The Supreme Court of South Carolina

In the Matter of Christopher Blakeslee Roberts, Respondent.

ORDER

By order dated September 24, 2010, the Court placed respondent on interim suspension pursuant to Rule 17(b), RLDE, Rule 413, SCACR. The Office of Disciplinary Counsel (ODC) now requests the Court appoint an attorney to protect the interests of respondent's clients pursuant to Rule 31, RLDE, Rule 413, SCACR. The request is granted.

IT IS ORDERED that Gregory J. English, Esquire, 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. English shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. English 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.

This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating accounts of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that Gregory J. English, Esquire, has been duly appointed by this Court.

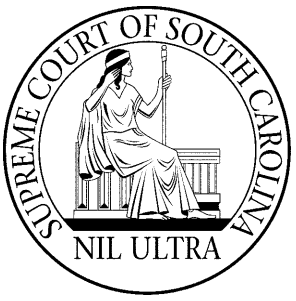
Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that Gregory J. English, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. English's office.

This appointment shall be for a period of no longer than nine months unless request is made to this Court for an extension.

IT IS SO ORDERED.

s/ Jean H. Toal C.J.
FOR THE COURT
Pleicones, J., not participating

Columbia, South Carolina
October 7, 2010



OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 41
October 11, 2010
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

M and M Corporation of South Carolina, Plaintiff,

v.

Auto-Owners Insurance Company, Defendant.

ON CERTIFICATION FROM THE U.S. DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

Joseph F. Anderson, Jr., United States District Judge

Opinion No. 26883
Heard April 8, 2010 – Filed October 11, 2010

CERTIFIED QUESTION ANSWERED

Clinch Heyward Belser, Jr., H. Freeman Belser and Michael J. Polk, all of Belser & Belser, of Columbia, for Plaintiff.

John T. Lay, Jr. and A. Johnston Cox, of Ellis Lawhorne & Sims, of Columbia, for Defendant.

CHIEF JUSTICE TOAL: The United States District Court for the District of South Carolina has certified to this Court three questions arising from a dispute concerning an all-risk Commercial Property Policy of insurance (the Policy). These questions concern the classification of water, for purposes of the insurance policy's coverage, that has been collected, concentrated, and cast onto adjoining property.

FACTS/PROCEDURAL BACKGROUND

M & M Corporation (Plaintiff) owns a hotel in Blythewood, South Carolina. In August 2006, the South Carolina Department of Transportation (SCDOT) was widening and improving Blythewood Road, a process that included installation of a new underground stormwater drainage system. Before installation was complete, approximately four inches of rain fell on Blythewood in one day. Plaintiff's hotel suffered significant water damage as a result of the rainwater exiting the incomplete drainage system.

The incomplete stormwater drainage system comprised 1,600 feet of pipes and collected water from an area of approximately 15.9 acres, terminating at an exposed, above-ground thirty-inch pipe fifty feet from the edge of the hotel property line and one hundred fifty feet from Plaintiff's hotel building. The total volume of water discharged from the pipe on the day at issue was over 830,000 gallons at a rate of 6.3 feet per second. The expelled water pooled in the hotel parking lot, reaching sufficient depth to enter the hotel building and cause damage to the property.

Plaintiff filed an action against Auto-Owners Insurance Company (Defendant), seeking to recover for the water damage under the Policy. Defendant denied coverage, citing the surface water and flood exclusions contained in the Policy. The parties filed cross motions for summary judgment. The district court found resolution turns on the definitions of

"surface water" and "flood" in the context of the Policy, and certified questions to this Court.

CERTIFIED QUESTIONS

I. Under an all-risk Commercial Property Policy of insurance, does "surface water" encompass rainwater collected and channeled in a stormwater collection system?

II. If the answer to Question I is no, can such non-surface water reacquire its classification as surface water upon exit from the stormwater collection system and, if so, under what circumstances?

III. Under an all-risk Commercial Property Policy of insurance, does "flood water" encompass water discharged from a stormwater collection system in concentrated form, pooled, and that thereafter enters a building?

LAW/ANALYSIS

Defendant argues the water at issue is properly characterized as surface water and flood water, thus it properly denied insurance coverage because damage resulting from both classifications of water is excluded under the Policy. We disagree and find the water expelled from the pipe was not surface water or flood water. Accordingly, we answer all certified questions in the negative.

The terms "surface water" and "flood water" are not defined in the Policy, so we must determine whether rainwater that has been collected, concentrated, and cast upon another's property is considered surface water or flood water for purposes of insurance coverage. Insurance policies are subject to the general rules of contract construction. *American Credit of*

Sumter, Inc. v. Nationwide Mutual Ins. Co., 378 S.C. 623, 628, 663 S.E.2d 492, 495 (2008). Courts interpret insurance policy language in accordance with its plain, ordinary, and popular meaning, except with technical language or where the context requires another meaning. *See id*; *Blakeley v. Rabon*, 266 S.C. 68, 72, 221 S.E.2d 767, 769 (1976). Policies are construed in favor of coverage, and exclusions in an insurance policy are construed against the insurer. *Buddin v. Nationwide Mutual Ins. Co.*, 250 S.C. 332, 337, 157 S.E.2d 633, 635 (1967).

The insurance policy in question has an exclusion for water damage that says, in pertinent part, damage resulting from "[f]lood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not" is not covered under the policy.

I. Is the water "surface water?"

Plaintiff asserts the water was not surface water when it was channeled into a stormwater collection system and cast upon its property. We agree.

South Carolina law defines surface water as

> waters of a casual and vagrant character, which ooze through the soil or diffuse or squander themselves over the surface, following no definite course. They are waters which, though customarily and naturally flowing in a known direction and course, have nevertheless no banks or channels in the soil, and include waters which are diffused over the surface of the ground, and which are derived from rains and melting snows . . . .

Lawton v. S. Bound R.R. Co., 61 S.C. 548, 552, 39 S.E. 752, 753 (1901). We need look no further to answer the question before us.[1]

[1] The common enemy rule does not bear on this case as it currently stands before this Court. While its theories are instructive, the rule itself need not be analyzed to determine the instant issue. The common enemy rule does not define what surface water is, but rather prescribes how landowners may deal

While the water at issue was surface water before it was collected in the stormwater system, it then was concentrated and cast onto Plaintiff's property. Once surface water is deliberately contained, concentrated, and cast onto an adjoining landowner's property, it is no longer naturally flowing, diffuse water. Water spewing in an unnatural concentration from a stormwater drainage system lacks the identifiable characteristics of surface water the court approved in *Lawton*.

The water intruding upon Plaintiff's property was not owing to fortuitous natural causes, but instead to the deliberate actions of another. We find that naturally falling water that has been intentionally concentrated and cast upon the insured's property is not surface water for the purposes of the Policy. Accordingly, we answer the first certified question no; the water at issue is not surface water.

II. If no, does the water become "surface water" after exiting the collection system?

We also answer the second certified question no; the water does not become surface water again for the purposes of the policy once it is discharged from the pipe. The water only reached Plaintiff's property in such a harmful concentration because of the deliberate containment and casting, not on account of a natural flow. Thus, the water does not regain surface water classification for the purposes of the policy once it has been expelled from the pipe.

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with the surface water on their lands. *See* William T. Toal, *Surface Water in South Carolina*, 23 S.C. L. Rev. 82, 88 (1971) (explaining surface water law in South Carolina). The common enemy rule addresses potential tort liability for obstructing and diverting the flow of surface water. Here, we are concerned with the definition of surface water in the context of a contract for insurance coverage.

III. Is the water "flood water?"

As to the third certified question, whether the water at issue is "flood water," we also answer no. Defendant asserts this Court should define "flood water" as a "great flow of water over what is usually dry land," thus qualifying the water at issue as flood water and excluding the damage from coverage. While South Carolina courts have not defined "flood water," Defendant's suggested definition is far too broad. Flood waters are those waters that breach their containment, either as a result of a natural phenomenon or a failure in a man-made system, such as a levee or a dam. *See Milbert v. Carl Carbon, Inc*. 406 P.2d 113, 117 (Idaho 1965) ("Flood waters are waters which escape, because of their height, from the confinement of a stream and overflow adjoining territory; implicit in the definition is the element of abnormality."). In either case, there is an element of fortuitousness. *See Long Motor Lines v. Home Fire & Marine Ins. Co. of Cal.*, 220 S.C. 335, 341, 67 S.E.2d 512, 515 (1951) (clarifying that in an insurance policy that defined "flood" as "the rising of streams or navigable waters," "rising" necessarily connoted an abnormal rising of the waters). We hold that the water in the present case is not flood water because it did not breach containment, but instead it was deliberately channeled and cast upon Plaintiff's land.

CONCLUSION

Therefore, we find the water at issue is neither surface water nor flood water for the purposes of the Policy, and answer all three certified questions in the negative.

BEATTY and KITTREDGE, JJ., concur. PLEICONES, J., dissenting in a separate opinion in which HEARN, J., concurs.

JUSTICE PLEICONES: I respectfully dissent. I believe that the water which damaged Plaintiff's property constituted "surface water" under long-standing South Carolina law. Accordingly, I would answer the first question "yes" and, as the answer disposes of the coverage issue, decline to answer the second and third questions.

A. Surface Waters and Water Courses

Typically, where a term is not defined in an insurance policy, a court must define the term according to the usual understanding of the term's significance to the ordinary person. See South Carolina Farm Bureau Mut. Ins. Co. v. Durham, 380 S.C. 506, 671 S.E.2d 610 (2009). However, courts may use a different meaning in interpreting a contract with technical language or where the context requires another meaning. See Blakeley v. Rabon, 266 S.C. 68, 221 S.E.2d 767 (1976). Because the term "surface water" is primarily a legal term, which has long been defined in this State's case law, I interpret its use in a contract in light of case law.

Like the majority, I look first to the definition of the term "surface water," which this Court set forth in 1901:

> Surface waters are waters of a casual and vagrant character, which ooze through the soil or diffuse or squander themselves over the surface, following no definite course. They are waters which, though customarily and naturally flowing in a known direction and course, have nevertheless no banks or channels in the soil, and include waters which are diffused over the surface of the ground, and which are derived from rains and melting snows; occasional outbursts of water, which in time of freshet or melting of snows descend from the mountains and inundate the country; and the moisture of wet, spongy, springy, or boggy ground.

Lawton v. South Bound R.R. Co., 61 S.C. 548, 552, 39 S.E. 752, 753 (1901), citing 24 Am. & Eng. Enc. Law, at 896. The majority begins and ends its analysis of the first question with the above definition. In my view, however,

further analysis is required to determine when "surface water" ceases to be "surface water."

One need look no further than the next sentence in the Lawton opinion to grasp the complexity of the question. Following the definition, the Court noted: "The distinguishing features of surface waters are purely negative, and consist in the absence of the distinguishing features which are common to all water courses." Id. at 552, 39 S.E. at 753. A "water course" is defined as follows:

> To constitute a water course, there must be a stream usually flowing in a particular direction, though it need not flow continually. It may sometimes be dry. It must flow in a definite channel, having a bed, sides, or banks, and it naturally discharges itself into some other stream or body of water. It must be something more than mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary causes. . . . It is essential to the existence of a water course that there should be a well defined bed or channel, with banks. If these characteristics are absent, there is no water course, within the legal meaning of the term. Hence, natural depressions in the land through which surface water from adjoining lands naturally flows are not water courses.

Id. at 552-53, 39 S.E. at 753-54. Under our case law, a water course is naturally occurring. Id.

B. Application

Neither party disputes that the water constituted "surface water" when it fell to the ground, but the majority finds that the water ceased to be "surface water" once it was collected and channeled into a stormwater collection system. I disagree.

The majority concludes that water, once channeled into the storm system, lacks the characteristics of "surface water" set out in the definition in Lawton. Specifically, the majority notes that water collected and channeled in a stormwater system is "no longer naturally flowing, diffuse water." In my opinion, the means of disposing of surface water does not change its character. Instead, "surface water" retains its identity until it reaches and becomes a part of a natural watercourse or body, such as a lake or pool. See 78 Am.Jur.2d § 174 (2009); Reith v. McGill Smith Punshon, Inc., 840 N.E.2d 226, 231 (Ohio Ct. App. 2005) (surface water "continues to be such until it reaches some well defined channel in which it is accustomed to, and does flow with other waters . . . and it then becomes the running water of a stream and ceases to be surface water."). This rule comports with South Carolina case law under the Common Enemy Rule.

While I agree with the majority that the Common Enemy Rule has no direct application here, case law based on the Rule is significant in determining whether "surface water" loses that characterization once it is artificially channeled. The Common Enemy Rule provides that surface water is a common enemy, and every landowner has the right to use such means as he deems necessary for the protection of his property from damages it would cause. See Johnson v. Williams, 238 S.C. 623, 633, 121 S.E.2d 223, 228 (1961). There are two exceptions to the rule: (1) a landowner must not handle surface water in such a way as to create a nuisance, and (2) he must not by means of a ditch or other artificial means collect surface water and cast it in concentrated form upon the lands of another.[2] Id.

In Lawton, the plaintiff complained that the defendant had filled a ditch, causing water to inundate the plaintiff's land. Id. at 550-51, 39 S.E. at 753. In deciding the case, the Court found it necessary to determine the character of the water: "Was it surface water, or the water of a natural water

[2] As no third party claim is presented, I express no opinion as to the liability, if any, of the SCDOT under this theory.

course?"[3] Id. at 552, 39 S.E. at 753. After reciting the definitions of the terms "surface waters" and "water course," the Court found the waters to be "surface waters."

> There is no allegation that there was "a stream usually flowing in a particular direction," nor is there any allegation that the water obstructed flowed "in a definite channel, having a bed, sides or bank," nor is there any allegation that there was "any well-defined bed or channel, with banks," through which the water obstructed was accustomed to flow; and this, as said, "is essential to the existence of a water course." Indeed, there is not a single fact alleged from which an inference could be reasonably drawn that the water in question was the water of a natural water course. On the contrary, the irresistible inference from the facts stated in the complaint is that the water obstructed was nothing but surface water, which was drained from plaintiff's land by the ditch, - a mere artificial channel. No lapse of time could invest such a channel with the characteristics of a natural water course.

Id. at 554, 39 S.E. at 754. Lawton supports the view that "surface water" maintains its character, even after it is artificially channeled, until encountering a natural watercourse. The holding supports this Court's statement in Lawton that "[t]he distinguishing features of surface waters are purely negative, and consist in the absence of the distinguishing features which are common to all water courses." Lawton, 61 S.C. at 552, 39 S.E. at 753.

Moreover, I note that language from a number of South Carolina cases describes water conveyed in an artificial channel as "surface water." See, e.g., Hoffman v. Greenville County, 242 S.C. 34, 129 S.E.2d 757 (1963) ("There is evidence from which the jury could conclude that the damaging of the property of the respondents was caused by the cutting of ditches thereon

[3] This Court alluded to the distinctions between "surface water" and a "water course" as early as 1888. See Waldrop v. Greenville, L. & S.R. Co., 28 S.C. 157, 5 S.E. 471 (1888).

without permission and by casting of surface water in force and impounded quantities thereon . . . ."); Garmany v. Southern Ry. Co. Terry, 152 S.C. 205, 208, 149 S.E. 765, 766 (1929) ("[s]uch artificial channel need not necessarily extend to the line or edge of the injured person's lands, in order to sustain an action for damages, but must extend to such a point that the surface water conveyed therein or thereby results in injury to such person's lands or health."); Silvester v. Spring Valley Country Club, 344 S.C. 280, 543 S.E.2d 563 (Ct. App. 2001) (party "constructed a French drainage system to collect and concentrate surface water"); Fuller-Ahrens Partnership v. South Carolina Dep't of Highways and Pub. Transp., 311 S.C. 177, 427 S.E.2d 920 (Ct. App. 1993) ("The pipe discharges surface water from the Sumter Highway and frontage road onto Fuller-Ahrens land."). These cases suggest that the water conveyed in the artificial channel is still characterized as "surface water."

In addition to diverging from the above-cited cases, the majority's holding severely limits the Common Enemy Rule to the point of nearly repealing the Rule. For if, as the majority holds, "surface water" loses its characterization once it is collected in an artificial structure, then a landowner may not dispose of "surface water" artificially channeled onto his property under the Common Enemy Rule as it has lost its identity as "surface water."[4] Consequently, henceforth a landowner who collects and channels surface water onto an adjoining landowner's property deprives the adjoining landowner of the ability to combat the water as a "common enemy." Contra Cannon v. Atlantic Coast Line R.R. Co., 97 S.C. 233, 81 S.E. 476 (1914). In short, "surface water" is no longer a *common* enemy.

In my opinion, "surface water" remains "surface water" until it reaches and becomes a part of a natural watercourse or definite body. This bright-

[4] The majority would hold that "surface water," once channeled, is "no longer naturally flowing, diffuse water." Moreover, section II of the majority opinion makes plain that the water, once channeled onto an adjoining landowner's property, cannot reacquire its character as "surface water." If such water does not constitute "surface water," flood water, or a natural watercourse, then I question what character the channeled and cast water attains.

line definition best comports with our precedent. Consequently, the water which damaged Plaintiff's property was "surface water."

C. "Stormwater Runoff"

Plaintiff also argues that the water collected and channeled in the stormwater system constitutes "stormwater" rather than "surface water." In Plaintiff's view, the General Assembly, in enacting the Stormwater Management and Sediment Reduction Act (the Act) "defined a new type of water in South Carolina, to wit, stormwater . . . ." I disagree.

The Act defines "stormwater runoff" as "direct response of a watershed to precipitation and includes the surface and subsurface runoff that enters a ditch, stream, storm sewer, or other concentrated flow during and following the precipitation." S.C. Code Ann. § 48-14-20(13). Based on this definition, Plaintiff contends that once the water entered the storm system, it ceased being "surface water" and became "stormwater runoff." While water collected and channeled in a storm system may constitute "stormwater runoff" under the Act, in my view, it also constitutes "surface water" until it reaches a natural watercourse.

D. Conclusion

In summary, I find that under South Carolina case law, the means of disposing of "surface water" does not change its character. "Surface water" continues as such until it reaches and becomes part of a natural watercourse or definite body of water. Consequently, I would answer "yes" to Question 1 and, as the answer disposes of the coverage issue, decline to answer the second and third questions.

HEARN, J., concurs.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

In the Matter of Donald Keith Knight, Jr., Respondent.

Opinion No. 26884
Submitted September 27, 2010 – Filed October 11, 2010

DISBARRED

Lesley M. Coggiola, Disciplinary Counsel and Barbara M. Seymour, Deputy Disciplinary Counsel, both of Columbia, for Office of Disciplinary Counsel.

W. Bennett McCollough, of Kingstree, for Respondent.

PER CURIAM: This attorney disciplinary matter is before the Court pursuant to the reciprocal disciplinary provisions of Rule 29, RLDE, Rule 413, SCACR.

FACTS

By order dated June 28, 2010, the Supreme Court of Georgia accepted respondent's Petition for Voluntary Surrender of License pursuant to Rule 4-104 of the Rules of the State Bar of Georgia,[1] which that court stated

[1] This rule, which addresses mental incapacity and substance abuse, states the following:

"is tantamount to disbarment," and directed that respondent's name be removed from the rolls of persons authorized to practice law in the State of Georgia. Respondent filed the petition after three formal complaints and seven additional grievances were filed against him alleging he forged his former law partner's name to bank documents, removed client funds from his trust account, deposited checks payable to his firm into his personal bank account, converted firm checks payable to third parties to his own use, accepted fees from clients then failed to communicate with them, willfully abandoned clients' cases, and converted funds he received in a fiduciary

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> (a) Want of a sound mind, senility, habitual intoxication or drug addiction, to the extent of impairing competency as an attorney, when found to exist under the procedure outlined in Part IV, Chapter 2 of these rules, shall constitute grounds for removing the attorney from the practice of law. Notice of final judgment taking such action shall be given by the Review Panel as provided in Rule 4-220(a).
>
> (b) Upon a finding by either panel of the State Disciplinary Board that an attorney may be impaired or incapacitated to practice law due to mental incapacity or substance abuse, that panel may, in its sole discretion, make a confidential referral of the matter to the Committee on Lawyer Impairment for the purposes of confrontation and referral of the attorney to treatment centers and peer support groups. Either panel may, in its discretion, defer disciplinary findings and proceedings based upon the impairment or incapacitation of an attorney pending attempts by the Committee on Lawyer Impairment to afford the attorney an opportunity to begin recovery. In such situations the committee shall report to the referring panel and Bar counsel concerning the attorney's progress toward recovery.
>
> (c) In the event of a finding by the Supreme Court of Georgia that a lawyer is impaired or incapacitated, the Court may refer the matter to the Committee on Lawyer Impairment, before or after its entry of judgment under Bar Rules 4-219 or 4-220(a), so that rehabilitative aid may be provided to the impaired or incapacitated attorney. In such situations the committee shall be authorized to report to the Court, either panel of the State Disciplinary Board and Bar counsel concerning the attorney's progress toward recovery.

capacity to his own use. Respondent admitted all of the material allegations in the formal complaints and the grievances and admitted he suffered from drug addiction to the extent that it impaired his competency as a lawyer.

Respondent did not notify the Office of Disciplinary Counsel (ODC) of the action taken by the Georgia Supreme Court, as required by Rule 29(a) of the Rules for Lawyer Disciplinary Enforcement, Rule 413, SCACR. However, ODC obtained a certified copy of the order and filed it with this Court. Rule 29(a), RLDE. The Clerk of Court sent respondent notice of receipt of the certified order and directed him to inform the Court of any claim he may have that the imposition of the identical discipline in South Carolina would be unwarranted and the reasons for that claim. Rule 29(b), RLDE.

Respondent has filed a return in which he seeks imposition of a lesser discipline under Rule 29(d)(5), RLDE.[2] Respondent states the Georgia Supreme Court accepted his Petition for Voluntary Surrender of License pursuant to State Bar of Georgia Rule 4-104 regarding mental incapacity and substance abuse. Respondent admits he was incapacitated due to drug addiction, but states he began treatment in the summer of 2008, which he continues to date, and was authorized by his psychiatrist to return to work on a limited basis in January 2009 and on an unrestricted basis in March 2009. He states his "mental capacity has recovered" and that the reason for surrender of his license no longer exists. Respondent has offered his medical records for consideration by the Court in imposing a lesser discipline than surrender of his license to practice law in South Carolina. Finally, respondent states none of his clients suffered monetary loss other than in retaining substitute counsel in the matters in which he represented them and that no funds were illegally taken by him.

[2] Rule 29(d) states the Court shall impose the identical discipline or incapacity inactive status unless the lawyer or disciplinary counsel demonstrates, or the Court finds, that it clearly appears on the face of the record from which the discipline is predicated that certain circumstances exist, including that the reason for the original transfer to incapacity inactive status no longer exists.

ODC has filed a reply in which it maintains Rule 29(d)(5), upon which respondent relies, is inapplicable because it applies in cases in which a lawyer is placed on incapacity inactive status in another state and reciprocal imposition of incapacity inactive status is being considered in South Carolina. ODC contends that in this case, respondent was not placed on incapacity inactive status in Georgia, but was instead disciplined. ODC states South Carolina does not have a procedure similar to the procedure Georgia has for the voluntary surrender of a license to practice law;[3] however, ODC asserts

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[3] Rule 4-227 of the Rules of the State Bar of Georgia states the following:

> (a) A petition for voluntary discipline shall contain admissions of fact and admissions of conduct in violation of Part IV, Chapter 1 of these rules sufficient to authorize the imposition of discipline.
>
> (b) Prior to the issuance of a formal complaint, a respondent may submit a petition for voluntary discipline seeking any level of discipline authorized under these rules.
>
> (1) Those petitions seeking private discipline shall be filed with the Office of General Counsel and assigned to a member of the Investigative Panel. The Investigative Panel of the State Disciplinary Board shall conduct an investigation and determine whether to accept or reject the petition as outlined at Bar Rule 4-203(a)(9).
>
> (2) Those petitions seeking public discipline shall be filed directly with the Clerk of the Supreme Court. The Office of General Counsel shall have 30 days within which to file a response. The court shall issue an appropriate order.
>
> (c) After the issuance of a formal complaint a Respondent may submit a petition for voluntary discipline seeking any level of discipline authorized under these rules.
>
> (1) The petition shall be filed with the Special Master who shall allow bar counsel 30 days within which to respond. The Office of General Counsel may assent to the petition or may file a response, stating objections and giving the reasons therefore. The Office of General Counsel shall serve a copy of its response upon the

respondent.

(2) The Special Master shall consider the petition, the Bars response and, the record as it then exists and may accept or reject the petition for voluntary discipline.

(3) The Special Master may reject a petition for such cause or causes as seem appropriate to the Special Master. Such causes may include but are not limited to a finding that:

(i) the petition fails to contain admissions of fact and admissions of conduct in violation of Part IV, Chapter 1 of these rules sufficient to authorize the imposition of discipline;
(ii) the petition fails to request appropriate discipline;

(iii) the petition fails to contain sufficient information concerning the admissions of fact and the admissions of conduct;

(iv) the record in the proceeding does not contain sufficient information upon which to base a decision to accept or reject.
(4) The Special Masters decision to reject a petition for voluntary discipline does not preclude the filing of a subsequent petition and is not subject to review by either the Review Panel or the Supreme Court. If the Special Master rejects a petition for voluntary discipline, the disciplinary case shall proceed as provided by these rules.

(5) If the Special Master accepts the petition for voluntary discipline, s/he shall enter a report making findings of fact and conclusions of law and deliver same to the Clerk of the State Disciplinary Board. The Clerk of the State Disciplinary Board shall file the report and the complete record in the disciplinary proceeding with the Clerk of the Supreme Court. A copy of the Special Masters report shall be served upon the respondent. The Court shall issue an appropriate order.

(6) Pursuant to Bar Rule 4-210(e), the Special Master may in his or her discretion extend any of the time limits in these rules in order to adequately consider a petition for voluntary discipline.

State Bar of Georgia Rule 4-110(f) defines a "Petition for Voluntary Surrender of License" as "[a] Petition for Voluntary Discipline in which the respondent voluntarily surrenders his license to practice law in this State." The definition states, as does the order of the Supreme Court of Georgia in this case, that a voluntary surrender of license is tantamount to disbarment.

that because "voluntary surrender in Georgia is the equivalent of disbarment," disbarment is appropriate in the case at hand.

ODC also notes that in order for this Court to deviate from the discipline imposed by the Georgia Supreme Court, it must find that it is clear from the face of the record from which the discipline is predicated that identical discipline should not be imposed. ODC contends respondent is asking this Court to consider matters outside that record and essentially seeking a re-investigation of the underlying disciplinary matters that gave rise to the disciplinary action in Georgia. ODC submits the purpose of reciprocal discipline is to avoid the necessity to re-investigate and re-litigate disciplinary matters that have already been decided by the authorities in another jurisdiction. Accordingly, ODC asks that the Court reject respondent's request that reciprocal discipline not be imposed and issue an order disbarring respondent.

LAW

When a lawyer has been disciplined in another jurisdiction, this Court will impose the identical discipline or incapacity inactive status unless the lawyer or disciplinary counsel demonstrates, or the Court finds, that it clearly appears on the face of the record from which the discipline is predicated, that (a) the procedure was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; (2) there was such infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Court could not, consistent with its duty, accept as final the conclusion on that subject; (3) the imposition of the same discipline by the Court would result in grave injustice; (4) the misconduct established warrants substantially different discipline in this state; or (5) the reason for the original transfer to incapacity inactive status no longer exists. Rule 29(d), RLDE. The burden is on the party seeking different discipline in this jurisdiction to demonstrate that the imposition of the same discipline is not appropriate. Id. If the Court determines that any of the elements above exist, it can enter such other order as it deems appropriate. Id. The burden is on

the party seeking different discipline in this jurisdiction to demonstrate that the imposition of the same discipline is not appropriate. Id. In all other aspects, a final adjudication in another jurisdiction that a lawyer has been guilty of misconduct or should be transferred to incapacity inactive status shall establish conclusively the misconduct or the incapacity for purposes of a disciplinary or incapacity proceeding in this state. Rule 29(e), RLDE.

Rule 4-104 of the Rules of the State Bar of Georgia clearly provides that a lawyer may be removed from the practice of law in Georgia if he suffers from a drug addiction that impairs his competency as a lawyer. Pursuant to Rules 4-110(f) and 4-227, a lawyer may voluntarily submit to such discipline by filing a Petition for Voluntary Surrender of License, which is the equivalent of disbarment.

Similarly, Rule 28(b)(6) of the South Carolina Rules for Lawyer Disciplinary Enforcement states that if this Court concludes a lawyer suffers from a physical or mental condition that adversely affects the lawyer's ability to practice law, it may enter *any order appropriate to the circumstances, the nature of the incapacity and probable length of the period of incapacity*. In addition, after receipt of an examination report of an expert, ODC and the lawyer may agree on proposed findings of fact, conclusions, and a recommended disposition. Rule 28(e), RLDE. The stipulated disposition must be submitted to the hearing panel for a recommendation to the Court that it be approved or rejected. Id. The final decision on the recommendation is made by the Court. Id. If the Court accepts the stipulated disposition, an order is entered in accordance with its terms. Id. Accordingly, a lawyer in South Carolina may also consent to disbarment based on a physical or mental condition that adversely affects his ability to practice law.

Based on the language of the applicable Georgia and South Carolina rules, we agree with ODC that respondent cannot rely on Rule 29(d)(5) because while a transfer to incapacity inactive status, or an equivalent disposition, is available under both Rule 4-104 and Rule 28, such disposition was not imposed in this case. Instead, respondent consented to a

form of discipline under the Georgia rule that is equivalent to disbarment, an option that is also available under the South Carolina rule. Moreover, respondent has failed to otherwise demonstrate that imposition of the same discipline in South Carolina is not appropriate. We therefore find disbarment is the appropriate sanction to impose as reciprocal discipline in this matter. Respondent is hereby disbarred from the practice of law in this state retroactive to June 28, 2010, the date respondent was disbarred from the practice of law in Georgia.

Within fifteen days of the date of this opinion, respondent shall file an affidavit with the Clerk of Court showing that he has complied with Rule 30, RLDE, Rule 413, SCACR, and shall also surrender his Certificate of Admission to the Practice of Law to the Clerk of Court.

DISBARRED.

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

The Supreme Court of South Carolina

In re: Amendments to the South Carolina Appellate Court Rules

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O R D E R

The South Carolina Bar has proposed amending Rule 1.15(f), RPC, Rule 407, SCACR, which concerns disbursement of funds in trust accounts. The proposed amendments restructure the text of section (f) and divide it into several subsections. The proposed amendments also add a section permitting disbursement of funds where ten days have passed and there is no notice that the credit for or collection of the funds has been delayed or impaired. Finally, the Bar suggests several new comments to Rule 1.15.

After the Bar proposed the amendment, the South Carolina Association for Justice requested that Rule 1.15(f) be further amended to permit checks issued by insurance companies to be disbursed immediately. The Court agrees, but we believe such disbursements should be permitted only in cases where insurance company checks total $50,000 or less.

Pursuant to Article V, § 4, of the South Carolina Constitution, we hereby amend Rule 1.15, RPC, Rule 407, SCACR, as set forth in the attachment to this Order. The amendments are effective immediately.

IT IS SO ORDERED.

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
October 6, 2010

RULE 1.15: SAFEKEEPING PROPERTY

. . .

(f)(1) A lawyer shall not disburse funds from an account containing the funds of more than one client or third person ("trust account") unless the funds to be disbursed have been deposited in the account and are collected funds.

(2) Notwithstanding Subsection (f)(1) above, a lawyer may disburse funds from a trust account at the lawyer's risk in reliance on the following deposits when the deposit is made:

(i) in cash or other items treated by the depository institution as equivalent to cash;

(ii) by verified and documented electronic funds transfer;

(iii) by a properly endorsed government check;

(iv) by a certified check, cashier's check, or other check drawn by a depository institution or an insurance company, provided the insurance company check does not exceed $50,000;

(v) by any other instrument payable at or through a depository institution, but only if the amount of such other instrument does not exceed $5,000 and the lawyer has a reasonable and prudent belief that the deposit of such other instrument will be collected promptly; or

(vi) by any other instrument payable at or through a depository institution and at least ten (10) days have passed since the date of deposit without notice to the lawyer that the credit for, or collection of, such other instrument has been delayed or is impaired.

If the actual collection of deposits described in Subsections (i) through (vi) above does not occur, the lawyer shall, as soon as practical but in no event more than five (5) business days after notice of noncollection, deposit replacement funds in the account.

. . .

Comment

. . .

[5] The requirement in Rule 1.15(f)(1) that funds be deposited and collected in the lawyer's trust account prior to disbursement is fundamental to proper trust accounting.

[6] Based on the lawyer's relationship with the depository institution or other considerations, deposited funds of various types may be made "available" for immediate withdrawal by the depository institution; however, lawyers should be aware that "available funds" are not necessarily collected funds since the credit given for the available funds may be revoked if the deposited item does not clear.

[7] Subsections (i) through (vi) of Rule 1.15(f)(2) represent categories of trust account deposits which carry a limited risk of failure so that disbursements may be made in reliance on such deposits without violating the fundamental rule of disbursing only on collected funds. In any of those circumstances, however, a lawyer's disbursement of funds from a trust account in reliance on deposits that are not yet collected funds is at the risk of the lawyer making the disbursement. The lawyer's risk includes deposited instruments that are forged, stolen, or counterfeit. If any of the deposits fail for any reason, the lawyer, upon receipt of notice or actual knowledge, must promptly act to protect the property of the lawyer's clients and third persons. If the lawyer accepting any such items personally pays the amount of any failed deposit within five (5) business days of receipt of notice that the deposit has failed, the lawyer will not be considered to have committed professional misconduct based upon the disbursement of uncollected funds.

[8] A lawyer's disbursement of funds from a trust account in reliance on deposits that are not yet collected funds in any circumstances other than Subsections (i) through (vi) of Rule 1.15(f)(2) may be grounds for a finding of professional misconduct.

[9] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

[10] The Lawyers' Fund for Client Protection provides a means through the collective efforts of the Bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Under Rule 411, SCACR, each active or senior member of the Bar is required to make an annual contribution to this fund.

[11] A lawyer's obligations with regard to identified but unclaimed funds are set forth in the Uniform Unclaimed Property Act, S.C. Code Ann. § 27-18-10, et seq.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Robert L. Cullen, Andrew A. Corriveau, John Caldwell, Andrea Hucks, Jamie Bellamy, Michael Pearson, and David Mandrell, Plaintiffs,

v.

J. Bennett McNeal, B. McNeal Partnership, L.P., Anthony R. Porter, and Wright's Point Home Owners Association, Inc., Respondents-Appellants,

of whom Robert L. Cullen, Andrew A. Corriveau and Andrea Hucks are Appellants-Respondents.

Appeal From Beaufort County
Carmen T. Mullen, Circuit Court Judge

Opinion No. 4750
Heard February 10, 2010 – Filed October 6, 2010

AFFIRMED

John E. North and Pamela K. Black, both of Beaufort, for Appellants-Respondents.

Joel D. Bailey, of Beaufort, for Respondents-Appellants.

LOCKEMY, J.: In this cross-appeal, the Appellants-Respondents (the Homeowners) argue the circuit court erred in (1) considering extrinsic evidence in interpreting the Declarations for Wright's Point; (2) construing the term "Developer"; (3) finding undeveloped land was a part of Wright's Point; (4) finding B. McNeal Partnership, L.P. was a "successor developer"; (5) finding the Developers were entitled to continue to control the Association; (6) finding the Developers were entitled to continue to control the Committee; and (7) failing to find the Homeowners were entitled to pursue the claims of the Association derivatively and seek attorney's fees. The Respondents-Appellants (the Developers) argue the circuit court erred in finding they were not entitled to attorney's fees. We affirm.

FACTS/PROCEDURAL BACKGROUND

Robert L. Cullen, Andrew A. Corriveau, and Andrea Hucks (the Homeowners) are property owners in Phase I of Wright's Point Plantation, a planned waterfront community in Beaufort County.[1] J. Bennett McNeal, B. McNeal Partnership, L.P., and Anthony R. Porter (the Developers) are real estate developers involved with the development of Wright's Point.

In 1997, Anthony Porter acquired a 1.7 acre tract, a 19.74 acre tract (Parcel B), and a 10.45 acre tract (Parcel C) of land in Beaufort County from Mary P. Logan, Lewis H. Wright, and John D. Wright. Anthony Porter's father, Jimmy Porter, acquired an 8.41 acre tract (Parcel D) from Lewis

[1] The Homeowners are part of an original group of seven property owners in Wright's Point who initiated this litigation against the Developers. Cullen, Corriveau, and Hucks are the only Homeowners who have appealed the circuit court's order.

Wright and John Wright. Pursuant to a recorded plat entitled "Wright's Point Phase I," portions of the 1.7 acre tract and Parcels B, C, and D were subdivided into 44 lots, roads, and community spaces. A majority of the land within Parcels B and D was labeled "Future Development" and not subdivided into lots.

In June 1998, the Declarations of Covenants, Conditions, Restrictions, and Easements (the Declarations) for Wright's Point, which subjected all four parcels owned by Anthony Porter and Jimmy Porter to the Declarations, were recorded. Pursuant to the Declarations, the Wright's Point Homeowner's Association (the Association) was incorporated to administer Wright's Point and enforce the Declarations. Porter and his father conveyed the open spaces, ponds, streets, and certain other areas in Wright's Point to the Association. Also, pursuant to the Declarations, all construction and improvements made within Wright's Point were subject to review and approval by the Wright's Point Architectural Committee (the Committee), which consisted of Anthony Porter, Jimmy Porter, and subsequently included their appointees, including McNeal. In April 1999, Anthony Porter conveyed undeveloped Parcel B and four lots in Phase I of Wright's Point to McNeal, d/b/a McNeal Land Company. In July 2002, Jimmy Porter conveyed undeveloped Parcel D to B. McNeal Partnership, L.P.

In May 2003, Homeowner Cullen convened a meeting of a group of property owners in Phase I and formed a separate entity called the Wright's Point Property Owners Association. According to the minutes of the meeting, those present wanted "a total revamping of the [Committee]" so as to permit the use of hardi-plank siding. They also expressed their concern over the use of amenities in Phase I by new property owners in subsequent phases. The newly-formed association elected Cullen as president and McNeal was elected as a board member, although he was not present at the meeting. In an October 2003 letter to property owners in Wright's Point, Cullen explained that McNeal informed him Phase I was only part of the total Wright's Point development, and plans to develop the remaining properties were moving forward. Cullen also explained that McNeal informed him Wright's Point was a "walking community" and owners in new phases should have access to the Wright's Point common areas and docks. In November 2003, Cullen presented McNeal with a document which purported to

"represent a consensus of the existing homeowners and residents." The document asserted that Phase I should be a "separate and independent area" from the remaining phases of Wright's Point, and residents in any additional phases should not have access to the common areas and docks.

In December 2003, Anthony Porter sent a letter to Cullen objecting to the existence of the Wright's Point Property Owner's Association and asserting that he was the Developer of Wright's Point, and thus, he was entitled to appoint and remove the Association's board members and officers. In January 2004, the Homeowners, together with other property owners, held an annual meeting of the Wright's Point Property Owners Association. Anthony Porter attended the meeting with his attorney and presented the Homeowners with a memorandum which stated: (1) he was the Developer of Wright's Point and still owned lots there, so he retained "the sole authority under the [Declarations] to appoint and remove the directors of the [Association]"; (2) the meeting being held was "not an official meeting" and several property owners, including himself, had not been given notice of the meeting; and (3) any meetings convened by the Homeowners had been done without his knowledge and were "not legal." In March 2004, at a supplemental annual meeting of the Wright's Point Property Owner's Association, the property owners in attendance ratified the filing of this declaratory judgment action.

The Homeowners filed suit against the Developers in March 2004. In their first cause of action for a declaratory judgment, the Homeowners asked the circuit court to find: (1) Anthony Porter's right to control the appointment of directors and officers of the Association had terminated, and this right belonged to the owners of the lots within Wright's Point; (2) the Homeowners were validly-elected directors of the Association; (3) McNeal did not have the right to act as the Developer or the Developer's representative in connection with the business and affairs of the Association; (4) McNeal and B. McNeal Partnership, L.P. did not have the right to annex real estate owned by either of them to Wright's Point, or to permit owners of any part of that real estate access to or use of the common areas and amenities owned by the Association and located within Wright's Point; (5) only those owners of lots depicted on the plat of the development and recorded in Plat Book 64 at page 150 (Phase I) had the right to access or use the common areas of Wright's

Point owned by the Association; and (6) Anthony Porter and McNeal did not have the right to include additional real estate within the scope of the Declarations.

In their third cause of action, the Homeowners sought both a temporary and permanent injunction "restraining and enjoining [the Developers] from asserting or attempting to assert control over the business or affairs of the Association," and "restraining and enjoining [the Developers] . . . from granting to any owner of real estate outside of Wright's Point Subdivision any purported right to access or use of the common areas of the Association."[2]

In their Answer and Counterclaim, the Developers asserted counterclaims for damages under multiple causes of action, including: civil conspiracy, breach of contract, breach of implied covenant of good faith and fair dealing, conversion, tortious interference with contractual relationships, and defamation. The Developers also sought declaratory and injunctive relief prohibiting the Homeowners from: (1) taking any action reserved to the Developer under the Declarations; (2) taking any action in the name of the Wright's Point Architectural Committee; and (3) taking any action in the name of the Association, or any other entity purporting to be legally entitled to act on behalf of the members of such association. The Developers also asked the circuit court to require the Homeowners to "account for and return all monies collected from Wright's Point property owners."

On February 27, 2007, McNeal, the owner of all the land other than the 44 lots depicted on the official plat, conveyed a portion of the property he acquired from Anthony Porter and a portion of the land he acquired from Jimmy Porter to Richard Ratcliff Homes, Inc. On February 28, 2007, Anthony Porter executed a document entitled "Supplemental Declaration to Declaration of Covenants, Conditions, and Restrictions for Wright's Point Covenants" (Supplemental Declaration), wherein he acknowledged that Jimmy Porter was a Developer although his name was not set forth in § 1.12 of the Declarations. In June 2007, Anthony Porter and Jimmy Porter

[2] The Homeowners withdrew their second cause of action for an accounting prior to trial.

assigned their rights as Developer of Wright's Point to B. McNeal Partnership, L.P.

After a March 2007 non-jury trial, the circuit court issued an order in October 2007 denying all of the declaratory and injunctive relief sought by the Homeowners. The circuit court found Anthony Porter had not relinquished his right as Developer to appoint and remove officers and directors of the Association or members of the Committee. The circuit court also determined Wright's Point was not confined to the properties in Phase I, and the remaining land within the development could be developed as part of subsequent phases. Furthermore, the circuit court determined the amenities and common areas within Phase I were not restricted for use solely by owners in Phase I, but were for the use and enjoyment of all current and future property owners within Wright's Point. The circuit court also found Jimmy Porter was an official developer of Wright's Point and B. McNeal Partnership, L.P. was an assignee and successor developer of Wright's Point.

The circuit court denied the Developers' counterclaims for damages and granted the Developers' request for injunctive relief with respect to the ability of the Developer to control the Association, and the right of all property owners to use and access the amenities and common areas of Wright's Point. The circuit court also granted the Developers' request for specific performance, requiring the Homeowners to perform their contractual obligations under the Declarations, particularly with respect to recognizing and adhering to the rights of the Developer to control the Association and complete the development. The circuit court denied both the Homeowners' and Developers' requests for attorney's fees. This appeal followed.

STANDARD OF REVIEW

The Homeowners asserted causes of action for declaratory judgment and injunctive relief. "Actions for injunctive relief are equitable in nature." Wiedemann v. Town of Hilton Head Island, 344 S.C. 233, 236, 542 S.E.2d 752, 753 (Ct. App. 2001). "In equitable actions, the appellate court may review the record and make findings of fact in accordance with its own view of a preponderance of the evidence." Id. A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying

issue. Burton v. York County Sheriff's Dept., 358 S.C. 339, 345-46, 594 S.E.2d 888, 891-92 (Ct. App. 2004). "To determine whether an action is legal or equitable, this [c]ourt must look to the action's main purpose as reflected by the nature of the pleadings, evidence, and character of the relief sought." Fesmire v. Digh, 385 S.C. 296, 303, 683 S.E.2d 803, 807 (Ct. App. 2009). Here, the Homeowners' primary purpose in bringing this action was to enjoin the Developers from controlling the Association and allowing Wright's Point property owners outside of Phase I to access the common areas of the subdivision. Therefore, we find this suit is an action in equity and this court may review the circuit court's factual findings in accordance with its own view of the preponderance of the evidence. See Cedar Cove Homeowners Ass'n, Inc. v. Di Pietro, 368 S.C. 254, 264, 628 S.E.2d 284, 288 (Ct. App. 2006) (holding "an action to enforce restrictive covenants by injunction is in equity").

LAW/ANALYSIS

I. Homeowners' Appeal

A. Extrinsic Evidence

The Homeowners argue the circuit court improperly relied upon extrinsic evidence in interpreting the Declarations without finding they were ambiguous. We disagree.

"The main guide in contract interpretation is to ascertain and give legal effect to the intentions of the parties as expressed in the language of the [contract]." Gilbert v. Miller, 356 S.C. 25, 30, 586 S.E.2d 861, 864 (Ct. App. 2003). "If a contract's language is clear and capable of legal construction, this [c]ourt's function is to interpret its lawful meaning and the intent of the parties as found in the agreement." Id. at 30-31, 586 S.E.2d at 864. "A clear and explicit contract must be construed according to the terms the parties have used, with the terms to be taken and understood in their plain, ordinary, and popular sense." Id. at 31, 586 S.E.2d at 864. Under the parol evidence rule, extrinsic evidence is inadmissible to vary or contradict the terms of a contract. Penton v. J.F. Cleckley & Co., 326 S.C. 275, 280, 486 S.E.2d 742,

745 (1997). "However, where a contract is ambiguous, parol evidence is admissible to ascertain the true meaning and intent of the parties." Id.

While the Homeowners argue the circuit court erred in relying upon extrinsic evidence, the Developers contend the circuit court determined the Declarations were unambiguous, and relied upon the Declarations' express language and clear meaning in making its findings. The Developers note the circuit court referenced cases in its order where the language of the contracts was clear and unambiguous. Furthermore, the Developers argue the circuit court's review of the evidence was done either to determine the resulting effect upon the rights or duties of the parties after it had interpreted the applicable provisions of the Declarations, or by way of support or confirmation of its interpretation.

We find the circuit court properly interpreted the Declarations in accordance with the rules of construction. A review of the circuit court's order reveals the court relied upon the express language of the Declarations and treated the specific covenants at issue as unambiguous. While the circuit court relied upon evidence presented at trial in its order, the evidence relied upon was used to determine the rights of both parties pursuant to the Declarations. The circuit court did not use extrinsic evidence to ascertain the intention of the parties.

B. Definition of "Developer"

The Homeowners argue the circuit court erred in finding Jimmy Porter was a Developer of Wright's Point. They contend the term "Developer" should be limited to the definition contained in § 1.12 of the Declarations. We disagree.

The Homeowners contend the circuit court erred in considering Anthony Porter's testimony that the omission of Jimmy's name from § 1.12 was a clerical error, and in considering the Supplemental Declaration which states that Jimmy Porter was a Developer although his name was not set forth in § 1.12. "In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties." Ecclesiastes Prod. Ministries v. Outparcel Assocs., LLC, 374 S.C. 483, 497, 649 S.E.2d 494, 501 (Ct. App.

2007). "Contracts should be liberally construed so as to give them effect and carry out the intention of the parties." Id. "The parties' intention must, in the first instance, be derived from the language of the contract." Id. "To discover the intention of a contract, the court must first look to its language - if the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect." Id. at 498, 649 S.E.2d at 501. "The parties' intention must be gathered from the contents of the entire agreement and not from any particular clause thereof." Id. at 498, 649 S.E.2d at 502.

The circuit court determined the omission of Jimmy Porter's name from § 1.12 was a clerical error. The circuit court noted that while Jimmy Porter's name was not included in the definition of the term "Developer" in § 1.12, an examination of the Declarations in their entirety supported its determination that Jimmy Porter was an official Developer of Wright's Point. The circuit court noted Jimmy Porter's name was included as "Developer" in the language on the first page of the Declarations, on the signature page, and in § 1.01. Furthermore, the circuit court noted the Declarations state that a "[d]eveloper is the owner of certain real property . . . described in Exhibit A." Exhibit A of the Declarations contains a description of all four parcels of land, including Parcel D which was owned by Jimmy Porter. The circuit court also noted the deed conveying the common areas in Phase I to the Association lists Anthony Porter and Jimmy Porter as grantors.

We find the Declarations, read in their entirety, support a finding that Jimmy Porter was a Developer of Wright's Point. The first sentence of the Declarations states: "This Declaration made this 24th day of April, 1998, by Anthony R. Porter and Jimmy W. Porter (hereinafter referred to as 'Developer')." Furthermore, the first "[w]hereas" clause on page one of the Declarations states that the "Developer" is the owner of certain real property . . . described in Exhibit A." Exhibit A includes Parcel D owned by Jimmy Porter. Moreover, Anthony Porter and Jimmy Porter signed the Declarations under the "Developer" heading. Accordingly, we find the circuit court did not err in determining that Jimmy Porter was a Developer of Wright's Point.

C. Undeveloped Land

The Homeowners argue the circuit court erred in finding Wright's Point included the areas identified as "Phase II" and "Future Development" on the recorded plat. The Homeowners contend Wright's Point is limited to the 44 lots, amenities, and common areas shown on the plat, and does not include the additional areas shown as "Phase II" and "Future Development." We disagree.

The circuit court held Wright's Point was not confined to the properties in Phase I. The circuit court found the recorded plat of Wright's Point included a Phase II and an area designated for Future Development. The circuit court noted the marketing materials used to sell properties in Wright's Point clearly stated the development would include multiple phases. Furthermore, the circuit court determined Wright's Point consisted of the four parcels described in "Exhibit A" attached to the Declarations.

The Homeowners argue phases subsequent to Phase I must be developed and submitted by the Developer pursuant to § 2.03 of the Declarations. § 2.03 states:

> Subdivision Plat. Developer reserves the right to modify, amend, revise and add to the Plat, at any time and from time to time, setting forth such information as Developer may deem necessary with regard to the Subdivision, including, without limitation, the locations and dimensions of the Lots, the private roads, utility systems, drainage systems, utility easements, drainage easements, access easements and building and set-back line restrictions.
>
> Developer reserves unto himself, his heirs and assigns, the right to develop and submit additional phases to this Declaration of Covenants, Conditions, Restrictions and Easements, Wright's Point Homeowner's Association, Inc. and related documents. Such additional phases shall be limited

> to the property which Developer has acquired from Lewis H. Wright, et al. and/or Mary P. Logan, or any properties contiguous thereto. Such additional phases will be subject to all of the Covenants, Conditions, Restrictions and Easements and the By-Laws upon Developer, his heirs and assigns, filing a copy of the plat signed by the Developer showing such additional phases or in the alternative filing with the Clerk of Court for Beaufort County, South Carolina his intention to add additional phases to the development.

The Homeowners argue land in "Phase II" and "Future Development" must be developed and submitted as additional phases and are not "already" a part of Wright's Point, as determined by the circuit court. The Homeowners also contend that when the Developer sold the undeveloped land to McNeal, his personal right to develop and submit additional phases was extinguished.

While the Homeowners contend Wright's Point consists only of Phase I, we find an examination of the Declarations in their entirety reveals Wright's Point includes the undeveloped land labeled "Phase II" and "Future Development" on the recorded plat. The Declarations define Wright's Point as the property described in Exhibit A, which includes Phase II and Future Development. The Declarations also refer to a "Community-Wide Standard" and define that term as the standard "generally prevailing throughout the Property." "Property" is defined in § 1.19 as all of the land described in Exhibit A. Furthermore, all of the property in Exhibit A was obtained by the Developers from Lewis H. Wright, et al. and Mary P. Logan as required by § 2.03. To the extent the Homeowners argue the development of additional phases would constitute an impermissible annexation of land into Wright's Point, we note § 2.03 provides for additional phases of development of existing property already subject to the Declarations and not an annexation of property not described in Exhibit A. Furthermore, although the undeveloped property was sold to McNeal, the Declarations provide that all of the property in Exhibit A "shall be held, transferred, sold, mortgaged, conveyed, leased, occupied and used subject to the covenants." Accordingly, we find the circuit

court did not err in determining that Wright's Point is not confined to the properties within Phase I.

D. McNeal as "Successor Developer"

The Homeowners argue the circuit court erred in approving the assignment of development rights to McNeal Partnership, L.P. We disagree.

§ 1.12 of the Declarations provides for a successor-in-title or successor-in-interest to the Developer of Wright's Point. § 1.12 states:

> "Developer" shall mean and refer to (a) Anthony R. Porter, or (ii) [sic] any successor-in-title or any successor in interest to Anthony R. Porter, to all of the Property then subject to this Declaration and provided in the instrument of conveyance to any such successor-in-title or interest is expressively designated as "Developer" hereunder by the grantor of such conveyance, which grantor shall be the "Developer" hereunder at the time of such conveyance.

In June 2007, Anthony Porter and Jimmy Porter assigned their development rights in Wright's Point to McNeal Partnership, L.P. The Homeowners requested the circuit court "reopen the trial" and "include in its ruling . . . a declaration as to the right of McNeal to act as the Developer." In its order, the circuit court held the assignment of Developer rights to McNeal was "done properly" and "was executed in accordance with the applicable language of the covenants." The circuit court noted the conveyance met the requirements of § 1.12 by expressly identifying Anthony Porter and Jimmy Porter "collectively as 'Developer.'"

First, the Homeowners argue the Developers' rights were extinguished and could not be conveyed. They contend Anthony Porter and Jimmy Porter conveyed their interests in the undeveloped land more than five years before the assignment in June 2007. Second, the Homeowners argue (1) it was a legal impossibility for McNeal to succeed to all of the property subject to the

Declarations, (2) none of the deeds which conveyed Parcels B and D contained any designation that the grantee was deemed the successor developer, and (3) McNeal did not take title to all of the property from the Developer. Third, the Homeowners argue the circuit court erred when it determined McNeal was a successor developer when the Assignment of Developer's Rights stated McNeal was not liable for the Developers' actions which occurred prior to the assignment.

The Developers note that according to § 1.12, a successor developer becomes Developer "to all of the Property then subject to this Declaration." The Homeowners argue Parcel C was subdivided and the lots sold thus making it impossible for McNeal to succeed as Developer of "all the property." The Developers contend § 1.12 does not state that lots are no longer subject to the Declarations once they have been conveyed to subsequent owners. The Developers also contend § 1.12 provides that a successor developer may either be a successor-in-title or a successor-in-interest. They note that while a successor-in-title would derive authority through a deed, a successor-in-interest may derive authority through another instrument of conveyance. Here, McNeal did not become a successor developer through a deed, but rather through the Assignment of Developer's Rights. The Developers also note McNeal was specifically identified as the successor developer by the grantor.

We find a preponderance of the evidence demonstrates that McNeal is a successor developer. The Assignment of Developer's Rights was properly executed and specifically identified McNeal as the successor developer. As a successor-in-interest and not a successor-in-title, there was no requirement that the deeds to Parcels B and D designate McNeal as a successor developer. Furthermore, § 12.04 provides that the provisions of the Declarations "shall run with and bind title to the Property" and are binding upon "all Owners . . . and their respective heirs . . . successors and assigns." Thus, the Declarations do not indicate that lots are no longer subject to the Declarations once they have been conveyed to subsequent owners. Additionally, the Homeowners have failed to prove that a successor developer cannot assume the rights of Developer and also disclaim liability for actions of the Developer prior to the assignment of rights. Accordingly, we affirm the circuit court's finding that McNeal is a successor developer of Wright's Point.

E. Control of the Association

The Homeowners argue the circuit court erred in finding the Developer was entitled to continue to appoint and remove officers and directors of the Association. We disagree.

§ 7.01 of the Declarations states, in part:

> Developer shall have the right to appoint and remove all members of the Board and any officer or officers of the Association until such time as the first of the following events shall occur: (i) the date as of which the last Lot in the Subdivision shall have been conveyed to a Person other than Developer or Builder, or (ii) the surrender by Developer of the authority to appoint and remove directors and officers of the Association by an express amendment to this Declaration executed and recorded by Developer.

The circuit court determined the language of §§ 7.01 and 12.01 was "clear and unambiguous" and that neither of the conditions set forth in § 7.01 and reiterated in § 12.01 had occurred. The circuit court found neither Anthony Porter nor Jimmy Porter had surrendered their authority to control the Association. In addition, the circuit court found Anthony Porter's transfer of title to his lots in Wright's Point to himself as Trustee of a Personal Residence Trust did not divest him of his property for purposes of control under § 7.01. The circuit court noted Anthony Porter testified the transfer of title in his lots was for tax purposes only, and that he continued to pay his Association dues. Furthermore, the circuit court determined the last lot in Wright's Point had not been conveyed to a person other than "Builder." The circuit court noted the Declarations define "Builder" as "any Person or legal entity engaged principally in the business of construction of structures to whom the Developer sells or has sold one or more Lots." The circuit court also noted that Ratcliff and Lloyd Denny, both licensed general contractors, testified as to their ownership of lots in Phase I.

First, the Homeowners argue Anthony Porter's conveyance of his lots in Phase I to his Personal Residence Trust constituted a conveyance "to a Person other than Developer" under § 7.01. They argue Porter's Trust is a different legal entity from "Developer." According to § 1.17 of the Declarations, "'Person shall mean and refer to a natural person, corporation, partnership, association, trust or other legal entity or any combination thereof." Second, the Homeowners contend none of the owners of lots in Phase I meet the definition of a "Builder" under the Declarations. They argue Ratcliff and Denny are not "Builders" simply because they hold contractor's licenses in their own names, as required by law. Third, the Homeowners argue Porter was no longer entitled to control the Association because he no longer had a financial interest in Wright's Point.

Based upon our finding that McNeal is a successor developer of Wright's Point, we affirm the circuit court's finding that the Developer was entitled to continue to appoint and remove officers and directors of the Association. Pursuant to § 7.01, the Developer has the right to control the Association "until the date as of which the last Lot in the Subdivision shall have been conveyed to a Person other than Developer or Builder," or he surrenders the authority by express amendment to the Declarations. Here, McNeal has not sold his lots in Phase I or the undeveloped property in Wright's Point, and he has not surrendered his right to control the Association. Accordingly, we affirm the circuit court's finding that the Developer was entitled to continue to appoint and remove officers and directors of the Association.

F. Control of the Committee

The Homeowners argue the circuit court erred in finding the Developer had the right to continue to control the Committee after Phase I was developed. We disagree.

§ 1.01 of the Declarations states, in part:

> "Wright's Point Architectural Committee" shall mean and refer to Anthony R. Porter and Jimmy W. Porter or such other individual(s) as Developer may appoint,

> or such entity to which the Wright's Point Architectural Committee may assign its duties, until all improvements constructed thereon and sold to permanent residents. At such time as all of the Lots in the Subdivision have been fully developed, the Developer shall notify the Board and all Owners of Lots in the Subdivision to that effect, at which time the Developer's rights and obligations as the Wright's Point Architectural Committee shall forthwith terminate. Notice to the Board and all the owners by Developer under this provision shall be in writing.

The circuit court found that because there were not improvements on all of the lots in Phase I, and because not all of the lots were owned by permanent residents, the Developer was entitled to remain in control of the Committee. The circuit court also found the Developer had not given notice to the Board and Owners as required by § 1.01.

The Homeowners argue it is impossible to determine whether all of the lots were owned by permanent residents, or whether all improvements had been constructed. They contend the Developer was no longer entitled to control the Committee because he sold all of the lots and had no financial interest in the development of the undeveloped land. The Developers maintain the evidence produced at trial demonstrates that not all of the lots were owned by permanent residents, and that not all of the lots had improvements.

We find a preponderance of the evidence demonstrates there were lots in Phase I not owned by permanent residents, and vacant lots in Phase I with no improvements. Homeowner Caldwell testified there were vacant lots in Phase I and lots that had not been sold to permanent residents. Richard Ratcliff and Homeowner Hucks both testified they owned lots in Phase I that had not been improved. Moreover, § 1.10 provides that the Developer retains control over the Committee until all of the lots are fully developed and the Developer notifies the Board and all Owners to that effect. Anthony Porter testified lots in Wright's Point would not be fully developed until all improvements within the entire development were complete to his

satisfaction. He also testified that "fully developed" does not mean "the completion and sale of all lots." Furthermore, there was no evidence produced at trial showing Anthony Porter ever notified the Board or the Owners that all of the lots had been fully developed as required by § 1.01. Accordingly, we affirm the circuit court's finding that the Developer had not relinquished the right to control the Committee.

G. Derivative Claims and Attorney's Fees

The Homeowners contend the circuit court erred in failing to find their claims were derivative and that they were entitled to attorney's fees. We disagree.

A party cannot recover attorney's fees unless authorized by contract or statute. Jackson v. Speed, 326 S.C. 289, 307, 486 S.E.2d 750, 759 (1997); see also Hegler v. Gulf Ins. Co., 270 S.C. 548, 549, 243 S.E.2d 443, 444 (1978) ("As a general rule, attorney's fees are not recoverable unless authorized by contract or statute."). The Homeowners argue they are entitled to attorney's fees pursuant to section 33-7-400 of the South Carolina Code (2006), which provides that "[d]erivative suits may be maintained on behalf of South Carolina corporations in federal and state court in accordance with the applicable rules of civil procedure." The Homeowners contend that while the statute does not specifically authorize attorney's fees, the statute's Official Comment provides for recovery. The Official Comment to section 33-7-400 of the South Carolina Code states in part: "[t]he right of successful plaintiffs in derivative suits to this recovery is so universally recognized, both by statute and on the theory of a recovery of a fund or benefit for the corporation, that specific reference was thought to be unnecessary." Assuming without deciding that this suit is a derivative action, the Homeowners are not entitled to attorney's fees under section 33-7-400. This section does not specifically authorize the recovery of attorney's fees, and the Official Comment is specifically limited to "successful plaintiffs." Accordingly, we affirm the circuit court's denial of the Homeowner's request for attorney's fees.

II. Developers' Appeal

The Developers argue the circuit court erred in denying their request for attorney's fees. This issue is not preserved for our review.

The Developers contend the language of § 11.01 of the Declarations provides a contractual basis that mandates an award of attorney's fees to the Developers and the Association. § 11.01 states, in part:

> Each Owner shall comply strictly . . . with the covenants, conditions and restrictions set forth in this Declaration . . . . Failure to comply with any of the same shall be grounds for . . . instituting an action . . . for damages and/or for injunctive relief, such actions to be maintainable by Developer, the Board on behalf of the Association, or in a proper case, by an aggrieved Owner. Should Developer or the Association employ legal counsel to enforce any of the foregoing, all costs incurred in such enforcement, including court costs and reasonable attorneys' fees, shall be paid by the violating Owner.

The Developers argue the Homeowners' attempts to gain control of the Association, dictate and limit the use of common amenities, and prevent future phases of development, as well as their movement of Association funds to an unauthorized account, constitute non-compliance with the Declarations. The Developers also argue they are entitled to attorney's fees pursuant to the Uniform Declaratory Judgments Act. Section 15-53-100 of the South Carolina Code (2005) provides that "[i]n any proceeding under this chapter the court may make such award of costs as may seem equitable and just."

In order for an issue to be preserved for appellate review it must have been raised to and ruled upon by the trial court. Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000). A party must "present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments." I'On,

L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Here, the Developers failed to present their arguments on appeal to the circuit court. In their Answer and Counterclaim, the Developers asserted they were entitled to recover attorney's fees due to the frivolous nature of the Homeowners' claims. However, the Developers did not assert they were entitled to attorney's fees pursuant to § 11.01 of the Declarations or section 15-53-100 of the South Carolina Code. Therefore, because the circuit court did not rule on these arguments and the Developers failed to file a Rule 59(e) motion requesting a ruling from the circuit court, these arguments are not preserved for our review.

CONCLUSION

For the foregoing reasons, the order of the circuit court is

AFFIRMED.

SHORT and WILLIAMS, JJ., concur.