the restrictions. *See Kinard*, 407 S.C. at 257-58, 754 S.E.2d at 895 (Stating neighbors were conflating the concept of subjecting property to restrictive covenants with amending the content of restrictive

covenants where they argued subjecting any property beyond the initial property described could only be accomplished through an amendment). Amending and restating the Original Declaration did not affect what property was bound, it merely changed the terms of the restrictive covenants applicable to property already bound—whether expressly or by application of RNE. In either event, the terms of the Amended Declaration replace and supersede those of the Original. And, as discussed in Section I, *supra*, the Amended Declaration applies to Homeowners' Lots by virtue of RNE.

IV. A covenant to pay assessments is a "restrictive covenant" and therefore subject to application upon real property by reciprocal negative easements.

A covenant to pay assessments is a restrictive covenant and can apply to real property by RNE. "Restrictive covenants, sometimes referred to as 'real covenants,' are agreements '***to do***, or refrain from doing, certain things with respect to real property.'" *Kinard*, 407 S.C. at 257, 754 S.E.2d at 893 (quoting *Queen's Grant*, 368 S.C. at 361, 628 S.E.2d at 913) (emphasis added). "When [restrictive covenants] arise by implication, a reciprocal negative easement has been created." *Bomar*, 270 S.C. at 679, 244 S.E.2d at 310.

Homeowners argue that RNE only applies to the "restrictions," but not "assessments" or "liens." (Init, Br. of Appellants, p. 17.) Homeowners asserts the trial court's order was silent on whether "assessments and liens" apply to Homeowners' properties. *Id.* No such silence exists. The trial court found Stonington conclusively established all four elements "for the applicability of the [...] Declarations' covenants to apply to the Phase II properties within Stonington, including [Homeowners'] Lots, by way of reciprocal negative easements." (R. p. 20). This ruling means *all* of the restrictive covenants in the Declaration apply, not just some. In South Carolina, the terms

"covenants," "restrictions," "restrictive covenants," "negative easements," are used interchangeably to mean "real covenants." Indeed, many homeowner association "Declarations" have one or any combination of these and other words (*i.e.* "Declaration of Covenants," "Declaration of Covenants, Conditions, and Restrictions," etc.). Regardless of the name, what they typically have in common are contractual provisions requiring property owners to do and refrain from doing something. Indeed, the restrictive covenants at issue in this case are contained in that certain "Amended and Restated Declaration of ***Covenants***, ***Conditions***, ***Restrictions***, ***Charges*** and ***Liens*** for Stonington" recorded in the Richland County Register of Deeds on September 6, 2005 in Book 1094 at Page 3911. (emphasis added). (R. pp. 72-115). This document replaced and superseded those certain restrictive covenants contained in the "Stonington Declaration of ***Covenants***, ***Conditions***, ***Restrictions*** and ***Easements*** (Amended)" recorded on November 5, 2002 in Book 721 at Page 3559. (emphasis added). (R. pp. 165-184).

Homeowners assert the application of a covenant to pay assessments via RNE is a novel issue in South Carolina. (Init. Br. of Appellants, p. 17.) Homeowners even state Stonington concedes it is a novel issue. *Id.* Homeowners misunderstand the novelty issue and Stonington's memorandum. Stonington's argument is and has always been that all of the restrictive covenants contained in the Declarations apply to all Stonington subdivision property, to include Homeowners' Phase II Lots. Stonington does not believe that is a novel issue. Stonington's memorandum, to which Homeowners presumably refer, argued, in the alternative to reciprocal negative easements applying *all* the restrictive covenants within the Declarations to Homeowners' Lots, that there was an abundance of other persuasive authority for finding Homeowners only have an obligation to pay assessments,

as their fair share of maintenance of common areas, services and amenities in a common interest community. (R. pp. 149-151).

A common interest community is defined in the Restatement (Third) of Property (Servitudes) § 6.2 (2000), which states,

> (1) A "common-interest community" is a real-estate development or neighborhood in which individually owned lots or units are burdened by a servitude that imposes an obligation that cannot be avoided by nonuse or withdrawal:
>
> (a) to pay for the use of, or contribute to the maintenance of, property held or enjoyed in common by the individual owners, or
>
> (b) to pay dues or assessments to an association that provides services or facilities to the common property or to the individually owned property, or that enforces other servitudes burdening the property in the development or neighborhood.

There are no reported South Carolina appellate opinions applying an implied covenant to pay assessments simply by virtue of a community being a common-interest community. However, there is ample, persuasive case law throughout the Unites States that requires lot owners to pay assessments to homeowners associations for the purpose of maintaining common area, services, and amenities as a matter of equity. *Perry v. Bridgetown Community Ass'n, Inc.*, 486 So. 2d 1230 (Miss. 1986) (landowner who purchases property deriving benefits from a homeowner association implies consent to be charged assessments and dues common to all members; alternatively, a covenant to pay assessments to maintain common areas is implied by necessity); *Braeshire Condominium Bd. Of Managers v. Brinkmeyer*, 841 S.W.2d 217 (Mo. Ct. App. 1992) (even if assessment procedure had been defective, court could use equitable power to require unit owners to pay assessments needed for common element); *Weatherby Lake Improvement Co. v. Sherman*, 611 S.W.2d 326 (Mo. Ct. App. 1980) (lot owners required to pay assessments for upkeep of lake even though developer who created lake failed to impose maintenance

obligation in deeds or create homeowners association; imposing assessments on all owners is fair and equitable because all hold easements to use lake); *Sea Gate Ass'n v. Fleischer*, 11 N.Y.S.2d 767 (Sup.Ct. 1960) (when ownership of property in residential community allows owners to use roads and other common areas of development, there is an implied agreement to pay proportionate costs of maintenance and repair); *Spinnler Point Colony Ass'n, Inc. v. Nash*, 689 A.2d 1026 (Pa. Commw. Ct 1997) (owner of property in private residential community with right to use roads and access lake is obligated to pay a proportionate share for repair, upkeep, and maintenance of roads, facilities, and amenities even if chain of title contains no covenant imposing assessments or referring to association; if lot owners were not obligated to pay assessments, community's facilities would fall into disrepair); *Meadow Run and Mountain Lake Park Ass'n v. Berkel*, 409 Pa. Super. 637, 598 A.2d 1024 (1991) (lot owners required to pay assessments to maintain lakes, dams, roads, and other common areas in development; although deeds did not include covenant to pay assessments, deeds provided that, if owners association was formed, occupants would be bound by such rules and regulations as to boating, bathing, ice skating, and fishing as association should adopt; residential communities are analogous to mini-governments and are dependent on collection of assessments to maintain and provide essential and recreational facilities). While the trial court did not make findings based on this argument, it does serve as an additional sustaining ground for finding Homeowners are required to pay assessments to Stonington.

The trial court's finding that the Declarations apply, and therefore ***all*** the restrictive covenants therein, to the Homeowners' Lots is fully supported by the evidence in the record

and existing South Carolina law. No genuine issue of material fact exists with regard to this narrow issue in the case.

V. The trial court properly dismissed the Homeowners' counterclaim.

The trial court did not err in dismissing the Homeowners' counterclaim for abuse of process. The Homeowners cannot demonstrate error in the trial court's ruling for a number of reasons.

A. The Homeowners abandoned their arguments as to their abuse of process counterclaim on appeal.

Mere allegations of error without arguments and supporting authority are insufficient to support an appeal. *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994). "Short, conclusory arguments unsupported by authority are deemed abandoned." *Cole v. S.C. Elec. and Gas, Inc.*, 355 S.C. 183, 196, 584 S.E.2d 405, 412 (Ct. App. 2003).

The Homeowners' argument on appeal regarding their counterclaim is short and conclusory. Only two cases are cited in support of the Appellant Homeowners' position. *Pond Place Partners, Inc. v. Poole* holds that *lis pendens* filings enjoy an absolute judicial privilege. 351 S.C. 1, 32, 567 S.E.2d 881, 897 (Ct. App. 2002). That case's only relevance is that abuse of process provides a remedy for a maliciously filed *lis pendens*. *Id.* at 31, 567 S.E.2d at 897. The other case the Homeowners cited merely holds that a *lis pendens* must comply with statutory requirements to be effective. *S.C. Nat'l Bank v. Cook*, 291 S.C. 530, 532-33, 354 S.E.2d 562, 563 (1987).

The Homeowners' counterclaim alleged that Stonington filed the *lis pendens* for the improper purpose of harassing them and coercing them into agreeing to the community covenants and restrictions and paying dues. (*See* R. pp. 124-25, 50-57.) The trial court

ruled that "[t]here is nothing in the record to suggest that Plaintiff acted with any ulterior purpose." (R. p. 21.) Furthermore, the trial court found that the *lis pendens* filing was appropriate and in accord with its statutory purpose. (R. pp. 21-22.)

On appeal, the Homeowners did not present any evidence to demonstrate factual error in the trial court's ruling. No authority was cited to support their argument that the *lis pendens* was improperly filed in this case. Therefore, the Homeowners' argument is deemed abandoned and the trial court's ruling granting summary judgment as to the counterclaims should be affirmed.

B. The Homeowners failed to meet their burden of proving the trial court erred.

Even if the Homeowners' arguments regarding their counterclaim are not deemed abandoned, they nevertheless fail. Their brief on appeal merely rehashes their arguments to the trial court. There is no argument as to why the trial court erred.

The Homeowners' initial brief offers nothing that was not submitted to the trial court. The first two paragraphs of section V of the brief are copied almost verbatim from the Homeowners' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment filed in the trial court on January 4, 2021. (*See* R. pp. 335-336.) The third paragraph of section V of the Homeowners' initial brief appears to be copied from their Rule 59(e) Motion filed on April 12, 2021. (*See* R. p. 457.) These arguments were presented to the trial court and considered in the trial court's Order filed May 28, 2021.

An appeal is not a "second bite at the apple." On appeal, the appellant's burden is to demonstrate that the trial court erred in its ruling. "[A]n appealed order comes to the appellate court with a presumption of correctness and the burden is on the appellant to demonstrate reversible error." *McCall v. IKON*, 380 S.C. 649, 659-60, 670 S.E.2d 695,

701 (Ct. App. 2008). That burden has not been met with respect to the Homeowners' counterclaims.

The first two paragraphs of the Homeowners' brief were argued to the trial court and ruled upon in the Order filed April 1, 2021. (R. pp. 6-7.) That Order was not appealed. Therefore, those arguments are barred by the law of the case doctrine. *Transportation Ins. Co. & Flagstar Corp. v. S.C. Second Inj. Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010) ("An unappealed ruling is the law of the case and requires affirmance."). In fact, the trial court repeatedly rejected these arguments in four (4) separate orders.[5] All four rulings are substantially identical, and three have not been appealed. (*See* R. pp. 1-49.) The homeowners' burden of proving error has not been met.

This leaves only the final paragraph of the Homeowners' brief. In that paragraph, the Homeowners contend that the *lis pendens* filing could be rendered unlawful by the outcome of this litigation. They cite no authority for this position; nor do they offer any reason why the trial court's ruling was incorrect. Their burden of demonstrating reversible error has not been met.

C. The trial court's ruling should be affirmed on the merits.

Alternatively, even if this Court reaches the merits of the Homeowners' arguments on appeal as to the counterclaims, the trial court's ruling should still be affirmed. The Homeowners contend that Stonington unreasonably delayed initiation of this litigation to settle the question as to the enforceability of the community covenants and restrictions.

[5] The trial court granted the Homeowners' Second 59e Motion and issued two amended Orders filed on July 6 and 7, 2021. (*See* R. pp. 24-49.) However, those rulings were not appealed. Moreover, the amended Orders did not affect the trial court's ruling as to the Homeowners' counterclaims.

That argument's relevance goes to the enforceability of the covenants and restrictions; it has nothing to do with the *lis pendens* filing.

A *lis pendens* is a pleading that provides notice of the pendency of litigation. *Pond Place*, 351 S.C. at 30, 567 S.E.2d at 896; S.C. Jur. *Lis Pendens* § 4 (May 2022 Update). "The purpose of a notice of pendency of an action is to inform a purchaser or encumbrancer that a particular piece of real property is subject to litigation." *Pond Place*, 351 S.C. at 16, 567 S.E.2d at 889. A *lis pendens* provides constructive notice to prospective purchasers or encumbrancers that they will be bound by the outcome of the litigation should they consummate the transaction. *Id.*; S.C. Code Ann. § 15-11-20. The *lis pendens* mechanism is not designed to benefit either party to a legal dispute, but rather, its purpose is to alert prospective purchasers of litigation affecting title to the property. *Pond Place*, 351 S.C. at 17, 567 S.E.2d at 889.

A subsequent purchaser is not bound by pending litigation in the absence of a *lis pendens*. *Walker v. Williams*, 212 S.C. 32, 46 S.E.2d 249 (1948) ("It is a fundamental principle that a party cannot be affected by a proceeding in court to which he was not a party, and in which he had no opportunity to be heard."). If Stonington had not filed the *lis pendens*, the purpose of this action could have been frustrated by alienation of the parcels at issue.

The timing of a *lis pendens* is governed by statute. S.C. Code Ann. § 15-11-10. A *lis pendens* is ineffective unless followed by a complaint within twenty (20) days. *Pond Place*, 351 S.C. at 17, 567 S.E.2d at 889. Thus, the timing of the *lis pendens* goes to the merits of this action; it cannot support an abuse of process claim.

Furthermore, the Homeowners failed to demonstrate a genuine issue of material fact as to their abuse of process claim. A motion for summary judgment cannot be defeated by mere allegations. *Shupe v. Settle*, 315 S.C. 510, 516, 445 S.E.2d 651, 655 (Ct. App. 1994). Affidavits or other evidence are necessary to create a genuine issue of material fact. *Id.* "A conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment." *Id.*

The trial court's ruling should be affirmed because no evidence was submitted to support the Homeowners' abuse of process claim. Rule 56(c), SCRCP. Moreover, the facts alleged in their brief do not establish a *prima facie* case of abuse of process.

"The tort of abuse of process is intended to compensate a party for harm resulting from another party's misuse of the legal system." *Pallares v. Seinar*, 407 S.C. 359, 370, 756 S.E.2d 128, 133 (2014). The elements of the tort are (1) an ulterior purpose, and (2) a willful act in the use of the process that is not proper in the regular conduct of the proceeding. *Id.*

The first prong of this test, an "ulterior purpose," cannot be satisfied when a party has an incidental or concurrent motive that is legitimate. *Food Lion, Inc. v. United Food & Commercial Workers Int'l Union*, 351 S.C. 65, 74, 567 S.E.2d 251, 255 (Ct. App. 2002). No liability for abuse of process obtains from merely pursuing a lawsuit to its authorized conclusion. *Hainer v. American Med. Int'l, Inc.*, 328 S.C. 128, 136, 492 S.C. 103, 107 (1997); 1 Am. Jur. 2d *Abuse of Process* § 5 (May 2022 Update). Moreover, the illegitimate motive must be the primary purpose of the process. *Pallares*, 407 S.C. at 371, 756 S.E.2d at 133. "The collateral objective must be the sole or paramount reason for acting." *Id.* (citation omitted).

This requirement is not satisfied in this case. Stonington had a legitimate reason for filing the *lis pendens*, as discussed above. Alienation of the affected properties would nullify any ruling in this case as to that property. Therefore, the Homeowners' allegation that Stonington had ulterior motives fails as a matter of law.

To satisfy the second element, the Homeowners must provide evidence of a willful act that improperly abused or perverted the legal process. *Food Lion*, 351 S.C. at 73-74, 567 S.E.2d at 255. "A party who simply pursues a lawsuit with a collateral purpose in mind has done nothing improper." *Id.* at 76, 567 S.E.2d at 256; *accord Guider v. Churpeyes, Inc.*, 370 S.C. 424, 432, 635 S.E.2d 562, 566-67 (Ct. App. 2006).

The filing of a *lis pendens* by a party who knows he has no right to the property for the purpose of preventing a sale to a third party has been held to constitute abuse of process. *Broadmoor Apartments of Charleston v. Horwitz*, 306 S.C. 482, 487, 413 S.E.2d 9, 12 (1991). Courts have also held that seeking the commitment of an opposing party in litigation for a mandatory mental evaluation constitutes abuse of process. *Pallares*, 407 S.C. at 373, 756 S.E.2d at 134. No such misconduct has been alleged, much less supported by evidence, in this case.

The Homeowners cited no authority for their contention that liability for abuse of process attaches merely because Stonington may not prevail in this action. South Carolina courts have rejected this argument. In *Cisson v. Pickens Savings and Loan Association*, a mortgagee intervened in an action to foreclose a mechanic's lien. 258 S.C. 37, 39, 186 S.E.2d 822, 823 (1972). The court ruled against the mortgagee and a subsequent action was brought against the mortgage for malicious prosecution and abuse of process. The

Supreme Court of South Carolina held that neither claim could be established. The court explained its rationale as follows:

> While we recognize the principle that an action for malicious prosecution may be predicated, under proper circumstances, upon an ordinary civil proceeding, such principle is not to be applied so as to hamper the basic right of citizens to sue or defend when sued. Such action does not place a threat of penalty for the mere failure to win; nor prevent one from bringing suit or defending when he reasonably believes he has a good chance . . . .

Cisson, 258 S.C. at 44, 186 S.E.2d at 825. Consistently with this understanding, the court rejected the claim for abuse of process, holding that "there is no liability [for abuse of process] where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." *Id.* at 45, 186 S.E.2d at 826.

Courts have dismissed abuse-of-process claims based solely upon a statutorily authorized *lis pendens*. *Ingles Markets, Inc. v. Maria, LLC*, No. 7:14-4828-MGL, 2016 WL 3406637 at 3 (D.S.C. June 21, 2016). The court denied summary judgment on the plaintiff's claims but granted summary judgment on the counterclaim for abuse of process. 2016 WL 3406637 at 4. Because Stonington is pressing viable legal claims with a view to upholding legitimate property interests, the abuse of process counterclaims must fail. *See id.* Accordingly, the trial court ruling must be affirmed.

CONCLUSION

Stonington has been entrenched in this case and the issues for years and, on many occasions, was confused by arguments raised in the Homeowners' Initial Brief. To the extent the disjointed, chaotic brief was meant to lead the reader to believe genuine issues of material fact exists as to the applicability of restrictive covenants on the Homeowners'' Lots, by virtue of sheer confusion, Stonington prays this Court does not fall victim to the

red herrings. For the reasons stated herein, Stonington respectfully submits that this Court should affirm the rulings of the trial court.

Respectfully submitted,

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May 26, 2022
Columbia, South Carolina

2016 WL 3406637
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United States District Court, D. South Carolina, Spartanburg Division.

INGLES MARKETS, INCORPORATED, and Sky King, Inc., Plaintiffs,

v.

MARIA, LLC, Defendant.

Civil Action No. 7:14-4828-MGL
|
Signed 06/21/2016

Attorneys and Law Firms

William Alexander Coates, James Henry Cassidy, Roe Cassidy Coates and Price, Greenville, SC, for Plaintiffs.

William Douglas Smith, Shane William Rogers, Johnson Smith Hibbard and Wildman, Spartanburg, SC, for Defendant.

ORDER

Mary Geiger Lewis, United States District Judge

*1 Plaintiffs Ingles Markets, Incorporated, and Sky King, Inc., ("Plaintiffs"), brought this civil action for specific performance and declaratory and injunctive relief against Defendant Maria, LLC, ("Defendant"), seeking to prevent Defendant from proceeding with construction on property adjacent to property leased by and owned by Plaintiffs. (ECF No. 1). Defendant answered and plead its own claim for declaratory relief, as well as counterclaims of tortious interference with contract, unfair trade practices, and abuse of process.[1] (ECF No. 22). The matter is presently before the Court on Plaintiffs' Motion for Summary Judgment, (ECF No. 56), and Defendant's Motion for Partial Summary Judgment. (ECF No. 55). Also pending is Defendant's Motion in Limine to Exclude Expert Testimony. (ECF No. 61). After full briefing by the parties on these motions, the Court held a hearing, heard argument and took all matters under advisement. (ECF No. 75). The Court has subsequently reexamined the briefs and exhibits of the parties and reviewed the hearing transcript, and these matters are now ripe for decision.

FACTUAL BACKGROUND

Plaintiff Ingles is the anchor tenant of a commercial retail space, or "shopping center," located near the intersection of U.S. Highway 176 and Springfield Road in Spartanburg, SC. Originally owned by developer Jaylin Spartanburg South, LLC, ("Jaylin"), the shopping center is now owned by Plaintiff Sky King. Bill and Miriam Akkary ("the Akkarys"), who are the controlling owners of Defendant Maria, have operated two businesses within the same shopping center since approximately 2001, when they first entered into leases with then-owner Jaylin.

Pursuant to the terms of the lease agreement, all owners and tenants in the shopping center are subject to certain use and development restrictions. (ECF Nos. 1-1 and 1-2). For example, owners and tenants may not erect additional buildings in the shopping center that do not appear on the site plan, which is attached to the amended lease agreement. (ECF No. 1-2). At least some of these restrictions are contained in a document referred to in this litigation as the Declaration of Reciprocal Easements or "REA," (ECF No. 1-3), which was filed with the Spartanburg County Register of Deeds on June 10, 2002.

On or about January 7, 2011, the Akkarys entered into a contract with Jaylin for the purchase of a 0.91 acre outparcel, or "subject property." On the site plan, the subject property appears as two separately designated, adjoining outparcels. (ECF No. 1-3 at p. 3).

At the time of closing, the REA was included in the subject property's chain of title and imposed certain restrictions on its future development. Although there is mention in four places in the REA of an "Exhibit E," this exhibit was not attached to the recorded instrument. The key provision of the REA that is at issue in this litigation, referred to as Article 5.3, directly references the unattached Exhibit E and reads as follows:

> *2 **5.3 Restrictions Relating to Development.** Development and use restrictions shall limit the construction to be performed on Parcels 1, 2, and 3 to the construction of one building of one story and no more than twenty-four (24) feet in height in the locations and with the requisite parking spaces, shown on Exhibit "E" attached hereto. (ECF No. 1-3 at p. 7).

Other references to the unattached Exhibit E appear in the sections of the REA which define the two outparcels that together comprise the subject property. These are referred to in the REA and its attached exhibits as "Parcel 2" and "Parcel 3," respectively. (ECF No. 1-3 at pp. 13-14).

The contract governing purchase and sale of the subject property required seller Jaylin to provide to the Akkarys copies of the following documents pertaining to the property: existing surveys, title insurance policies, condemnation information, environmental reports, copies of leases and amendments, and any other information pertaining to the ownership or operation of the property which the buyer reasonably requests. Although Jaylin produced a copy of the REA and other plats, sketches and drawings of the subject property, Jaylin never produced an Exhibit E or any other document setting out additional restrictions or limitations on use and development.

After owning the subject property for several years, the Akkarys, now operating through Defendant Maria, closed on a construction loan and entered into an agreement with a company for development of the subject property. The contemplated new construction would consist of a single building of approximately 8,800 square feet, resting across the .91 acres purchased from Jaylin and spanning portions of both "Parcel 2" and "Parcel 3," as designated in the REA.

As construction was about commence, Plaintiffs filed this action, alleging that Defendant's proposed structure was in violation of restrictions contained in the REA, including both the language of the above cited Article 5.3 which limits "construction to be performed on Parcels 1, 2, and 3 to the construction of one building of one story" and additional building size and configuration limitations set out in a document which Plaintiffs proffer as the unattached, un-filed "Exhibit E." (ECF No. 1-4).[2] Plaintiffs maintain that the contemplated construction will result in irreparable harm to their property interests, primarily because the proposed building will permanently obstruct the visibility of the Ingles store (or any future replacement tenant) from the adjacent roadways, resulting in loss of customer goodwill and, ultimately, business revenue. Defendant counters that its proposed construction is not in violation of any restriction contained in the REA of which it had notice or of which it is chargeable with having notice.

SUMMARY JUDGMENT STANDARD

Pursuant to Federal Rule of Civil Procedure 56(a), a party is entitled to summary judgment if the pleadings, responses to discovery, and the record reveal that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The party seeking summary judgment bears the initial responsibility of informing the court of the basis for its motion. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). This requires the movant to identify those portions of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of genuine issues of fact. Celotex, 477 U.S. at 323; see also Anderson, 477 U.S. at 249.

*3 Although the moving party bears this initial responsibility, the nonmoving party must then produce specific facts showing that there is a genuine issue for trial. See Celotex, 477 U.S. at 334. In satisfying this burden, the nonmoving party must offer more than a mere "scintilla of evidence" that a genuine issue of material fact exists, Anderson, 477 U.S. at 252, or that there is "some metaphysical doubt" as to material facts. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Rather, it must produce evidence on which a jury could reasonably find in its favor. See Anderson, 477 U.S. at 252.

In considering the motion for summary judgment, the court must construe all facts and reasonable inferences in the light most favorable to the nonmoving party. See Miltier v. Beorn, 896 F.2d 848 (4th Cir. 1990). Summary judgment is proper "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there [being] no genuine issue for trial." Matsushita, 475 U.S. at 587 (1986) (internal quotations omitted).

DISCUSSION

Plaintiffs' Complaint seeks an order from this Court permanently enjoining Defendant from constructing any building or buildings on the subject property that are in violation of the restrictions set out in the REA, including the proffered Exhibit E. See ECF No. 1 at ¶¶ 10-18 and

30-38.[3] In order to grant a permanent injunction, the Court must find that Plaintiffs have demonstrated success on the merits, including, specifically, that they have shown: (1) an irreparable injury; (2) that cannot be adequately remedied by a customary legal remedy such as money damages; (3) that the balance of hardships among the parties weighs in favor of granting the injunction; and (4) that the public interest would not be disserved by the grant of relief. eBay, Inc. v. MercExchange, LLC, 547 U.S. 388, 391 (2006).

However, on the record before it, the Court cannot conclude that the above standards are satisfied as to any of Plaintiffs' claims for equitable relief, all of which ask the Court in one form or another to conclude that Defendant's proposed construction is in violation of the proffered Exhibit E. The Court finds that a genuine issue of material fact exists as to whether this document's inclusion was actually agreed to by declarant Jaylin and intended to be filed along with the rest of the REA, such that its contents may legally limit Defendant's proposed construction, in the event that the Court finds as a matter of law that Defendant had actual or constructive notice of its contents.[4]

The Court will, however, take the occasion of these cross motions for summary judgment to conclude that Defendant's counterclaims for tortious interference, unfair trade practices and abuse of process are properly dismissed. As Plaintiffs point out, each of these claims include, as an essential element, "improper" action or motive by the opposing party. In the case of tortious interference, for example, the proponent of the claim must show that the opposing party intentionally interfered with potential contractual relations "for an improper purpose or by improper methods." Santoro v. Schulthess, 384 S.C. 250, 262 681 S.E.2d 897 (Ct. App. 2009). Similarly, in order to prove out a claim under the South Carolina Unfair Trade Practices Act, ("SCUTPA"), the proponent must show evidence of "unfair or deceptive acts or practices" by the opposing party. S.C. § 39-5-20(a). For an abuse of process claim, the proponent must show, not only an "ulterior purpose" (i.e. a bad motive), but a willful, improper use of process. Pallares v. Seinar, 407 S.C. 359, 370-71, 756 S.E.2d 128 (2014). Here, Defendant appears to maintain that by pressing its claims in the instant litigation and by its earlier filing of a Lis Pendens, Plaintiffs have acted improperly and/or with a bad motive. However, the Court finds no affirmative evidence of improper action or motive in the record. The Court has already declined to find that the filing of the Lis Pendis was done without right. See ECF No. 48. Moreover, the record before the Court clearly indicates that, in this litigation, Plaintiffs are pressing viable legal claims with a view to upholding legitimate property interests. Consider that quite apart from the above-addressed controversy concerning the legal status of the proffered Exhibit E, in each of their three causes of action for equitable relief, Plaintiffs also seek to enforce restrictions contained in the properly filed portions of the REA, including, in particular, the language in Article 5.3, which "limit[s] the construction to be performed on Parcels 1, 2, and 3 to the construction of one building of one story." (ECF No. 1-3 at p. 7). Plaintiffs maintain that Defendant's proposed construction of one building across portions of Parcel 2 and 3 would constitute a violation of this language, and the Court is inclined to agree. To construct more than one building of more than one story on any of Parcels 1, 2, and 3 would obviously violate the provision's clear language. But so too would any attempt to develop the parcels in any other manner than one building of one story per parcel, including Defendant's proposed plan to erect a building that cuts across Parcels 2 and 3, which happen to be adjacent. Moreover, as Plaintiffs emphasize, at the time of the purchase of the subject property, well prior to the start of any construction on the subject property, Defendant had actual notice of the contents of all properly-filed portions of the REA, including its clear and separate delineation of Parcels 1, 2 and 3 and the development restrictions applicable to each by the express terms of Article 5.3.

***4** Although the Court is not prepared, on this record, in light of the above-indicated dispute of material fact, to undertake the full legal analysis necessary to grant or deny an award of permanent injunctive relief, the Court cannot find and does not find that in seeking to enjoin Defendant's proposed development of the subject parcel Plaintiffs are operating from any motive other than the entirely proper motivation of seeking to protect what they regard to be legitimately obtained and enforceable property rights.

CONCLUSION

Having carefully considered the arguments raised by counsel at the hearing, the briefs and exhibits of the parties, and all relevant case law, and for all of the reasons set out above, the Court hereby **DENIES** Defendant's Motion for Partial Summary Judgment, (ECF No. 55), and **GRANTS IN PART AND DENIES IN PART** Plaintiffs' Motion for Summary Judgment, (ECF No. 56), dismissing Defendant's counterclaims for tortious interference, unfair trade practices and abuse of process.

Finally, as to Defendant's Motion in Limine to Exclude Expert Testimony of Richard Alterman, (ECF No. 61), the Court **DENIES** that motion to the extent that the Court will consider Alterman's opinion, as an expert in shopping center development, but only to the extent that the Court finds Alterman's opinion helpful and otherwise consistent with the dictates of Federal Rule of Evidence 702 and only on the question of what harm, if any, Plaintiffs would suffer if an injunction is not granted and Defendant is permitted to build in a manner contrary to the restrictions contained in the REA.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2016 WL 3406637

Footnotes

1 Additionally, both Plaintiffs and Defendant brought competing claims of trespass, which were subsequently dismissed *with prejudice* by stipulation of the parties. (ECF No. 76).

2 In an effort to establish that this document, which appears to be a "blow-up" of a relevant portion of the site plan, is in fact the missing and agreed to (by declarant Jaylin) "Exhibit E," Plaintiffs rely primarily upon certain deposition testimony of Ingles attorney, Mr. Ephraim Spielman, and other correspondence issuing from his office. See ECF No. 79 (Hearing Transcript) at p. 32.

3 This relief in sought in Plaintiffs' Third Cause of Action. Similarly, in their First and Second Causes of Action, Plaintiffs seek a grant of specific performance and a declaration from the Court that Defendant's proposed construction is in violation of both restrictions contained in the filed portions of the REA and in the proffered Exhibit E. (ECF No. 1 at pp. 2-6).

4 For similar reasons, the Court cannot find for Defendant on its counterclaim for declaratory relief, as the Court cannot conclude on this record that the proffered Exhibit E is not a legally binding portion of the "Declaration" whose contents may properly limit the subject property's development by Defendant. See ECF No. 22 at p. 8.

End of Document

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

Appellate Case No. 2021-000641
Civil Action Case No. 2018-CP-40-06557

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.

CERTIFICATE OF COUNSEL

In accordance with Rule 262, SCARC, the undersigned certifies that the Final Brief of Respondent complies with the Supreme Court Order of May 26, 2022.

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