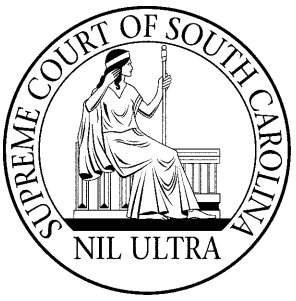

OPINIONS

OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 45
November 18, 2015
Daniel E. Shearouse, Clerk
Columbia, South Carolina
www.sccourts.org

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

Neal Beckman, Employee, Respondent,

v.

Sysco Columbia, LLC, Employer, and Gallagher Bassett Services, Inc., Carrier, Petitioners.

Appellate Case No. 2014-001691

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from the Appellate Panel
South Carolina Workers' Compensation Commission

Opinion No. 27590
Heard November 3, 2015 – Filed November 18, 2015

DEPUBLISH THE OPINION OF THE COURT OF APPEALS AND DISMISS CERTIORARI AS IMPROVIDENTLY GRANTED

Kathryn Fiehrer Walton, of Wood Law Group, L.L.C., of Charleston, for Petitioners.

Frederick W. Riesen, Jr., of Riesen Law Firm, L.L.P., of N. Charleston, and Stephen Benjamin Samuels, of Samuels Law Firm, L.L.C., of Columbia, both for Respondent.

PER CURIAM: We granted the petition for a writ of certiorari to review the Court of Appeals' decision in *Beckman v. Sysco Columbia*, L.L.C., 408 S.C. 501, 759 S.E.2d 750 (Ct. App. 2014). We first direct the Court of Appeals to depublish its opinion and assign the matter an unpublished opinion number.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. Next, we dismiss as improvidently granted the writ of certiorari.

Accordingly, we

DEPUBLISH THE OPINION OF THE COURT OF APPEALS AND DISMISS CERTIORARI AS IMPROVIDENTLY GRANTED.

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

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

v.

Jason Alan Johnson, Petitioner.

Appellate Case No. 2014-002097

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal From York County
Lee S. Alford, Circuit Court Judge

Opinion No. 27591
Heard October 20, 2015 – Filed November 18, 2015

DISMISSED AS IMPROVIDENTLY GRANTED

Appellate Defender David Alexander, of Columbia, for Petitioner.

Attorney General Alan Wilson and Assistant Attorney General William M. Blitch, Jr., both of Columbia, and Solicitor Kevin S. Brackett, of York, for Respondent.

PER CURIAM: We granted a writ of certiorari to review the court of appeals' decision in *State v. Johnson*, 410 S.C. 10, 763 S.E.2d 36 (Ct. App. 2014). We now dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

TOAL, C.J., BEATTY, KITTREDGE, HEARN, JJ., and Acting Justice James E. Moore, concur.

The Supreme Court of South Carolina

In the Matter of Robert Andrew Hedesh, Respondent

Appellate Case No. 2015-002211

ORDER

On August 12, 2015, Respondent was suspended from the practice of law for a period of ninety days. He has now filed an affidavit requesting reinstatement pursuant to Rule 32, of the Rules for Lawyers Disciplinary Enforcement contained in Rule 413, SCACR.

The request is granted and he is hereby reinstated to the practice of law in this state.

BY: s/ Daniel E. Shearouse
CLERK

Columbia, South Carolina
November 12, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The SPUR at Williams Brice Owners Association, Inc., Respondent,

v.

Sunil V. Lalla and Sharan W. Lalla, Appellants.

Appellate Case No. 2013-001479

Appeal From Richland County
Clifton Newman, Circuit Court Judge

Opinion No. 5362
Heard October 15, 2014 – Filed November 18, 2015

AFFIRMED

S. Jahue Moore and John Calvin Bradley Jr., both of Moore Taylor Law Firm, P.A., of West Columbia, for Appellants.

Brian Matthew Lysell, D. Reece Williams III, and W. Taylor Stanley of Callison Tighe & Robinson, LLC, of Columbia, for Respondent.

MCDONALD, J.: Sunil V. Lalla and Sharon W. Lalla (collectively, the Lallas), co-owners of a unit in a horizontal property regime known as The SPUR at Williams Brice Stadium (The SPUR), appeal the circuit court's order allowing The SPUR to enforce a restrictive covenant prohibiting the Lallas from renting their

unit to any student currently enrolled in a two or four-year college. The Lallas argue the restriction has no reasonable basis and discriminates against a specific class of individuals. The Lallas further argue the circuit court erred in failing to hold the restrictive covenant null and void. We affirm.

FACTS AND PROCEDURAL HISTORY

The SPUR is a horizontal property regime consisting of real property, condominiums, and general limited common areas. The SPUR was created by master deed dated September 19, 2006 (Master Deed). The SPUR at Williams Brice Owners Association, Inc. (the Association) is a nonprofit corporation that exists for the sole purpose of administering The SPUR and enforcing The SPUR's Master Deed and bylaws pursuant to the South Carolina Horizontal Property Act.[1] Article XIV of the Master Deed provides, in relevant part, the following:

> The rental of any unit to any student currently enrolled in a two (2) or four (4) year college, institute, or university is strictly prohibited. Additionally, any tenant of any Unit shall be prohibited from having any roommate that is enrolled in a two (2) or four (4) year college, institute, or university. Any tenant in violation of this Restriction shall have their lease automatically terminated, and shall have thirty (30) days to vacate the Unit.[2]

[1] S.C. Code Ann. §§ 27-31-10 to -440 (2007 & Supp. 2014).

[2] Article XVI further provides:

> However, any owner or owners may allow their child or grandchild to reside in, or rent, the Unit that they own, even if that child or grandchild is currently enrolled in a two (2) or four (4) year college, institute, or university. Additionally, the child or grandchild of any owner or owners who reside in, or rent out, their parents['] or grandparents['] Unit shall be entitled to have one (1) roommate who is also currently enrolled in a two (2) or four (4) year college, institute, or university. Nothing contained herein shall prevent a person . . . who is

Landmark Resources, LLC (Landmark) has managed the Association since July 1, 2007.

In 2007, the Lallas purchased a three-bedroom condominium at The SPUR (Unit 101) for $470,000. Sunil Lalla explained by affidavit that he "purchased the condo to enjoy football games at USC." When the Lallas purchased the unit, their daughter was considering attending college at the University of South Carolina. The Lallas intended for their daughter and two roommates to occupy Unit 101 during their college years and planned to receive rental payments from their daughter's roommates.

In 2008,[3] the real estate market declined, and Unit 101, like homes across the United States, substantially decreased in value. Despite their attempts, the Lallas were unable to sell the unit. At the time of the hearing in this matter, Unit 101 had been on the market for approximately four years.

During the summer of 2010, the Lallas notified the Association of their decision to rent to college students and began doing so. The Association's board meeting minutes from June 3, 2010, indicate the following:

> Management brought to the attention of the Board a comment form completed by an owner. The comment card stated that the Association is allowing the condominium to turn into a dormitory. . . . After discussing the comment card [with] the Board[,] a motion was made to consult with [the] drafters of the Master Deeds as it pertains to rentals. The motion was made to clarify the parameters of student rentals with the attorney—find out if a moratorium for students to rent can be placed immediately; motion was carried unanimously.

> enrolled in a two (2) or four (4) year college, institute, or university, from purchasing a Unit or becoming an owner thereof.

[3] During the summer of 2008, the Association adopted a set of rules and regulations that was distributed to each property owner at The SPUR.

On July 6, 2010, Landmark sent notice to each owner regarding enforcement of the Master Deed provision barring rentals to unrelated college students. The notice gave owners until May 31, 2011, to terminate any such leases.

The February 11, 2011 board meeting minutes state that "[a] letter was presented to the [b]oard from an attorney on behalf of Unit #111[4] contesting the [Association's] Master Deed of enforcing rental requirements." On May 25, 2011, Landmark sent another notice reminding owners that the Master Deed prohibited unit rentals to unrelated college students. Again, on July 14, 2011, the Association addressed the student rental issue in its board meeting minutes: "To identify renter[s] who are attending a 2 or 4 year school, all owner[s] must have potential renters complete [an] application and forward that application to the Board for approval . . . The Board will also start enforcing the Rules and Regulations concerning renting units."

On October 10, 2011, the Association filed this declaratory judgment action seeking interpretation and enforcement of the Master Deed and bylaws. Specifically, the Association asked that the circuit court find the Lallas were "in violation of the Master Deed by renting to a student or students and should be enjoined from doing so now or in the future." The Association further sought an award of "costs and fees pursuant to [section 15-53-100 of the South Carolina Code (2005)] and Section XXIIIC of the Master Deed."

The Lallas answered and counterclaimed, seeking a declaration that the restrictive covenant was null and void due to changed circumstances. The parties agreed to have the circuit court rule on the outstanding issues without testimony. The circuit court's order demonstrates that the parties had a "full opportunity" to create a record, present evidence through stipulated facts and affidavits, and present arguments through briefs.

The circuit court granted the Association's request for declaratory relief, ruling that "[w]hen the [Lallas] purchased Unit 101, they became subject to the provisions of the Master Deed and [b]ylaws." The Lallas appealed, asserting that the restrictions discriminate against a specific class of individuals (college students) and are unreasonable as there has been no damage to other property owners. The Lallas further assert the circuit court erred in declining to hold the rental restriction null and void due to its unreasonableness and the changed economic circumstances

[4] This is not the unit at issue in this dispute.

depressing condominium values substantially below the 2007 purchase price. Finally, the Lallas contend the court erred in ruling their affirmative defense of waiver inapplicable and in enjoining the Lallas from continuing to rent Unit 101 to their current tenants.

STANDARD OF REVIEW

"Declaratory judgment actions are neither legal nor equitable and, therefore, the standard of review depends on the nature of the underlying issues." *Judy v. Martin*, 381 S.C. 455, 458, 674 S.E.2d 151, 153 (2009). "An action to enforce restrictive covenants by injunction is in equity." *S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001); *see also Cedar Cove Homeowners Ass'n, Inc. v. DiPietro*, 368 S.C. 254, 258–59, 628 S.E.2d 284, 286 (Ct. App. 2006). "In an action at equity, tried by a judge alone, an appellate court may find facts in accordance with its own view of the preponderance of the evidence." *Inlet Harbour v. S.C. Dep't of Parks, Recreation & Tourism*, 377 S.C. 86, 91, 659 S.E.2d 151, 154 (2008). "However, we are not required to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility." *Straight v. Goss*, 383 S.C. 180, 192, 678 S.E.2d 443, 449 (Ct. App. 2009). "Moreover, the appellant is not relieved of his burden of convincing the appellate court the trial judge committed error in his findings." *Pinckney v. Warren*, 344 S.C. 382, 387–88, 544 S.E.2d 620, 623 (2001). In an action for declaratory relief, the burden of proof rests with the party seeking the declaration, and that party must meet its burden by a greater weight or preponderance of the evidence. *See Vt. Mut. Ins. Co. v. Singleton*, 316 S.C. 5, 10, 446 S.E.2d 417, 421 (1994); *see also Menne v. Keowee Key Prop. Owners' Ass'n, Inc.*, 368 S.C. 557, 564, 629 S.E.2d 690, 694 (Ct. App. 2006).

LAW AND ANALYSIS

I. Restrictive Covenant

The Lallas argue the circuit court erred in determining that they failed to meet their burden of establishing that the restrictive covenant is unreasonable and unenforceable. We disagree.

"Restrictive covenants, sometimes referred to as 'real covenants,' are agreements 'to do, or refrain from doing, certain things with respect to real property.'" *Kinard v. Richardson*, 407 S.C. 247, 257, 754 S.E.2d 888, 893 (Ct. App. 2014). "Restrictive

covenants are contractual in nature, and thus, the language used in the restrictive covenant is to be construed according to its plain and ordinary meaning." *Penny Creek Assocs., LLC v. Fenwick Tarragon Apartments, LLC*, 375 S.C. 267, 271, 651 S.E.2d 617, 620 (Ct. App. 2007). Restrictions on the use of property are historically disfavored. *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 270, 363 S.E.2d 891, 893 (1987). "The historical disfavor of restrictive covenants by the law emanates from the widely held view that society's best interests are advanced by encouraging the free and unrestricted use of land." *Rhodes v. Palmetto Pathway Homes, Inc.*, 303 S.C. 308, 311, 400 S.E.2d 484, 485 (1991).

The law governing the enforceability of covenants restricting the use of real property is well-established in South Carolina. "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." *Buffington v. T.O.E. Enters.*, 383 S.C. 388, 392, 680 S.E.2d 289, 291 (2009). In order to enforce a restrictive covenant, "a party must show that the restriction applies to the property either by the covenant's express language or by a plain and unmistakable implication." *Id.*; *see also Sea Pines Plantation Co.*, 294 S.C. at 269, 363 S.E.2d at 894 ("A restrictive covenant will be enforced if the covenant expresses the party's intent or purpose, and this rule will not be used to defeat the clear express language of the covenant."). "Courts shall enforce such covenants unless they are indefinite or contravene public policy." *Sea Pines Plantation Co.*, 294 S.C. at 270, 363 S.E.2d at 894. As with any other action on a contract, the party who seeks to enforce a restrictive covenant has the burden of proving that the non-moving party intended to create a covenant. *Charping v. J.P. Scurry & Co.*, 296 S.C. 312, 314, 372 S.E.2d 120, 121 (Ct. App. 1988).

In their answer, the Lallas admit they own a unit in The SPUR, and that they are subject to the provisions of the Master Deed and bylaws. Under article VIII of the Master Deed, "every Condominium . . . is hereby . . . subject to the restrictions, easements, conditions, and covenants prescribed and established herein." Furthermore, the bylaws established by the Association provide that "[a]ll present or future co-owners . . . are subject to the regulations set forth in these [bylaws] and in said Master Deed." Under the South Carolina Horizontal Property Act, "[e]ach co-owner shall comply strictly with the bylaws . . . and with the covenants, conditions and restrictions set forth in the master deed." S.C. Code Ann. § 27-31-170 (2007). In reviewing the Lallas' admissions, The SPUR's Master Deed, the

Association's bylaws, the pertinent statutes, and the circuit court's order, we find no error in the circuit court's ruling that "when the [Lallas] became owners of a unit in [The SPUR], they voluntarily and intentionally bound themselves by the restrictive covenants barring the rental of any unit to college students who are unrelated to the unit's owner." Accordingly, we affirm the circuit court's ruling that the rental ban provision of the restrictive covenant is binding upon the Lallas.

II. The Lallas' Affirmative Defenses

Upon the Association's showing that the restrictive covenant was binding on the Lallas, the Lallas bore the burden of asserting affirmative defenses to the restrictive covenant's enforceability. *See Circle Square Co. v. Atlantis Dev. Co.*, 267 S.C. 618, 628, 230 S.E.2d 704, 708 (1976). The circuit court ruled the restrictive covenant does not contravene public policy, as it neither unconstitutionally discriminates nor violates the statutory laws of the United States or the State of South Carolina. The circuit court further opined that a change in market conditions is not a valid defense to the enforcement of a restrictive covenant.

A. Unreasonable Restrictions

On appeal, the Lallas argue the circuit court erred in failing to find the restrictive covenant unenforceable because it is unreasonable. We disagree.

Part of the Lallas' argument on this point is that "[t]his class of currently enrolled college students is indistinguishable from college students who are children and grandchildren of owners or their roommates. This class is indistinguishable from college students who are condo owners." It does not appear that the circuit court addressed this particular "reasonableness" argument. *See Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) ("It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit] court to be preserved for appellate review."). Moreover, the Lallas did not move for reconsideration of this issue under Rule 59(e), SCRCP. *See Noisette v. Ismail*, 304 S.C. 56, 58, 403 S.E.2d 122, 124 (1991) (finding issue was not preserved where the trial judge did not explicitly rule on the appellant's argument and the appellant did not raise the issue in a Rule 59(e), SCRCP, motion to alter or amend the judgment); *West v. Newberry Elec. Coop.*, 357 S.C. 537, 543, 593 S.E.2d 500, 503 (Ct. App. 2004) (stating an issue that is neither addressed by the trial judge in a final order nor raised by way of a Rule 59(e), SCRCP, motion is not preserved for review). Thus, we conclude the question of whether South

Carolina should incorporate a separate reasonableness test—as distinguished from the "rational basis" equal protection analysis—regarding the enforceability of restrictive covenants in the Master Deed of a horizontal property regime is unpreserved.[5]

B. Equal Protection[6]

The Lallas argue the rental restriction is impermissibly discriminatory and violates the Equal Protection Clauses of article I, section 3 of the South Carolina Constitution and the Fourteenth Amendment of the United States Constitution. We disagree.

Article I, section 3 of the South Carolina Constitution provides, in pertinent part, that no person shall "be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws." S.C. Const. art. I, § 3; *see also Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 428, 593

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[5] In *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, our supreme court clarified that "the equal protection clause does not prohibit different treatment of people in different circumstances under the law." 401 S.C. 280, 294–95, 737 S.E.2d 601, 608–09 (2013) (quoting *Harbit v. City of Charleston*, 382 S.C. 383, 396, 675 S.E.2d 776, 782–83 (Ct. App. 2009)); *see also Town of Hollywood v. Floyd*, 403 S.C. 466, 480–81, 744 S.E.2d 161, 168 (2013) (recognizing clarification). As this is precisely the prohibition the Lallas propose as a defense to enforcement in asserting that family-member and unit-owning college student residents are indistinguishable from the non-related college student class barred by the rental restriction, they would be unable to prevail on the merits of this argument as well.

[6] "The general rule, well established in South Carolina, is that courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions." *White v. J.M. Brown Amusement Co.*, 360 S.C. 366, 371, 601 S.E.2d 342, 345 (2004); *see also Batchelor v. Am. Health Ins. Co.*, 234 S.C. 103, 108, 107 S.E.2d 36, 38 (1959) (holding contracts violating public policy as expressed in constitutional provisions, statutes, or judicial decisions are void).

S.E.2d 462, 469 (2004). Similarly, the Equal Protection Clause of the United States Constitution provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. While the private acts and agreements of individuals do not implicate the Equal Protection Clause, "the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment." *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948) (holding the states denied petitioners the equal protection of the laws in granting judicial enforcement of certain restrictive agreements). Therefore, for a restrictive covenant to be judicially enforceable, it must not discriminate on the basis of a classification that, if applied by the state, would contravene either the state or federal Equal Protection Clause.

"To satisfy the equal protection clause, a classification must (1) bear a reasonable relation to the purpose sought to be achieved, (2) members of the class must be treated alike under similar circumstances, and (3) the classification must rest on some rational basis." *Sunset Cay*, 357 S.C. at 428, 593 S.E.2d at 469. Use of a classification will be declared unconstitutional under the Equal Protection Clause "if its repugnance to the Constitution is clear beyond a reasonable doubt." *Taylor v. Medenica*, 331 S.C. 575, 578, 503 S.E.2d 458, 460 (1998). "Where an alleged equal protection violation does not implicate a suspect class or abridge a fundamental right, the rational basis test is used." *Dunes W. Golf Club, LLC*, 401 S.C. at 293, 737 S.E.2d at 608; *see also Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *Sunset Cay*, 357 S.C. at 428–29, 593 S.E.2d at 469. "In a case such as this, the rational basis standard, rather than strict scrutiny, applies because the classification at issue does not affect a fundamental right and does not draw upon inherently suspect distinctions such as race, religion, or alienage." *Harbit*, 382 S.C. at 396, 675 S.E.2d at 783.

An inherently suspect classification is one whose members have faced a long history of discrimination, *see Palmore v. Sidoti*, 466 U.S. 429, 432 (1984); whose members are a discrete and insular minority who would otherwise be unheard by the political process, *see United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); or which is drawn according to an immutable trait acquired at birth, *see Frontiero v. Richardson*, 411 U.S. 677, 686 (1973). We agree with the circuit court that because college students have not faced a long history of discrimination, are not an insular minority, and have not been classified according to an immutable trait acquired at birth, a classification based upon an individual's

status as a college student is not inherently suspect. Thus, we conclude the circuit court correctly applied a rational basis analysis in rejecting the Lallas' equal protection claim.

A classification bears a rational relationship to its purpose as long as there is some evidence that it will further a legitimate purpose. *See Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (explaining that the Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the facts on which the classification is based rationally may have been considered to be true by the decision maker, and the relationship of the classification to the goal is not so attenuated as to render the distinction arbitrary or irrational); *see also Whaley v. Dorchester Cty. Zoning Bd. of Appeals*, 337 S.C. 568, 576, 524 S.E.2d 404, 408 (1999) (noting a legitimate government interest exists in limiting traffic and protecting aesthetic values in residential areas).

A classification may withstand rational basis review even if it is underinclusive or overinclusive, so long as the classification is not arbitrary. *See Ry. Express Agency v. New York*, 336 U.S. 106, 109–10 (1949) (finding a traffic regulation satisfied rational basis review even though it prohibited motorists from selling general advertising space on their vehicles but allowed business owners to advertise their products on vehicles engaged in that business); *id.* at 110 ("It is no requirement of equal protection that all evils of the same genus be eradicated or none at all."); *N.Y.C. Transit Auth. v. Beazer*, 440 U.S. 568, 592–94 (1979) (holding the exclusion of those in methadone maintenance programs from employment in the Transit Authority was constitutionally permissible even though many participants would be able to perform the requisite job functions safely); *Vance v. Bradley*, 440 U.S. 93, 108–09 (1979) (holding mandatory retirement age constitutional despite the statute being underinclusive in failing to remove from employment some younger individuals who were no longer qualified to continue working and overinclusive in removing from employment those who were older but still capable).

The purpose of the restrictive covenant's classification in this case is to ensure the comfort and safety of The SPUR's residents and protect the investments of property owners by minimizing the risk of creating a dormitory-like atmosphere at the complex. The rental prohibition is rationally related to its purpose because it bars from the pool of possible renters a population that the Association alleges has a tendency to engage in certain behaviors dangerous to themselves and disruptive to those around them. The fact that some potential renters barred by the college

student prohibition might not be disruptive or disorderly does not render the classification itself arbitrary or constitutionally violative. *See, e.g.*, *Beazer*, 440 U.S. at 592–94.

Accordingly, we affirm the circuit court's well-reasoned opinion that the restrictive covenant satisfies both the federal and state equal protection clauses because it is "rationally related to maintaining the safety, comfort, and investment of owners."

C. Fair Housing Protections[7]

The Lallas further argue that the circuit court erred in enforcing the Association's rental restriction because it is unreasonable, discriminatory, and seeks to prohibit an ordinary class of people from access to housing accommodations in violation of state and federal law. We disagree.

The federal Fair Housing Act and South Carolina Fair Housing Law prohibit discrimination in the rental of a dwelling based upon a person's race, color, religion, sex, familial status, or national origin. *See* S.C. Code Ann. § 31-21-40 (2007); 42 U.S.C. § 3604 (2012). Within both statutes, "'familial status' means one or more individuals (who have not attained the age of eighteen years) being domiciled with--(1) a parent or another person having legal custody of such individual or individuals; or (2) the designee of such parent or other person having such custody . . . ." 42 U.S.C. § 3602(k) (2012); *see* S.C. Code Ann. § 31-21-30(6)(a) (2007).

Here, the rental restriction is wholly unrelated to any classification protected by state and federal housing laws. *See, e.g.*, *Tufano v. One Toms Point Lane Corp.*, 64 F.Supp.2d 119, 126 (E.D.N.Y. 1999) (holding that where a plaintiff's amended complaint failed to allege discrimination based upon one of the six "denominated determinants" there was no discriminatory nexus and his Fair Housing Act claim must be dismissed). Thus, we affirm the circuit court's ruling that the restrictive covenant is neither unconstitutionally discriminatory nor violative of state or federal law.

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[7] *See* United States Fair Housing Act, 42 U.S.C. §§ 3601-3631; South Carolina Fair Housing Law, S.C. Code Ann. §§ 31-21-10 to -150 (2007 & Supp. 2014).

D. Change in Economic Circumstances

The Lallas argue the circuit court erred in failing to hold the Association's restrictions null and void as the change in economic conditions, specifically the decline in the real estate market following their purchase of the Unit, renders enforcement of the restrictions unreasonable. We disagree.

"Under South Carolina law, a party may bring a declaratory judgment action to invalidate a restrictive covenant based on a change of conditions." *Menne*, 368 S.C. at 564, 629 S.E.2d at 694. "[A]ffirmative relief may be granted against a restrictive covenant where there is such a change in the character of the neighborhood as to render the enforcement of the covenant valueless to the covenantee and oppressive and unreasonable as to the covenantor." *Id.* However, South Carolina courts have been hesitant to terminate a restrictive covenant on the basis of a change in conditions. *Id.*; *Shipyard Prop. Owners' Ass'n v. Mangiaracina*, 307 S.C. 299, 308–09, 414 S.E.2d 795, 801 (Ct. App. 1992). "A party seeking to annul a restrictive covenant must show the change of conditions represented so radical a change that the original purpose of the restrictive covenant can no longer be realized." *Menne*, 368 S.C. at 564, 629 S.E.2d at 694. Notwithstanding the changed character, when one protected by a covenant seeks enforcement thereof, we cannot endorse the change while the purpose of the covenant may still be accomplished. *Circle Square Co.*, 267 S.C. at 631, 230 S.E.2d at 709.

In *Buffington*, our supreme court reviewed an order enjoining the operators of a Toyota dealership from using their real property—located across from the dealership and within a subdivision—for commercial purposes. 383 S.C. at 390, 680 S.E.2d at 290. Certain lots within the subdivision, including the lots owned by the dealership operators, were subject to a restrictive covenant limiting their use to residential purposes. *Id.* at 390–91, 680 S.E.2d at 290. In examining the equities relating to enforcement of the covenant, the court concluded it would be inequitable to consider the dealership operators' financial loss in purchasing and improving their land because they were on notice of the subdivision's restriction prohibiting any use other than residential when they purchased it. *Id.* at 393, 680 S.E.2d at 291. The *Buffington* court further found that to ignore the restriction, in the absence of evidence to support lifting the restriction based on equitable

doctrines, "would eliminate a homeowner's justified reliance on property restrictions." *Id.* at 393–94, 680 S.E.2d at 291–92.

In this case, the purpose of the restrictive covenant is to ensure the safety of The SPUR's residents as well as the value of the unit owners' investments. The units' decrease in value due to the declining real estate market and economy had no effect on the Association's need to minimize the risk that The SPUR might develop a dormitory-like atmosphere. Like the dealership operators in *Buffington*, when the Lallas purchased their unit, they were on notice (by way of the Master Deed) of the restrictive covenant prohibiting the rental of any unit to college students unrelated to the unit's owner. Accordingly, we agree with the circuit court that the economic change in conditions alleged by the Lallas fails to support the discharge of the restrictive covenant.

E. Waiver

The Lallas argue the circuit court erred in ruling that the affirmative defense of waiver was unavailable in this case. We disagree.

"Waiver is a voluntary and intentional abandonment or relinquishment of a known right. It may be expressed or implied by a party's conduct, and it may be applied to bar a party from relying on a statute of limitations defense." *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994) (citation omitted). "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." *Lyles v. BMI, Inc.*, 292 S.C. 153, 158–59, 355 S.E.2d 282, 285 (Ct. App. 1987). The party asserting waiver has the burden of proof. *Provident Life & Accident Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 929 (Ct. App. 1994). "Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended." *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 387–88 (1992).

Here, the circuit court determined that the Lallas failed to produce any evidence to support a waiver defense. *See Provident Life & Accident Ins. Co.*, 317 S.C. at 478, 451 S.E.2d at 929 ("Waiver, like estoppel, is an affirmative defense and the burden of proof is upon the party who asserts it."). The Lallas contend the circuit court ignored the evidence in the record that the Association allowed other non-related students to live at The SPUR. However, we find that even if the Association

previously failed to monitor the rental of units, the record reflects that, upon receiving a complaint, the Association took action to enforce the restrictive covenant prohibiting rentals to unrelated college students. Therefore, the circuit court properly found no waiver by the Association of its right to enforce the rental restriction. *See, e.g.*, *King v. James*, 388 S.C. 16, 30, 694 S.E.2d 35, 42–43 (Ct. App. 2010) (finding waiver defense inapplicable and explaining that "for a party to waive a right, the party must have known of the right and known that the right was being abandoned."). Accordingly, we affirm the circuit court's finding that waiver is inapplicable.

III. Injunction

In their reply brief, the Lallas argue the circuit court erred in enjoining them from continuing to rent their unit to their current tenants. We find this argument is not properly before the court. *See Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 692 (Ct. App. 2001) ("[A]n argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief.").

CONCLUSION

The circuit court properly held the rental prohibition of Article XIV of the Master Deed and Restrictive Covenant to be valid and enforceable. The circuit court's enjoining of the Lallas from renting, or continuing to rent, their unit in violation of the restrictive covenant was likewise proper. Accordingly, the ruling of the circuit court is

AFFIRMED.

WILLIAMS and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Hotel and Motel Holdings, LLC, Respondent,

v.

BJC Enterprises, LLC, Wendy J. Bellamy, Americana, Inc., a/k/a Americana Motel of Myrtle Beach, Inc., Mozingo & Wallace Architects, LLC, Kersi S. Shroff, and Shroff Management, Inc., Defendants,

BJC Enterprises, LLC, Wendy J. Bellamy, Americana, Inc., a/k/a Americana Motel of Myrtle Beach, Inc., Appellants,

v.

First Palmetto Savings Bank, F.S.B., Jack Jones, Donald D. Godwin, and Bhupendra Patel, Respondents.

Appellate Case No. 2011-198106

Appeal From Horry County
William H. Seals, Jr., Circuit Court Judge

Opinion No. 5363
Heard December 10, 2014 – Filed November 18, 2015

AFFIRMED

Kathryn M. Cook, of Kathryn M. Cook, PA, of North Myrtle Beach, for Appellants.

Audra McCall Byrd, R. Wayne Byrd, and Carlyle Richardson Cromer, all of Turner Padget Graham & Laney, PA, of Myrtle Beach; and Sarah Patrick Spruill, of Haynsworth Sinkler Boyd, PA, of Greenville, for Respondents.

MCDONALD, J.: BJC Enterprises, LLC (BJC), Wendy Jones Bellamy, and Americana, Inc. a/k/a Americana Motel of Myrtle Beach, Inc. (Americana) (collectively, Appellants) seek appellate review of several orders,[1] arguing the circuit court erred in (1) granting First Palmetto Savings Bank's (Palmetto) motion for summary judgment as to Appellants' third-party claims; (2) granting Hotel and Motel Holdings, LLC's (H&M) motion for summary judgment as to Appellants' counterclaims; (3) granting Jack Jones, Donald Godwin, and Bhupendra Patel's (collectively, Individual Respondents) motion to dismiss; and (4) granting H&M's motion to strike Appellants' request for a jury trial on H&M's cause of action for claim and delivery. We affirm.

FACTS/PROCEDURAL BACKGROUND

On January 14, 2005, Palmetto made a $5,573,146.62 loan (Loan) at a 5.550% interest rate to BJC for the purpose of purchasing Emerald Shores Motel and its first row parking lot (collectively, Emerald Shores). BJC's members included managing member Wendy Jones Bellamy, Bellamy's brother Harvey L. Jones (Brother), and family friend Henry C. "Trip" Coan, III. In addition to the 2005 Loan, BJC used $1,000,000 in cash contributed by Coan for the $6,900,000 purchase. Prior to obtaining this loan, Bellamy, Brother, and their family, through the corporation Americana, owned and operated a neighboring motel known as Rainbow Court Motel, along with various other rental properties in the vicinity.

The terms of the note (2005 Note) called for "23 monthly interest payments ranging from $23543.01 to $26065.48 beginning 02-14-2005 and 1 payment of $5,606,065.48 on 01-14-2007." The 2005 Note was secured by a commercial security agreement and three assignments of leases and rents (2005 Assignments). The 2005 Note was further secured by three mortgages (2005 Mortgages): (1) the

[1] This consolidated appeal addresses seven circuit court orders.

Emerald Shores mortgage, consisting of four property parcels mortgaged by BJC; (2) a mortgage on Rainbow Court and various rental properties, consisting of nine parcels mortgaged by Americana; and (3) a mortgage by Bellamy on a rental duplex. Palmetto perfected its security interest on January 19, 2005, by filing a UCC-1 financing statement (UCC-1) as to "[a]ll furniture, fixtures and equipment located at 404 N. Ocean Blvd., Myrtle Beach, SC 29577 and used in the operation of the Emerald Shores Motel." As additional collateral, Coan posted a $500,000 certificate of deposit (CD), and Bellamy, Brother, and Coan executed personal guarantees for BJC's obligations under the 2005 Note.

On January 12, 2007, Palmetto renewed the Loan at an 8.25% interest rate and executed a new promissory note (2007 Note). The terms of the 2007 Note called for "11 monthly interest payments ranging from $35271.15 to $38050.20 beginning 02-12-2007, and 1 payment of $5,612,198.82 on 01-12-2008." The 2007 Note was secured by the 2005 Mortgages and the 2005 commercial security agreement. In her capacity as BJC's managing member, Bellamy executed three mortgage modifications, and all three BJC members executed personal guarantees.

On January 17, 2008, Palmetto again renewed the Loan at the 8.25% interest rate, executed a new promissory note (2008 Note), and executed a new commercial security agreement (2008 CSA). The terms of the 2008 Note called for "11 monthly payments of $47,905.19 beginning 02-17-2008, and 1 balloon payment of $5,509,352.46 on 01-17-2009." The 2008 Note was secured by the 2005 Mortgages, the 2005 Assignments, and a commercial security agreement. In her capacity as BJC's managing member, Bellamy again executed mortgage modifications, and all three members again executed personal guarantees.

Throughout 2008, BJC was late on its monthly payments and eventually ceased making payments in October 2008. In mid-October, BJC met with Palmetto to discuss the 2008 Note. At this meeting, Palmetto indicated that it was not willing to renew the 2008 Note for another year, and that it expected BJC to make the balloon payment of $5,509,352.46 on January 17, 2009. Despite the fact that neither Bellamy nor BJC were financially capable, Bellamy informed Palmetto that she would be able to make the payment "in a relatively short period of time."

This series of events culminated in Bellamy's attempted suicide on November 3, 2008. Bellamy testified in her deposition that she attempted suicide to make her $5,500,000 life insurance policy proceeds available to pay off the 2008 Note and save her family's properties. Following her release from Grand Strand Regional

Medical Center, Bellamy was involuntarily hospitalized in Florence for fourteen days. Thereafter, she remained under psychiatric care for approximately two years in Myrtle Beach. Subsequently, Bellamy was not involved with the management of Emerald Shores or Rainbow Court, nor was she involved in further efforts to renegotiate or extend the 2008 Note.

In November 2008, Brother and Coan agreed to bring current the payments on the 2008 Note, and Palmetto agreed to continue negotiations for a possible renewal of the 2008 Loan. In a November 24, 2008 letter to BJC, Palmetto offered to extend the 2008 Note for one year, reduce the interest rate to 7%, and require interest-only payments. Appellants claim they never received this letter because it was mailed to Rainbow Court while Bellamy was incapacitated, and the motel was closed for the season.[2] Palmetto contends that it mailed the letter to Rainbow Court because the motel's address is the address of record set forth in the loan documents (Loan Documents).

On December 9, 2008, Bellamy signed a durable power of attorney (POA) in favor of her paternal uncle, Jack Jones (Uncle). At this point, Uncle took over all negotiations on the 2008 Note; he faxed a copy of the POA to Palmetto's corporate headquarters on December 15, 2008. Appellants allege that neither Uncle nor Palmetto advised them of the November 24, 2008 offer.

When the 2008 Note matured on January 17, 2009, BJC failed to make the required balloon payment. On January 22, 2009, Brother, Coan, and Uncle (in his capacity as Bellamy's POA) attended a meeting at Palmetto's headquarters in Camden. At this meeting, Palmetto's President and CEO, Sammy Small, Sr., advised the parties that he planned to liquidate Coan's $500,000 CD and apply it to the principal due on the 2008 Note. Appellants claim that Uncle and Small left the room to speak privately and never divulged the substance of their conversation. Later in January, Brother and Uncle returned to Camden for another meeting with Small. Brother alleges that Uncle and Small once again met privately and failed to divulge the substance of their conversation.

In addition to these private meetings, Uncle began having regular contact with Small including, but not limited to, approximately 115 phone calls between

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[2] According to Appellants, Rainbow Court and Emerald Shores are seasonal hotels, generally open only from Memorial Day weekend through Labor Day.

January 22, 2009, and June 30, 2009. Appellants claim that Uncle and Small kept secret communications regarding the 2008 Note and the three mortgaged properties. They further allege that Uncle and Small led them to believe that they were "negotiating in good faith to achieve a restructuring, renewal, or workout of the 2008 Note . . . and to prevent foreclosure on the properties."

On February 2, 2009, Palmetto initiated an action against BJC, seeking to foreclose on the three mortgaged properties. Subsequently, in exchange for BJC's promise to pay the 2008 property taxes and make a $150,000 interest payment by May 31, 2009, Palmetto approved a payment deferral request and agreed to refrain from seeking foreclosure through May 31, 2009. Bellamy, accompanied by Brother and Uncle, hand-delivered a certified check in the amount of $95,000 to Small on February 3, 2009. Palmetto's payment deferral included the following language: "Customer paid $95,000.00 in delinquent interest and attorney fees. Advancing to May 2009 to give them time to sell the property and pay us off. Loan remains in default and all sums due and payable."

BJC paid the 2008 property taxes on February 5, 2009, and Palmetto voluntarily dismissed the initial foreclosure action on February 13, 2009. On March 23, 2009, Bhupendra Patel, a long-time business associate of Uncle, began managing the hotel properties and continued to manage the properties for nearly a year after the commencement of the foreclosure action at issue in this appeal.[3] As manager, Patel was paid $60,000 per year and was responsible for the day-to-day operations of Emerald Shores and Rainbow Court, as well as paying bills, making deposits, making repairs, maintaining the pool, and taking care of the grounds.

Patel opened two checking accounts at Palmetto, one for Emerald Shores and one for Rainbow Court. While manager, Patel never made payments to Palmetto. He did, however, make payments to Uncle in the amount of $20,000; Uncle's brother, Wilbur Jones (Jones), in the amount of $50,000; and himself in the amount of $30,000. In their depositions, Patel and Uncle testified that the payments made to Uncle and Jones were reimbursements for loans made to Emerald Shores and Rainbow Court. As manager, Patel also signed an agreement allowing three of Rainbow Court's rental property tenants to reside in their units "with my permission at no monetary cost to them for the year of 2010." The agreement

[3] At his deposition, Uncle testified that he had personally loaned Patel "a couple million" over their twenty-five-year relationship, and that together, Uncle and Godwin had loaned Patel a substantial amount of money over the years.

specified that "[r]ent and utilities including water, gas, electric, basic cable, and internet ([R]oad Runner) are included in this agreement (Telephone is excluded)."

On or around March 27, 2009, Palmetto retained counsel to draft the documents necessary to sell the 2008 Note. Thereafter, Palmetto hired C. Vernon Hammond to appraise the various properties associated with the 2005 Mortgages. Hammond valued the mortgaged properties at $6,465,000 collectively: Emerald Shores at $3,750,000; Rainbow Court at $1,700,000; and the rental properties, including Bellamy's duplex, at $1,015,000. On May 31, 2009, BJC failed to make the remaining $55,000 payment to Palmetto. On June 4, 2009, Palmetto filed a lis pendens against the hotels; on June 11, 2009, Palmetto filed the present commercial foreclosure action.

On June 15, 2009, Uncle and Godwin filed articles of organization with the South Carolina Secretary of State creating H&M, with Uncle as the company's sole member. Although Godwin assisted Uncle in forming H&M and served as its registered agent, he had no interest in the company until October 2009, when he purchased a fifty percent membership interest. Appellants allege that H&M is a "sham corporation being used by its principal, [Uncle], in an attempt to escape liability . . . [H&M] carried on no business, had no assets, [and] no means of revenue production other than being funded by [Uncle] and later Godwin in an attempt to distance itself from the pre-incorporation activities of its members."[4]

On June 24, 2009, Uncle and Palmetto entered into a loan sales agreement (Agreement).[5] Pursuant to the Agreement, Palmetto paid for all of H&M's legal fees associated with the present foreclosure action. On June 30, 2009, Palmetto assigned the 2008 Note, the 2005 Mortgages, and the Loan Documents, which consisted of the 2005 Assignments, the 2008 CSA, and the UCC-1, to H&M for $5,000,000. Additionally, Palmetto loaned H&M $4,750,000 at a 5% interest rate to finance the purchase. That same day, Uncle delivered a cashier's check in the

[4] On October 27, 2009, H&M opened an account at Palmetto; Uncle and Godwin each deposited $5000.

[5] Palmetto did not require H&M—a brand new entity with no history of income, liability, or credit worthiness—to fill out a loan application, nor did it require approval from the bank's loan committee.

amount of $250,000 to Palmetto, and in his capacity as H&M's sole member, executed a promissory note on behalf of H&M (H&M Note).

The terms of the H&M Note called for "56 monthly interest payments ranging from $18472.22 to $81805.56 beginning 11-01-2009 and 1 payment of $4,769,131.94 on 06-30-2014." The additional terms of the H&M Note called for "[H&M] to provide a principal reduction in the amount of $750,000.00 by 10-15-09" and that "upon [] default of terms contained herein, [the] interest rate is increased from 5.00% per annum to 8.00% per annum." The H&M Note was secured by a collateral assignment, pledge agreement, and security account Palmetto CD. Pursuant to the borrower's settlement statement, the principal amount of the new loan (H&M Loan) was $4,750,000, the total due from borrower was $250,000, and the balance to borrower was $0. At his deposition, Uncle testified that he loaned H&M $1,000,000 to put into a CD with Palmetto to serve as interest payment for the five-year term of the loan to H&M.

On September 11, 2009, the Honorable Steven H. John signed a consent order substituting H&M as the plaintiff in the foreclosure action.[6] On September 22, 2009, H&M filed an amended complaint seeking foreclosure, claim and delivery, and the appointment of a receiver.

On November 4, 2009, Appellants answered H&M's amended complaint. On June 9, 2010, Appellants filed an amended answer, counterclaims against H&M, and a third-party complaint against Palmetto and Individual Respondents. Against H&M, Appellants counterclaimed for (1) breach of contract, (2) breach of contract accompanied by fraudulent act, (3) civil conspiracy, (4) fraud, (5) conversion, (6) violation of the South Carolina Unfair Trade Practices Act (SCUTPA),[7] (7) tortious interference with contractual relationship, and (8) intentional infliction of emotional distress.

Appellants' third-party complaint set forth the following claims against Individual Respondents: (1) civil conspiracy, (2) conversion, (3) tortious interference with a contractual relationship, and (4) intentional infliction of emotional distress.

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[6] The order substituting H&M as the plaintiff in the foreclosure action was not appealed.

[7] S.C. Code Ann. §§ 39-5-10 to -180 (1985 & Supp. 2014).

Appellants also sued Uncle individually for breach of fiduciary duty. Appellants sued Palmetto for (1) breach of contract, (2) breach of contract accompanied by fraudulent act, (3) civil conspiracy, (4) fraud, (5) conversion, (6) violation of SCUTPA, and (7) intentional infliction of emotional distress.

H&M filed a motion seeking the appointment of a receiver, specifically requesting that Patel be appointed. The circuit court heard the motion on December 8, 2009, granting H&M's motion to appoint a receiver, but denying its request to appoint Patel. In an April 20, 2010 order, the circuit court appointed Kenan L. Walker of Waccamaw Land & Timber, LLC, receiver for the properties secured by the Loan Documents.[8]

Individual Respondents filed motions to strike and dismiss in response to the third-party claims. The circuit court heard these motions on September 23, 2010. In its October 15, 2010 order, the circuit court declined to rule on the motion to dismiss and concluded that Appellants' third-party claims for breach of contract, breach of contract accompanied by a fraudulent act, and civil conspiracy were proper under Rule 14, SCRCP. The circuit court struck Appellant's remaining third-party claims against Individual Respondents, including the breach of fiduciary duty claim against Uncle, as improper under Rule 14, SCRCP. Finally, the circuit court ordered stricken Appellants' remaining third-party claims for fraud and unfair trade practices against Palmetto.[9]

On April 14, 2011, the Honorable William H. Seals, Jr. heard Individual Respondents' Rule 12(b)(6), SCRCP, motion to dismiss Appellants' third-party claim for civil conspiracy. The circuit court granted this motion in an order filed April 21, 2011 (Order #1). Appellants moved to reconsider Order #1 on May 5, 2011; the circuit court denied the motion by order filed November 30, 2011 (Order #2).

On April 18, 2011, H&M moved for summary judgment as to Appellants' counterclaims. H&M filed its own motion for summary judgment on the foreclosure and claim and delivery causes of action on May 3, 2011. Palmetto moved for summary judgment on Appellants' third-party claims on May 2, 2011. Judge Seals heard the three summary judgment motions on May 12, 2011.

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[8] The order appointing Walker as receiver was not appealed.
[9] This October 15, 2010 order was not appealed.

In its June 6, 2011 order (Order #3), the circuit court granted Palmetto's motion for summary judgment on Appellants' third-party claims for breach of contract, breach of contract accompanied by fraudulent act, and civil conspiracy. In a separate June 6, 2011 order (Order #4), the circuit court granted H&M's motion for summary judgment as to all of Appellants' counterclaims. In a third order, also dated June 6, 2011, the circuit court denied H&M's motion for summary judgment on its claims for foreclosure and claim and delivery.

On June 6, 2011, H&M moved to strike Appellants' jury trial request, arguing that "[t]his matter involves the foreclosure of real property mortgages, which is particularly appropriate for a non-jury trial." The circuit court heard this motion on August 24, 2011, concluding that "the only affirmative claims that remain pending in this case are those asserted by H&M." The circuit court granted H&M's motion to strike the jury trial demand by order filed September 29, 2011 (Order #5).

On June 7, 2011, Appellants moved for reconsideration of Order #3 and Order #4. On July 27, 2011, the circuit court denied Appellants' motion to reconsider Order #3 (Order #6). Likewise, on July 28, 2011, the circuit court denied Appellants' motion to reconsider Order # 4 (Order #7). This appeal followed.

LAW/ANALYSIS

I. Individual Respondents' Rule 12(b)(6) Motion to Dismiss

Appellants contend that because they set forth the necessary allegations of fact, law, and special damages sufficient to state a civil conspiracy claim[10] against Individual Respondents, the circuit court erred in dismissing this claim against Uncle, Godwin, and Patel. We disagree that Appellants properly pled special damages and affirm the circuit court's dismissal of the civil conspiracy claim. *See* Rule 9(g), SCRCP ("When items of special damage are claimed, they shall be specifically stated.").

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[10] "A civil conspiracy exists when there is (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes the plaintiff special damage." *Robertson v. First Union Nat'l Bank*, 350 S.C. 339, 348, 565 S.E.2d 309, 314 (Ct. App. 2002). "It is essential that the plaintiff prove all of these elements in order to recover." *Pye v. Estate of Fox*, 369 S.C. 555, 567, 633 S.E.2d 505, 511 (2006).

"A ruling on a motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the factual allegations set forth in the complaint, and the court must consider all well-pled allegations as true." *Fabian v. Lindsay*, 410 S.C. 475, 481, 765 S.E.2d 132, 136 (2014) (quoting *Disabato v. S.C. Ass'n of Sch. Adm'rs*, 404 S.C. 433, 441, 746 S.E.2d 329, 333 (2013)). "On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). Therefore, this court must "construe the complaint in a light most favorable to the nonmovant and determine if the 'facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case.'" *Id.* (quoting *Williams v. Condon*, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001)). If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. *Clearwater Tr. v. Bunting*, 367 S.C. 340, 343, 626 S.E.2d 334, 335 (2006). "Furthermore, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action." *Spence v. Spence*, 368 S.C. 106, 116–17, 628 S.E.2d 869, 874 (2006).

Our review of the record reveals the damages sought in the conspiracy cause of action are identical to those sought in Appellants' causes of action for fraud, breach of contract accompanied by fraud, conversion, interference with contractual relationship, and breach of fiduciary duty. *See Pye*, 369 S.C. at 568, 633 S.E.2d at 511 ("Because the quiddity of a civil conspiracy claim is the damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action."); *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 117, 682 S.E.2d 871, 875 (Ct. App. 2009) ("If a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed."). Moreover, at oral argument before this court, Appellants conceded that they failed to plead with specificity any special damages in their third-party action and counterclaim for conspiracy. Accordingly, we find the circuit court properly dismissed Appellant's civil conspiracy claim against Individual Respondents.

II. Summary Judgment

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRCP." *Bovain v. Canal Ins.*, 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009). Rule 56(c), SCRCP, provides

that "a trial court may grant a motion for summary judgment 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Id.* (quoting Rule 56(c), SCRCP). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 329–30, 673 S.E.2d 801, 802 (2009). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Id.* at 330, 673 S.E.2d at 803. "However, in cases requiring a heightened burden of proof . . . the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment." *Id.* at 330–31, 673 S.E.2d at 803.

A. Appellants' Third-Party Claims against Palmetto

Appellants argue that because they submitted evidence "far exceeding the 'mere scintilla' standard," the circuit court erred in granting summary judgment on their third-party claims against Palmetto for breach of contract, breach of contract accompanied by fraudulent act, and civil conspiracy.[11] Appellants further contend that Palmetto "breached [its] duty of good faith and fair dealing under the loan documents" and "breached [its] obligation of confidentiality concerning the lending relationship." We disagree.

[11] The failure to plead special damages is fatal to Appellants' third-party civil conspiracy claim against Palmetto. *See* Part I, *supra*.

1. Breach of Contract[12]

"The elements for a breach of contract are the existence of a contract, its breach, and damages caused by such breach." *S. Glass & Plastics Co. v. Kemper*, 399 S.C. 483, 491–92, 732 S.E.2d 205, 209 (Ct. App. 2012). "The general rule is that for a breach of contract the [breaching party] is liable for whatever damages follow as a natural consequence and a proximate result of such breach." *Id.* at 492, 732 S.E.2d at 209 (quoting *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962)). However, one who seeks to recover damages for breach of a contract must demonstrate that he has performed his part of the contract, "or at least that he was, at the appropriate time, able, ready, and willing to perform it." *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 334 S.C. 469, 487, 514 S.E.2d 126, 135 (1999) (quoting *Parks v. Lyons*, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951)).

It is uncontested that a contractual relationship existed between Palmetto and Appellants. It is further uncontested that Appellants were in default when they failed to make the required balloon payment on January 17, 2009, and again when they failed pay the balance on the $150,000 interest payment by May 31, 2009. When asked why the payment was not made on or before May 31, 2009, Bellamy testified that the payment could have been made but was not made, and that she thought Uncle and Patel were going to ensure that the payment was made by the

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[12] Appellants did not assert their argument regarding their unawareness of Palmetto's letter offering to renegotiate the terms of the 2008 Note until their motion to reconsider the entry of summary judgment. In their amended answer, counterclaims, and third-party complaint, Appellants make no claim that Palmetto mailed the letter to an address at which it knew Appellants would not receive the letter. Moreover, Appellants did not make this argument in their memorandum in opposition to Palmetto's motion for summary judgment or at the motions hearing. Accordingly, we find this argument is not preserved for appellate review. *See Kiawah Prop. Owners Grp. v. Pub. Serv. Comm'n of S.C.*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (finding the issue is not preserved because a party may not raise an issue in a motion to reconsider, alter, or amend a judgment that could have been presented prior to the judgment); *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990) ("A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not.").

deadline. Therefore, even if Palmetto breached its contract with Appellants, Appellants failed to demonstrate that they performed, or that they were even able to perform, their own obligation.

"[T]here exists in every contract an implied covenant of good faith and fair dealing." *Commercial Credit Corp. v. Nelson Motors, Inc.*, 247 S.C. 360, 367, 147 S.E.2d 481, 484 (1966). "However, there is no breach of an implied covenant of good faith where a party to a contract has done what provisions of the contract expressly gave him the right to do." *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995). "Moreover, entering into an agreement, with no intention of keeping such agreement, constitutes fraudulent misrepresentation; however, mere breach of contract does not constitute fraud." *Id.*

A review of the record reveals that Palmetto (1) renegotiated and renewed the Loan in 2007 and again in 2008, (2) agreed to renegotiate a renewal of the Loan in November 2008 and February 2009, (3) approved BJC's request for payment deferral, and (4) voluntarily dismissed its original foreclosure action against BJC. There is no language in the 2008 Note prohibiting Palmetto from selling or assigning the 2008 Note, 2005 Mortgages, or the Loan Documents. Additionally, there is no evidence that Palmetto prevented the $55,000 payment from being made or that Palmetto refused to accept payment. Therefore, we find Palmetto did not breach any "duty of good faith and fair dealing under the loan documents."

"The normal bank-depositor arrangement creates a creditor-debtor relationship rather than a fiduciary one." *Burwell v. S.C. Nat'l Bank*, 288 S.C. 34, 40, 340 S.E.2d 786, 790 (1986). However, "[i]n limited circumstances . . . a fiduciary relationship may be created between a bank and a customer if the bank undertakes to advise the customer as a part of the services the bank offers." *Id.* "Such a relationship charges the bank with a duty to disclose material facts which may affect its customers' interest." *Id.* at 40–41, 340 S.E.2d at 790.

Although it is clear that Bellamy, in her capacity as BJC's managing member, trusted Small, there is no evidence that she reposed a special trust in him. In her deposition, Bellamy testified that Small assured her that he would not discuss BJC's loan with anyone else. However, there is no evidence that Palmetto had a contractual duty not to disclose information about the 2008 Note to a potential purchaser once the loan was in default. Consequently, Palmetto was within its legal rights to disclose information about the 2008 Note to Uncle. Furthermore, BJC could not have reasonably believed that Small was acting on BJC's behalf.

Therefore, Palmetto did not breach any "obligation of confidentiality concerning the lending relationship." Accordingly, we find the circuit court properly granted Palmetto's motion for summary judgment as to Appellants' third-party breach of contract claim.

2. Breach of Contract Accompanied by Fraudulent Act

South Carolina has long recognized a plaintiff's right to recover punitive damages for a breach of contract accompanied by fraudulent act. *See, e.g., Welborn v. Dixon*, 70 S.C. 108, 117, 49 S.E. 232, 235 (1904) (recognizing that where a breach of contract is accompanied with a fraudulent act, punitive damages may be recoverable). In order to maintain a claim for breach of contract accompanied by fraudulent act, a plaintiff must prove three elements: (1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract, not merely to its making; and (3) a fraudulent act accompanying the breach. *Floyd v. Country Squire Mobile Homes, Inc.*, 287 S.C. 51, 53–54, 336 S.E.2d 502, 503–04 (Ct. App. 1985) (citations omitted).

There is no evidence in the record, however, that Palmetto breached its contract with Appellants. This is fatal to Appellants' claim. Consequently, we find the circuit court did not err in granting Palmetto's motion for summary judgment on Appellants' third-party claim for breach of contract accompanied by fraudulent act.

B. Appellants' Counterclaims against H&M

Appellants argue the circuit court erred in granting H&M's motion for summary judgment on Appellants' counterclaims for breach of contract, breach of contract accompanied by a fraudulent act, and civil conspiracy[13] because H&M was not a holder in due course of the 2008 Note and its accompanying mortgages, and was therefore subject to the same defenses and claims that Appellants asserted against Palmetto. Appellants further contend that the circuit court erred in granting H&M's motion for summary judgment on their counterclaims for fraud, conversion, unfair trade practices, tortious interference with a contractual relationship, and intentional infliction of emotional distress. We disagree.

[13] The failure to plead special damages is fatal to Appellants' counterclaim against H&M. *See* Part I, *supra*.

1. Holder in Due Course

Initially, we note that the circuit court never ruled on the issue of whether H&M was a holder in due course of the 2008 Note and accompanying mortgages. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). Moreover, Appellants failed to specifically raise the argument regarding H&M's "holder in due course status" in their motion to reconsider the circuit court's order granting H&M's motion for summary judgment on Appellants' counterclaims. *See Dodge v. Dodge*, 332 S.C. 401, 418, 505 S.E.2d 344, 352–53 (Ct. App. 1998) (explaining that father's argument regarding the amount of a fee is not preserved as the father failed to specifically raise the issue in his motion for reconsideration); *see also Chastain v. Hiltabidle*, 381 S.C. 508, 515, 673 S.E.2d 826, 829 (Ct. App. 2009) ("When an issue is raised to but not ruled upon by the trial court, the issue is preserved for appeal only if the party raises the same issue in a Rule 59(e) motion."). Accordingly, we find this argument is not preserved.

2. Breach of Contract

Palmetto assigned the Loan Documents to H&M following Palmetto's commencement of the present foreclosure action. Thus, H&M had a legal right to continue the pursuit of the foreclosure action. *See Twelfth RMA Partners, L.P. v. Nat'l Safe Corp.*, 335 S.C. 635, 639–40, 518 S.E.2d 44, 46 (Ct. App. 1999) (explaining that an assignee "stands in the shoes of its assignor" and "should have all the same rights and privileges, including the right to sue on the contract, as the assignor").

Moreover, it is uncontested that Appellants failed to make the balloon payment on January 17, 2009, as required by the 2008 Note, and failed to make an interest payment to Palmetto in the amount of $55,000—the remainder due to satisfy the full interest payment of $150,000. *See Swinton*, 334 S.C. at 487, 514 S.E.2d at 135 (explaining that one who seeks to recover damages for breach of a contract must demonstrate that he has performed his part of the contract, "or at least that he was, at the appropriate time, able, ready, and willing to perform it"). Accordingly, we

find the circuit court properly granted H&M's motion for summary judgment on Appellants' counterclaim for breach of contract.[14]

3. Remaining Counterclaims

As a preliminary matter, we note that Appellants failed to cite to any authority in their arguments on appeal regarding the circuit court's entry of summary judgment on their counterclaims for fraud, conversion, unfair trade practices, tortious interference with a contractual relationship, and intentional infliction of emotional distress. *See* Rule 208(b)(1)(D), SCACR (requiring citation to authority in the argument section of an appellant's brief); *Broom v. Jennifer J.*, 403 S.C. 96, 115, 742 S.E.2d 382, 391 (2013) (finding an issue abandoned where the party's brief cited only one family court rule and presented no argument as to how the ruling was an abuse of discretion or constituted prejudice); *State v. Lindsey*, 394 S.C. 354, 363, 714 S.E.2d 554, 558 (Ct. App. 2011) ("An issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority."). Additionally, Appellants' argument as to the entry of judgment on the counterclaims for conversion, unfair trade practices, and intentional infliction of emotional distress is limited to one sentence. *See State v. Cutro*, 332 S.C. 100, 108, 504 S.E.2d 324, 328 (1998) (holding a one-sentence argument is too conclusory to present any issue on appeal); *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (noting when a party fails to cite authority or when the argument is simply a conclusory statement, the party is deemed to have abandoned the issue on appeal).

Furthermore, as to the cause of action for fraud, Appellants presented one argument below and another on appeal. *See State v. Freiburger*, 366 S.C. 125, 134, 620 S.E.2d 737, 741 (2005) (explaining that an issue is not preserved for appeal where one ground is raised below and another ground is raised on appeal). In their counterclaims, memorandum in opposition to H&M's motion for summary judgment, and motion to reconsider the circuit court's order granting H&M's motion for summary judgment, Appellants alleged that H&M "fraudulently induced . . . Bellamy to execute a personal guarantee in January 2008 for the debt incurred in 2005." However, on appeal, Appellants argue the following:

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[14]As there is no evidence that Palmetto or H&M breached any contract with Appellants, we further find the circuit court properly granted summary judgment on the counterclaim against H&M for breach of contract accompanied by fraudulent act. *See Floyd*, 287 S.C. at 53–54, 336 S.E.2d at 503–04.

> [Palmetto]'s participation in the secret and undisclosed plan to "sell" the BJC loan to [Uncle] for $250,000, install Patel as manager over the properties and revenue to assure default in the May 31 [, 2009] $150,000 payment, drafting the Loan Sale Agreement beginning in March[] 2009, and giving [Appellants] no written notice of default and opportunity to cure prior to filing the Lis Pendens on June 4, 2009[,] and the Complaint on June 11, 2009[,] are facts imputed to H&M from which a jury could find fraud . . . .

Accordingly, we find that Appellants' arguments regarding the circuit court's entry of summary judgment on the remaining counterclaims are not preserved for appellate review.

III. H&M's Action for Claim and Delivery

Appellants assert that the circuit court erred in granting H&M's motion to strike their request for a jury trial on H&M's cause of action for claim and delivery; however, H&M contends that its action for claim and delivery is moot, as it was adjudicated in the circuit court's unappealed order appointing a receiver. We agree with the circuit court's decision that the action for claim and delivery is moot.

"An action in claim and delivery is an action at law for the recovery of specific personal property." *First Palmetto State Bank & Trust Co. v. Boyles*, 302 S.C. 136, 138, 394 S.E.2d 313, 314 (1990). "Whether a party is entitled to a jury trial is a question of law, which [an appellate court] reviews de novo, owing no deference to the [circuit court's] decision." *Carolina First Bank v. BADD, LLC*, Op. No. 27486 (S.C. Sup. Ct. filed Jan. 28, 2015) (Shearouse Adv. Sh. No. 4 at 23), *reh'g granted* (Apr. 9, 2015).

The cause of action for claim and delivery is governed by South Carolina Code sections 15-69-10 to -210 (2005). Section 15-69-30 provides:

> When a delivery is claimed an affidavit must be made by the plaintiff or by someone on his behalf showing:
>
> (1) That the plaintiff is the owner of the property claimed, particularly describing it, or is lawfully entitled

> to the possession thereof by virtue of a special property therein, the facts in respect to which shall be set forth;
>
> (2) That the property is wrongfully detained by the defendant;
>
> (3) The alleged cause of the detention thereof, according to the affiant's best knowledge, information and belief;
>
> (4) That the property has not been taken for a tax, assessment or fine pursuant to a statute or seized under an execution or attachment against the property of the plaintiff or, if so seized, that it is by statute exempt from such seizure; and
>
> (5) The actual value of the property.

Id.

It is undisputed that H&M failed to file such an affidavit. Likewise, H&M did not include any similar allegations in its amended complaint. However, in the event the property described in the CSA and UCC-1 could not be voluntarily obtained, H&M demanded immediate possession of the property. H&M further demanded that the security property be sold and the proceeds applied to the debt.

The circuit court's order appointing a receiver states:

> [T]he real and personal properties which are the subjects of this proceeding are cash-producing properties . . . (the Properties) and that foreclosure of the Properties under the mortgages has been instituted.
>
> . . . .
>
> It is ordered, adjudged and decreed that Kenan L. Walker . . . be appointed receiver under the provisions of the mortgages to take possession of the Properties and to perform the acts and functions which are herein more particularly set forth.

Appellants did not move for the circuit court to alter or amend this order, nor did they appeal it; thus, it is the law of the case. *See Carolina Chloride, Inc. v. Richland Cty.*, 394 S.C. 154, 171–72, 714 S.E.2d 869, 878 (2011) (explaining that an unchallenged ruling, right or wrong, becomes the law of the case). Therefore, we affirm the circuit court's conclusion that the cause of action for claim and delivery was "previously adjudicated by the [circuit] court and [is] therefore moot."[15]

CONCLUSION

For the foregoing reasons, we hold the circuit court properly granted Individual Respondents' Rule 12(b)(6) motion to dismiss the cause of action for civil conspiracy; properly entered summary judgment for Palmetto on the third-party claims for breach of contract, breach of contract accompanied by fraudulent act, and civil conspiracy; and properly granted H&M's motion for summary judgment on the counterclaims for breach of contract, breach of contract accompanied by fraudulent act, and civil conspiracy. Appellants' arguments that H&M is not a "holder in due course" and that the circuit court erroneously granted H&M's motion for summary judgment on their counterclaims for fraud, conversion, unfair trade practices, tortious interference with a contractual relationship, and intentional infliction of emotional distress are not properly before the court. Finally, as H&M's action for claim and delivery is moot, we need not address Appellants' contention that the circuit court erred in striking their demand for a jury trial.

Accordingly, the decisions of the circuit court are

AFFIRMED.

WILLIAMS and GEATHERS, JJ., concur.

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[15] Because we find that H&M's cause of action for claim and delivery is moot, we need not address Appellants' contention that the circuit court erred in striking their demand for a jury trial. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (ruling an appellate court need not review remaining issues when its determination of a prior issue is dispositive of the appeal).