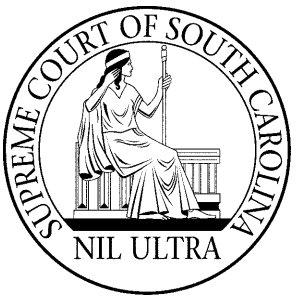

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 15
April 15, 2015
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Loida Colonna, Petitioner,

v.

Marlboro Park Hospital, Employer, and Gallagher Bassett Services, Inc., Carrier, Respondents.

Appellate Case No. 2013-001599

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Florence County
Michael G. Nettles, Circuit Court Judge

Opinion No. 27513
Heard March 17, 2015 – Filed April 8, 2015

CERTIORARI DISMISSED AS IMPROVIDENTLY GRANTED

Stephen Benjamin Samuels, of Samuels Law Firm, LLC, of Columbia, for Petitioner.

Weston Adams, III, of McAngus Goudelock & Courie, L.L.C., of Columbia, and Helen Faith Hiser, of McAngus Goudelock & Courie, L.L.C., of Mount Pleasant, both for Respondents.

PER CURIAM: We granted certiorari to review the Court of Appeals' decision in *Colonna v. Marlboro Park Hospital*, 404 S.C. 537, 745 S.E.2d 128 (Ct. App. 2013). After careful consideration of the Appendix and briefs, the writ of certiorari is

DISMISSED AS IMPROVIDENTLY GRANTED.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Kenneth W. Workman, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2013-002789
Lower Court Case No. 2012-CP-23-02386

ON WRIT OF CERTIORARI

Appeal From Greenville County

The Honorable C. Victor Pyle, Jr., Circuit Court Judge
The Honorable Edward W. Miller, Post Conviction Judge

Opinion No. 27514
Submitted March 19, 2015 – Filed April 15, 2015

REVERSED AND REMANDED

Susannah Conyers Ross, of Ross & Enderlin, PA, of Greenville, for Petitioner.

Attorney General Alan McCrory Wilson and Senior Assistant Attorney General Karen Christine Ratigan, both of Columbia, for Respondent.

PER CURIAM: Petitioner seeks a writ of certiorari from the dismissal, after a hearing, of his application for post-conviction relief (PCR). We grant the petition for a writ of certiorari, dispense with further briefing, and reverse.

FACTUAL/PROCEDURAL BACKGROUND

In a joint trial, petitioner and codefendant Oshawn Robinson were convicted of assault and battery, conspiracy, possession of a weapon during the commission of a violent crime, and armed robbery. After petitioner's direct appeal was dismissed pursuant to *Anders*,[1] petitioner filed an application for PCR, alleging trial counsel was ineffective in failing to object to a coercive *Allen*[2] charge and in failing to challenge the trial judge's ruling barring cross-examination of the State's witness, Timothy Wright, regarding the sentencing recommendation Wright received in exchange for testifying against petitioner and Robinson.

The PCR judge denied petitioner's application for PCR, finding (1) petitioner failed to meet his burden of proving trial counsel was ineffective in failing to object to the *Allen* charge, as the charge was not unduly coercive; and (2) petitioner was not prejudiced by trial counsel's failure to challenge the ruling barring cross-examination regarding Wright's sentence.

ISSUES

Was trial counsel ineffective in failing to object to the *Allen* charge?

Was trial counsel ineffective in failing to challenge the ruling barring cross-examination regarding Wright's sentence?

LAW/ANALYSIS

In South Carolina state courts, an *Allen* charge cannot be directed to the minority voters on the jury panel. *Green v. State*, 351 S.C. 184, 194, 569 S.E.2d 318, 323 (2002). Instead, an *Allen* charge should be even-handed, directing both the majority and the minority to consider the other's views. *Id*. A trial judge has a duty to urge, but not coerce, a jury to reach a verdict. *Id*. Whether an *Allen* charge is unconstitutionally coercive must be judged in its "context and under all the

---

[1] *Anders v. California*, 386 U.S. 738 (1967).

[2] *Allen v. United States*, 164 U.S. 492 (1896).

circumstances." *Tucker v. Catoe*, 346 S.C. 483, 490-91, 552 S.E.2d 712, 716 (2001). The four factors adopted by this Court in *Tucker* to determine whether an *Allen* charge is unconstitutionally coercive are:

> (1) Does the charge speak specifically to the minority juror(s)?
>
> (2) Does the charge include any language such as "You have got to reach a decision in this case"?
>
> (3) Is there an inquiry into the jury's numerical division, which is generally coercive?
>
> (4) Does the time between when the charge was given, and when the jury returned a verdict, demonstrate coercion?

At trial, victim testified two men robbed him at gunpoint. Victim identified petitioner and Robinson as his assailants after seeing their pictures on the evening news. However, a third person, Timothy Wright, pled guilty to robbing victim. Wright testified he conspired with petitioner and Robinson to rob victim and all three men robbed victim together.

The defense called an expert witness to testify regarding false identification. The expert testified to the hazards of cross-racial identification, memory development during short and traumatic events, and how memories can be influenced when there is a suggestive succeeding event, such as a news broadcast featuring pictures of the defendants.

Neither petitioner nor Robinson testified, and the jury began deliberations at 10:33 a.m. From 10:56 a.m. to 11:26 a.m., the jury re-listened to Wright's testimony. At 1:15 p.m., the jury asked the trial judge if there were three photographs displayed on the news broadcast wherein victim identified petitioner and Robinson as his assailants, or if there were photographs of only two people. The trial judge informed the jury he could not answer this question, as it pertained to the facts of the case. At 2:50 p.m., the jurors indicated they could not reach a unanimous decision. The trial judge gave an *Allen* charge, which stated in relevant part:

> Now it's been said that jury service is perhaps the highest service that a citizen can perform for his or her country

> during peace-time. And I certainly agree with that. *However, I tell you that a juror does not render good jury service who arbitrarily says, I know what I want to do in this case, and if and when everybody agrees with me, then we'll write a verdict. And we will not write a verdict until that time.*
>
> . . . .
>
> I tell you that it is the duty of each of you to tell the others how you feel and why you feel that way. *However, I also tell you that if much the larger number of your panel are in favor of one particular verdict, then a dissenting [sic] juror or jurors should consider whether or not his or her or their positions is a reasonable one which makes no impression upon the minds of the majority.*
>
> *In other words, if a majority of you are for one particular form of a verdict, the minority ought to seriously ask themselves whether they can reasonably doubt the correctness of the judgment of the majority.*

(Emphasis added). The trial judge did not charge the majority jurors to consider the positions of the minority jurors. The trial judge concluded the *Allen* charge by stating:

> *Therefore, ladies and gentlemen, I cannot accept any report at this time that you cannot agree on a unanimous verdict in this case. I am of the opinion that you have not deliberated sufficiently long that I could in good conscience accept that report. And I tell you frankly it will take considerably more time before I am convinced that you cannot reach a verdict.*
>
> I therefore, humbly beseech you to return to your jury room, continue your deliberations *with the hope that you can arrive at a unanimous verdict within a reasonable time.*

(Emphasis added). Trial counsel made no objection to the charge, and the jury returned a guilty verdict at 4:47 p.m., two hours after receiving the *Allen* charge.

In light of the four factors delineated in *Tucker*, we find the *Allen* charge given at petitioner's trial was unconstitutionally coercive. *See Tucker, supra* (finding an *Allen* charge violated the defendant's due process rights when the charge, viewed as a whole, was impermissibly directed at minority jurors and when the jurors returned a guilty verdict an hour and a half after receiving the charge); *State v. Williams*, 386 S.C. 503, 690 S.E.2d 62 (2010) at note 7 (cautioning trial judges against using the language "with the hope that you can arrive at a verdict" because the language could potentially be construed as coercive, as jurors are not required to reach a verdict after expressing they are deadlocked). Accordingly, we find trial counsel was deficient in failing to object to the charge.

Further, we find petitioner was prejudiced by trial counsel's deficient performance in failing to object to the unconstitutionally coercive *Allen* charge. *See Strickland v. Washington*, 466 U.S. 668, 695 (1984) (stating prejudice is defined as a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different).

CONCLUSION

We find petitioner was prejudiced by trial counsel's deficient performance in failing to object to an unconstitutionally coercive *Allen* charge; accordingly, we grant the petition for a writ of certiorari, dispense with further briefing, reverse the PCR judge's denial of relief, and remand for a new trial in the criminal case.

Because we grant petitioner relief on the first issue presented, we need not address petitioner's remaining issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (appellate court need not address remaining issues when disposition of prior issue is dispositive).

REVERSED AND REMANDED.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

The Supreme Court of South Carolina

In the Matter of Joel F. Geer, Respondent

Appellate Case No. 2015-000734
Appellate Case No. 2015-000735

ORDER

The Office of Disciplinary Counsel petitions this Court to place respondent on interim suspension pursuant to Rule 17 of the Rules for Lawyer Disciplinary Enforcement (RLDE) contained in Rule 413 of the South Carolina Appellate Court Rules (SCACR). The petition also seeks appointment of the Receiver, Peyre T. Lumpkin, pursuant to Rule 31, RLDE.

IT IS ORDERED that respondent's license to practice law in this state is suspended until further order of this Court.

Respondent is hereby enjoined from taking any action regarding any trust, escrow, operating, and any other law office account(s) respondent may maintain at any bank or other financial institution, including, but not limited to, making any withdrawal or transfer, or writing any check or other instrument on the account(s).

IT IS FURTHER ORDERED that Mr. Lumpkin is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Lumpkin may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office account(s) respondent may maintain that are necessary to effectuate this appointment. Respondent shall promptly respond to Mr. Lumpkin's requests for information and/or documentation and shall fully cooperate with Mr. Lumpkin in all other respects.

Further, this Order, when served on any bank or other financial institution maintaining trust, escrow, operating, and/or any other law account(s) of respondent, shall serve as notice to the bank or other financial institution that Peyre T. Lumpkin has been duly appointed by this Court and that respondent is enjoined from making withdrawals or transfers from or writing any check or other instrument on any of the account(s).

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that the Receiver, Peyre T. Lumpkin, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Lumpkin's office.

Mr. Lumpkin's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

s/ Jean H. Toal C.J.

Columbia, South Carolina

April 10, 2015

The Supreme Court of South Carolina

The State, Respondent,

v.

Dwayne Eddie Starks, Petitioner.

Appellate Case No. 2015-000013
Lower Court Case No. 2012-GS-01-00392

ORDER

Petitioner seeks a writ of certiorari to review the decision of the Court of Appeals in *State v. Starks*, 410 S.C. 580, 765 S.E.2d 148 (Ct. App. 2014). The petition is denied. However, we hereby direct the Court of Appeals to depublish the opinion in this case (Op. No. 5276).

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

April 9, 2015

The Supreme Court of South Carolina

Duke Energy Carolinas, L.L.C., Petitioner,

v.

South Carolina Department of Health and Environmental Control, South Carolina Attorney General, American Rivers, and The South Carolina Coastal Conservation League, Defendants,

Of Whom South Carolina Department of Health and Environmental Control, American Rivers, and The South Carolina Coastal Conservation League are the Respondents.

Appellate Case No. 2013-001118
Lower Court Case No. 2009-ALC-07-0377-CC

ORDER

The parties submitted a consent motion to dismiss this matter in which petitioner sought review of the Court of Appeals' opinion in *Duke Energy Carolinas, L.L.C. v. S.C. Dep't of Health & Env't Control*, 404 S.C. 119, 744 S.E.2d 194 (Ct. App. 2012). We grant the consent motion to dismiss this matter. We hereby direct the Court of Appeals to depublish its opinion and assign the matter an unpublished opinion number. The above opinion shall no longer have any precedential effect.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
April 10, 2015

The Supreme Court of South Carolina

RE: Proposed Amendments the South Carolina Rules of Professional Conduct, Rule 407 of the South Carolina Appellate Court Rules

Appellate Case No. 2015-000495

ORDER

The South Carolina Bar has proposed amending Rule 1.0, containing terminology, of the Rules of Professional Conduct to include the following definition of "person": "Person" includes an individual, corporation, company, limited liability company, association, trust, partnership and any other organization or entity.

Pursuant to Article V, § 4, of the South Carolina Constitution, we hereby amend Rule 1.0 of Rule 4.7, SCACR, as requested by the Bar. The definition will appear as Rule 1.0(j). We also amend references to Rule 1.0 in several comments to the Rules of Professional Conduct to reflect the re-lettering of the definitions in Rule 1.0 and to reflect past changes in lettering.

These amendments shall become effective immediately. A copy of the amended rules is attached.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina
April 15, 2015

RULE 1.0: TERMINOLOGY

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (g) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

(c) "Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

(d) "Depository institution" means any bank, credit union or savings and loan association authorized by federal or state laws to do business in South Carolina and insured by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, or any successor insurance corporation(s) established by federal or state law.

(e) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association, or in a legal services organization; lawyers employed in the legal department of a corporation, government, or other organization; and lawyers associated with an enterprise who represent clients within the scope of that association.

(f) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction or which has a purpose to deceive.

(g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated reasonably adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(h) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(i) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(j) "Person" includes an individual, corporation, company, limited liability company, association, trust, partnership and any other organization or entity.

(k) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(l) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(m) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(n) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(o) "Serious crime" denotes any felony; any lesser crime that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; or, any crime a necessary element of which, as determined by the statutory or common law definition of the crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, willful failure to file income tax returns, or an attempt, conspiracy or solicitation of another to commit a serious crime.

(p) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

(q) "Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(r) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording and e-mail. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment

Confirmed in Writing

[1] If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

If a lawyer has obtained a client's informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm

[2] Whether two or more lawyers constitute a firm within paragraph (d) can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the Rule that is involved. A group of lawyers could be regarded as a firm for purposes of the Rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the Rule that information acquired by one lawyer is attributed to another.

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

[4] Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.

Fraud

[5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction or conduct which has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., Rules 1.2(c), 1.6(a), 1.7(b), and 1.18(d). The communication necessary to obtain such consent

will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. I n general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. A number of Rules require that a person's consent be confirmed in writing. See Rules 1.7(b), 1.9(a), and 1.18(d). For a definition of "writing" and "confirmed in writing," see paragraphs (o) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See, e.g., Rules 1.8(a) and (g). For a definition of "signed," see paragraph (o).

Screened

[8] This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under Rules 1.8(l), 1.10(e), 1.11, 1.12 or 1.18.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials

relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

Rule 1.6, Comment [8]:

[8] Paragraph (b)(3) does not limit the breadth of Paragraph (b)(1), but describes one specific example of a situation in which disclosure is permitted to prevent a criminal act by the client. Paragraph (b)(3) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(f), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(3) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

Rule 1.7, Comment [15]:

[15] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(q)), such representation may be precluded by paragraph (b)(1).

Rule 1.7, Comment [18]:

[18] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(r) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and

advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. The better practice is to include within any writing the risks, advantages and alternatives discussed as a matter of full disclosure. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Rule 1.10, Comment [1]:

[1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(e). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2] - [4]. For purposes of imputing disqualification under this Rule, however, paragraph (e) treats legal services organizations differently from other law firms by permitting screening.

Rule 1.10, Comment [9]:

[9] Rule 1.10(e) allows programs providing legal services to indigents to avoid imputed disqualification by screening lawyers from conflicting matters within the office. See Rule 1.0(n) for screening procedures. The authorization of screening is intended to increase the number of persons to whom each program can provide legal services, while at the same time protecting the clients from prejudice. Paragraph (e) applies only to programs of the type delineated and does not authorize screening by private law firms to avoid imputed disqualification.

Rule 1.11, Comment [6]:

[6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(n) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly relating the lawyer's compensation to the fee in the matter in which the lawyer is disqualified.

Rule 1.12, Comment [4]:

[4] Requirements for screening procedures are stated in Rule 1.0(n). Paragraph (c)(1) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

Rule 1.13, Comment [3]:

[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy

and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(h), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

Rule 1.18, Comment [7]:

[7] Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(n) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

Rule 2.4, Comment [5]:

[5] Lawyers who represent clients in alternative dispute resolution processes are governed by the Rules of Professional Conduct. When the dispute resolution process takes place before a tribunal, as in binding arbitration (see Rule 1.0(q)), the lawyer's duty of candor is governed by Rule 3.3. Otherwise, the lawyer's duty of candor toward both the third party neutral and other parties is governed by Rule 4.1.

Rule 3.3, Comment [1]:

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(q) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

Rule 3.3, Comment [8]:

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(h). Thus, although a lawyer should resolve doubts

about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

Rule 3.5, Comment [5]:

[5] The duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition. See Rule 1.0(q) and Rule 3.3, Comment [1].

Rule 4.2, Comment [8]:

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(h). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

Rule 5.1, Comment [1]:

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(e). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

R.C. Frederick Hanold, III and Rose F. Hanold, and Carol R. Mitchell and George P. Mitchell, Jr., Respondents,

v.

Watson's Orchard Property Owners Association, Inc., a South Carolina Corporation, Pelham Farm, LLC, a South Carolina Corporation, Legacy One, LLC, a South Carolina Corporation, SESP, LLC, a South Carolina Corporation, an unknown Trustee of the Revocable Trust Agreement Dated March 19, 1996, established by James B. Stephens as amended, and unknown Jay Stephens and Mike Stephens as Co-Personal Representative of the Estate of James B. Stephens, Defendants,

Of whom Pelham Farm, LLC, a South Carolina Corporation, Legacy One, LLC, a South Carolina Corporation, an unknown Trustee of the Revocable Trust Agreement Dated March 19, 1996, established by James B. Stephens as amended, and unknown Jay Stephens and Mike Stephens as Co-Personal Representative of the Estate of James B. Stephens, are the Appellants.

v.

Property Owners in Watson's Orchard Subdivision: N. Carter Poe, III; McNally Reeves, as Trustee of the Residual Trust under Item Five of the Last Will and Testament of Hattie L. Reeves dated February 9, 1998; Janet B. Yusi; Lucy S. Tiller; James G. Stephens; Rachel P. McKaughan; Ramon J. Ashy and Jana Ashy; Christopher D. Scalzo and Heather V. Scalzo; Erma R. Rash, as Trustee of the Erma R. Rash Revocable

Trust dated February 12, 2010; James Edwin Conrad, as Trustee of the James Edwin Conrad Living Trust dated September 7, 2010; Sue Lane Conrad; Horst H. H. Eschenberg and Floride C. Eschenberg; Caryl L. Clover, as Trustee of the Caryl L. Clover Revocable Living Trust Agreement dated May 12, 1999; Mary F. Newell; Timothy M. Conroy and Elizabeth W. Conroy; Nathan Scolari; Joel Wells Norwood and Lynn Norwood; J. Lynn Shook; Juan Hernandez and Janice M. Pelletier; Scott P. Payne and Kathleen H. Payne; Joe G. Thomason and Dana L. Henry Thomason; Traci Segura; Cameron E. Smith and Joan B. Smith; Charles E. Howard and Sharon F. Howard; Penelope J. Galbraith; Meredith C. Vry; Delores B. Mitchell; Lisette M. Silva and Mary F. Colley; Ilona K. Alford and William G. Alford; George T. McLeod and Martha T. McLeod; Ronald S. Wilson and Robin E. Wilson; The Merrill J. Gildersleeve and Anore L. Novak Revocable Living Trust dated November 1, 1996; Anna Marie T. Azores and Kim O. Gococo; Ashley Westrope as Trustee of Martha Randolph Westrop Trust dated June 6, 1988; Cliff C. Jollie and Martha W. Jollie; David A. Saliny and Xiaoli Saliny; Lecia S. Franklin; Dean D. Varner and Deborah P. Varner; W. Frank Durham, Jr.; Christine M. Howard; Samuel P. Howard, Jr. and Jane H. Howard; Manfred E. Kramer and Jane J. Kramer; Mary J. Steele; James J. Barrett, III and Kimberly A. Barrett; Richard A. Herman and Patricia L. Herrman, Third-Party Defendants.

Appellate Case No. 2013-000452

Appeal From Greenville County
Edward W. Miller, Circuit Court Judge

Opinion No. 5312
Heard November 4, 2014 – Filed April 15, 2015

AFFIRMED

William D. Herlong, of The Herlong Law Firm, LLC, of Greenville, for Appellants.

Randall Scott Hiller, of Greenville, for Respondents.

WILLIAMS, J.: Pelham Farm, LLC; Legacy One, LLC; an unknown trustee of the revocable trust agreement established by James B. Stephens; and Jay Stephens and Mike Stephens, as co-personal representatives of the estate of James B. Stephens (collectively Appellants[1]) contend the circuit court erred in finding their amendment to a restrictive covenant that governed the development of property in Greenville County, South Carolina, was invalid for lack of a majority vote. We affirm.

FACTS

In the 1960s, Richard Watson and his wife began developing their substantial landholdings that stretched from present-day I-385 up to and across the north and south side of Pelham Road in Greenville, South Carolina. Prior to this time, Watson's land was used as an orchard. Once development began, restrictions were placed on the entire property[2] to limit its development to single family residential use. Subsequently, a subdivision plat was recorded that created forty-seven lots in

[1] Watson's Orchard Property Owners Association, Inc. (WOPOA) was a defendant in the declaratory judgment action but did not appeal the underlying decision.

[2] In January 1962, the Watsons recorded a preliminary protective covenant that applied to the property on both the north and south side of Pelham Road.

what is currently known as Watson's Orchard Subdivision.[3] Thereafter, these lots were developed into upscale homes.

In 1979, Watson recognized that his property south of Pelham Road could realize a greater value if developed commercially. As a result, he sold the vast majority of his property on the south side of Pelham Road to Lincoln of South Carolina, Inc. (Lincoln). Lincoln then entered into negotiations with the owners of the lots in Watson's Orchard Subdivision to obtain a release of the residential use restrictions for Watson's property south of Pelham Road. These negotiations resulted in the property owners, with the exception of J.B. Stephens, agreeing to release the restrictions in exchange for the transfer of a twenty-two acre buffer zone on the south side of Pelham Road, that was to be sold and developed as single family residential lots.

As part of the agreement, the property in the buffer zone was to be owned by Watson's Orchard Property Owners Association, Inc. (WOPOA), a for profit corporation tasked with the responsibility of developing and selling the lots within the buffer zone. The stock in WOPOA was granted to the owners of Watson's Orchard Subdivision who would ultimately benefit financially from the sale of the lots within the twenty-two acres.

In 1981, Lincoln, as the declarant, imposed the Restrictions and Covenants (1981 R&Cs), which are the subject of this action, upon the twenty-two acre buffer zone. Thereafter, Lincoln conveyed the twenty-two acre tract of land to WOPOA. Although J.B. Stephens did not have any stock in WOPOA, in exchange for his cooperation to release the residential use restrictions, Stephens purchased six acres on the south side of Pelham Road (the Property) directly across from Watson's Orchard Subdivision from WOPOA. This six-acre tract contained sufficient property to allow it to be developed into five residential lots. The successors to J.B. Stephens are the appellants in this action.

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[3] In September 1964, after the forty-seven lots were platted and approved, additional restrictions and protective covenants were recorded specifically for Watson's Orchard Subdivision, all of which are still in effect today.

The 1981 R&Cs included a provision requiring a majority vote of the current property owners of Watson's Orchard Subdivision, as well as the owners of the lots in the buffer zone, to change or amend the 1981 R&Cs. The pertinent provision states the following:

> [T]he covenants, conditions[,] and restrictions hereinafter set forth shall run with the property . . . and be binding upon all parties having any right, title or interest in the said described properties . . . until January 1, 2010[,] at which time said covenants, conditions, and restrictions shall be automatically extended for successive periods of ten (10) years each unless, *by vote of a majority of the then owners of the lots into which the property described above shall have been developed and in Watson's Orchard Subdivision*, the within covenants, conditions[,] and restrictions are changed or amended, in whole or in part.

(emphasis added). In 2005, J.B. Stephens attempted to purchase the remainder of the property in the buffer zone owned by WOPOA for over two million dollars. The transaction was never consummated, but Respondents contend it spurred Appellants' efforts to amend the 1981 R&Cs, which prompted the present litigation.

Several months prior to the January 1, 2010 date listed in the 1981 R&Cs, Appellants attempted to amend the 1981 R&Cs to remove the residential development requirement for the property that abuts J.B. Stephens' acreage south of Pelham Road. Appellants obtained twenty-nine of fifty-four possible votes[4] in favor of amending the 1981 R&Cs, and then filed the amended Restrictions and Covenants (2009 R&Cs) in the Greenville County Register of Deeds Office on November 9, 2009. Of the necessary twenty-nine votes, Appellants asserted they possessed five votes based on the five "lots" within the six acres purchased by J.B. Stephens in 1981.

[4] Respondents contend the number of votes allotted to J.B. Stephens was directly correlated to how many favorable votes the board of WOPOA needed to remove the restrictions, citing to a document in which the board postulated different ways to count J.B. Stephens' votes to obtain a majority vote.

Homeowners R.C. Frederick Hanold III, Rose Hanold, Carol Mitchell, and George Mitchell Jr., (Respondents) filed suit on September 8, 2009, seeking a declaratory judgment that the 2009 R&Cs were not validly adopted. WOPOA and Appellants answered and counterclaimed for a declaratory judgment that the 2009 R&Cs were valid. WOPOA and Appellants filed an amended answer, adding the property owners in WOPOA as third-party defendants. The property owners did not respond and default judgment was entered against them. WOPOA, Appellants, and Respondents then filed cross motions for summary judgment on April 27, 2012, and the circuit court denied both motions, finding genuine issues of material fact existed and, thus, summary judgment was inappropriate.

The circuit court received testimony and evidence from both parties on September 4 and 5, 2012, in the declaratory judgment action. In its order finding for Respondents, the circuit court concluded the Property had "not been developed into lots for the purpose of being entitled to vote to amend or modify the restrictive covenants." The circuit court concluded the plain and unambiguous language of the 1981 R&Cs required the lots be developed prior to being eligible to vote. The court cited the following in support of its conclusion: (1) Appellants failed to demonstrate a plat was ever prepared or recorded as required by Greenville County ordinance, which was a prerequisite to subdividing or offering a lot for sale; (2) the Property possessed a single tax map number, preventing it from being legally sold as five individual lots on the date of the purported amendment; and (3) the 1981 deed of sale and other supporting documents offered to demonstrate the six-acre tract was comprised of five separate lots only showed the intent of the parties to the conveyance, not the intent of Lincoln, which is paramount in interpreting a restrictive covenant. The court then ruled the amendment to the 1981 R&Cs and subsequent recording of the 2009 R&Cs were both void and of no force and effect. This appeal followed.

STANDARD OF REVIEW

"Declaratory judgments in and of themselves are neither legal nor equitable." *Campbell v. Marion Cnty. Hosp. Dist.*, 354 S.C. 274, 279, 580 S.E.2d 163, 165 (Ct. App. 2003). "The standard of review for a declaratory judgment action is therefore determined by the nature of the underlying issue." *Id.*

"Restrictive covenants are contractual in nature." *Hardy v. Aiken*, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006). An action to enforce restrictive covenants by means of injunctive relief, however, is an action in equity. *Cedar Cove*

Homeowners Ass'n v. DiPietro, 368 S.C. 254, 258, 628 S.E.2d 284, 286 (Ct. App. 2006). In an equitable action, we may find the facts in accordance with our own view of the evidence. *Id.* "While this standard permits a broad scope of review, an appellate court will not disregard the findings of the [circuit] court, which saw and heard the witnesses and was in a better position to evaluate their credibility." *Buffington v. T.O.E. Enters.*, 383 S.C. 388, 391, 680 S.E.2d 289, 290 (2009).

In this case, Respondents requested the circuit court enjoin and restrain Appellants from using the property in any manner inconsistent with the 1981 R&Cs. The circuit court, in declaring the amendment to the 2009 R&Cs invalid, effectively enjoined Respondents from developing the property in any manner inconsistent with the 1981 R&Cs. Accordingly, this action sounds in equity, and we may review the circuit court's factual findings in accordance with our own view of the preponderance of the evidence. *See Cullen v. McNeal*, 390 S.C. 470, 481, 702 S.E.2d 378, 384 (Ct. App. 2010).

LAW/ANALYSIS

Appellants claim the circuit court failed to consider overwhelming evidence in their favor when it declared the 1981 R&Cs were improperly amended. Specifically, Appellants contend the circuit court erred in (1) ignoring documentary evidence, lay witness testimony, and expert testimony that overwhelmingly established the Property was comprised of five lots; (2) improperly relying on state and local law when it concluded Appellants were required to record the plat of the Property as a prerequisite to subdividing the Property into lots; and (3) failing to consider the text of the 1981 R&Cs as well as the drafter's intentions when it concluded the Property was not developed into lots. We address each argument in turn.

I. Documentary Evidence & Lay and Expert Testimony

Appellants first contend the overwhelming evidence demonstrated the Property was comprised of five developed lots, thus entitling Appellants to five votes pursuant to the 1981 R&Cs. Because we hold the Property does not satisfy the plain and ordinary meaning of "lots which shall have been developed," we affirm the circuit court and find it properly declined to consider this evidence.

"[A] restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly

construed, with all doubts resolved in favor of the free use of property." *Hardy*, 369 S.C. at 166, 631 S.E.2d at 542 (alteration in original). "The language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it at the time of execution." *Id.* "[T]he paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document." *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 863–64 (1998) (internal quotation marks and citation omitted). "When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract's force and effect . . . ." *Moser v. Gosnell*, 334 S.C. 425, 430, 513 S.E.2d 123, 125 (Ct. App. 1999) (citation omitted). To that end, when the language creating restrictions on the use of property is unambiguous, the restrictions will be enforced according to their plain and obvious meaning. *Shipyard Prop. Owners' Ass'n v. Mangiaracina*, 307 S.C. 299, 308, 414 S.E.2d 795, 801 (Ct. App. 1992).

We find the plain language of the 1981 R&Cs only afforded a property owner voting rights for developed lots. The term "developed" is not defined in the 1981 R&Cs. However, resort to its usual and customary definition leads us to the conclusion that the Property was not developed into lots as required by the 1981 R&Cs. *See Anderson v. Buonforte*, 365 S.C. 482, 490, 617 S.E.2d 750, 754 (Ct. App. 2005) ("When a term is not defined within a contract, evidence of its usual and customary meaning is competent to aid in determining its meaning."); *Strother v. Lexington Cnty. Recreation Comm'n*, 332 S.C. 54, 62, 504 S.E.2d 117, 122 (1998) (holding when faced with an undefined term, the court must interpret the term in accord with its usual and customary meaning).

South Carolina courts have not expressly defined the term "developed" in the context of restrictive covenants pertaining to landholdings. However, cases from other jurisdictions dealing with the term "developed" in the context of land confirm that "develop" connotes conversion into an area suitable for use or sale.[5] *See*

[5] Respondents cite to a Greenville County ordinance as further proof that for a parcel of land to be subdivided into lots for purposes of development, there must be an intent to sell, lease, or build on the property. *See* Greenville County, S.C., Ordinance 4225 (Sept. 16, 2008) ("Subdivision means all divisions of a tract or parcel of land into two or more lots, building sites, or other divisions for the purpose, whether immediate or future, of sale, lease, or building development[. . . .]").

Kenai Peninsula Borough v. Cook Inlet Region, Inc., 807 P.2d 487, 496 (Alaska 1991) ("In the context of raw land, the common meaning of 'developed' includes subdivided property which is ready for sale." (footnote omitted)); *Winkelman v. City of Tiburon*, 32 Cal. App. 3d 834, 843 (Ct. App. 1973) ("The term 'develop' connotes the act of converting a tract of land into an area suitable for residential or business uses."); *Prince George's Cnty. v. Equitable Trust Co.*, 408 A.2d 737, 742 (Md. Ct. Spec. App. 1979) (defining the term "develop" as "the act of converting a tract of land into an area suitable for residential or business uses" (citing Webster's New Int'l Dictionary (2d ed.1959)); *Muirhead v. Pilot Props., Inc.*, 258 So. 2d 232, 233 (Miss. 1972) (stating "[t]he term 'develop' has generally been interpreted when used in connection with real estate to mean the converting of a tract of land into an area suitable for residential or business uses"); *Sleasman v. City of Lacey*, 151 P.3d 990, 991 (Wash. 2007) (finding an ordinance requiring a permit for tree removal on "undeveloped" or "partially developed" property did not apply to the homeowners' property because under the plain meaning of the ordinance, the property was "developed" as it was a lawful building site ready for sale or use); *B & W Constr., Inc. v. City of Lacey*, 577 P.2d 583, 586 (Wash. Ct. App. 1978) (finding the platting of property on paper without further steps to develop it, such as adding sewers, streets, and utilities, was insufficient to show a lot was developed for purposes of establishing comparable value of property in an inverse condemnation case); *cf. Best Bldg. Co. v. Sikes*, 394 S.W.2d 57, 63 (Tex. App. 1965) (approving the trial court's finding in a breach of contract action based in part on extrinsic evidence that the term "develop" would include the acts of subdividing a tract of land into lots, adding streets, and installing utilities).

Merriam-Webster's Dictionary defines "develop" in a land context as follows: "to convert (as raw land) into an area suitable for residential or business purposes <they [develop]ed several large tracts on the edge of town>; *also*: to alter raw land into (an area suitable for building) <the subdivisions that they [develop]ed were soon built up>." *See* Webster's Third New Int'l Dictionary 618 (3d ed. 1986). Although the most recent edition of Black's Law Dictionary does not define the term "develop" or "developed," it states "improved land"[6] is "[l]and that has been

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[6] We are, however, aware that "developed" land is not always tantamount to "improved" land. *See Sleasman*, 151 P.3d at 993 (finding that after land is developed, it may then be improved by adding a structure to the land, and clarifying that "one cannot build or improve upon a lot unless it is developed").

developed; esp., land occupied by buildings and structures," whereas "unimproved land" is "[r]aw land that has never been developed, and usu[ally] that lacks utilities." Black's Law Dictionary 1008–09 (10th ed. 2014). Based on its plain and ordinary meaning, we find the term "developed" requires affirmative acts on the part of the owner to transfer the property from raw land to a more improved state.

In light of these definitions, we look at the language contained within the 1981 R&Cs. The 1981 R&Cs specifically state that the document may be amended only "by a vote of a majority of the then owners of the lots into which the property . . . shall have been developed . . . ." In drafting the 1981 R&Cs, Lincoln specifically required the lot to be developed prior to possessing a right to change the 1981 R&Cs. Appellants set forth no evidence—whether it be roads, sewer lines, water, or electricity—that they instituted any improvements on the Property in the thirty years of their ownership as contemplated by the 1981 R&Cs. We recognize Appellants possessed an easement for sewer, drainage, and utilities over the Property, but an easement, in and of itself, is not tantamount to an improvement. Further, while Appellants claim the unrecorded plat dividing the Property into five smaller lots proves the lots were developed, we find this evidence is not conclusive on whether J.B. Stephens intended to develop and sell these five lots because the plat was never recorded. *See Sleasman*, 151 P.3d at 992-93 (finding "the most obvious example of 'development' is the platting process where building lots are made ready for sale or use for future improvement"). Moreover, Lincoln chose the past tense when it included the language "have been developed," as opposed to "may be developed" or "will be developed." *See generally Mathis v. Brown & Brown of S.C., Inc.*, 389 S.C. 299, 318, 698 S.E.2d 773, 783 (2010) (finding choice of the past tense of the verbs "rendered" and "recompensed" in a statutory scheme as evidence the acts were to have occurred in the past as opposed to prospectively). We cannot imply language into the 1981 R&Cs that is not written, even if a different interpretation would be more favorable in the present day. *See S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001) ("The court may not limit a restriction in a deed, nor, on the other hand, will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written." (emphasis omitted)). Even if Appellants took some prefatory steps to develop the Property into five lots, under

the plain meaning of the term, we find Appellants failed to develop the lots prior to amending the 1981 R&Cs. Thus, we affirm the circuit court's finding on this issue.[7]

II. Reliance upon State and Local Law

Next, Appellants claim the circuit court and Respondents improperly cite to Section 30-5-240 of the South Carolina Code (2007) and a Greenville County ordinance for the proposition that a sale pursuant to an unrecorded plat is void or voidable. We address each argument in turn.

Section 30-5-240 states,

> When real property is subdivided for the purpose of sale and is sold or offered for sale according to a plat of a survey thereof, the person first offering such property for sale *shall* file a plat or blueprint of such survey in the office of the clerk of court of the county in which such real estate is situate[d]. In the event that the owner fails to comply with the above provision he shall become liable to the purchaser or to any subsequent grantee of the land, or of any portion thereof, in such sum as shall be found necessary to procure and record such plat.

(emphasis added).

The relevant portion of the Greenville County ordinance states,

> The owner . . . of any land . . . who transfers, sells, or agrees to sell such land by reference to, or exhibition of, or by other use of a plat or subdivision of such land before such plat has been approved by the Planning Commission and recorded in the office of the County Register of Deeds shall forfeit and pay a penalty of $100

[7] Because we find the language of the 1981 R&Cs regarding developed lots is unambiguous, we decline to consider extrinsic evidence submitted by Appellants in support of their argument that the lots were developed. *See McClellanville*, 345 S.C. at 623, 550 S.E.2d at 303 (holding that a court will not examine extrinsic evidence to interpret a contract absent an ambiguity).

> for each lot so transferred, sold, or agreed or negotiated to be sold.

Greenville County, S.C., Ordinance 3870, § 1.3 (Dec. 13, 2004). Appellants submitted no proof that either Appellants or any predecessor in interest ever submitted a plat, received approval for a plat, or recorded a plat as contemplated and required by law.[8]

We find the failure to fulfill the requirements enunciated in the foregoing state and local law are evidence that J.B. Stephens did not intend to subdivide the Property for development purposes when the plat was initially prepared. Further, although Appellants' failure to abide by these rules of law would not necessarily invalidate a subsequent sale, we find it would be inequitable to permit Appellants to use an unrecorded plat as evidence that the lots were subdivided and intended for sale if the ordinance and statute require recordation as a prerequisite to sale. *See Buffington*, 383 S.C. at 393, 680 S.E.2d at 291 ("[W]hile there is no formulaic balancing test, . . . this [c]ourt has consistently held that courts should consider equitable doctrines when determining whether to enforce a restrictive covenant and enjoin a landowner from using their land in a manner that violates the covenant."). Based on the foregoing, we find the circuit court did not err in relying upon section 30-5-240 and a Greenville County ordinance as support for its conclusion that the Property was not developed into lots as contemplated by the 1981 R&Cs.

III. Text of the 1981 R&Cs and the Drafter's Intent

Last, Appellants contend the circuit court failed to consider the text of the 1981 R&Cs as well as the drafter's intentions when it concluded the Property was not developed into lots. We disagree.

Appellants first claim another provision within the 1981 R&Cs confirms that the lots in question were developed. Appellants cite to a sentence within the 1981 R&Cs that permits the restrictions to be enforced against "any property owner of

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[8] Appellants cite to the Greenville County tax map sheet, which reflects the Property is demarcated into five smaller lots, as evidence that the plat was at some point submitted to the authorities. However, the circuit court never noted this evidence in its order, and Appellants failed to submit further proof that the plat was submitted to the Greenville County Planning Commission for approval.

any lot into which the property described above shall subsequently be *cut*." (emphasis added). Appellants essentially argue that a "lot" is merely property which has been "cut" from a larger parcel of land. Assuming this to be true, this reference does not require us to find the Property was developed into five lots. This provision pertains to an owner's ability to enforce the restrictive covenants against any other owner who violates the 1981 R&Cs. We find it reasonable to conclude that any owner could bring an action to enforce the 1981 R&Cs against any other owner, regardless of how many lots the owner in violation of the 1981 R&Cs possesses.

On the other hand, Lincoln specifically required the lots to be developed before an owner could vote to amend or modify the 1981 R&Cs. Further, we note that in the amendment provision within the 1981 R&Cs, Lincoln chose to afford each homeowner within Watson's Orchard Subdivision a vote based on residency within the subdivision. However, for the owners in possession of property outside the subdivision, their voting rights were not based merely on owning a "lot," but on owning a "developed lot." We find it reasonable to conclude that homeowners within the subdivision and property owners who expended financial resources to develop their lots would be most affected by any changes to the 1981 R&Cs and, thus, would be afforded the greatest voting rights.

Next, Appellants claim the circuit court ignored the testimony of Patrick Grayson, the attorney who drafted the 1981 R&Cs, regarding the meaning of "developed lots." Because the language in the 1981 R&Cs was unambiguous, we find the circuit court did not need to consider extrinsic evidence—by way of testimony or otherwise—regarding the meaning of this term. *See McClellanville*, 345 S.C. at 623, 550 S.E.2d at 303 (holding that a court will not examine extrinsic evidence to interpret a contract absent an ambiguity).

CONCLUSION

Based on the foregoing, the circuit court's decision is

AFFIRMED.

GEATHERS and McDONALD, JJ., concur.