The Supreme Court of South Carolina

In the Matter of Victoria Twiford Roach, Petitioner

Appellate Case No. 2014-000001

ORDER

The records in the office of the Clerk of the Supreme Court show that on September 17, 1996, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated December 27, 2013, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Voctoria Twiford Roach shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

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

January 22, 2014

The Supreme Court of South Carolina

In the Matter of Stacy R. Biggart, Petitioner

Appellate Case No. 2014-000063

ORDER

The records in the office of the Clerk of the Supreme Court show that on , November 17, 20013, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Supreme Court of South Carolina, dated January 8, 2014, Petitioner submitted her resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court her certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of her resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that she has fully complied with the provisions of this order. The resignation of Stacy R. Biggart shall be effective upon full compliance with this order. Her name shall be removed from the roll of attorneys.

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

January 22, 2014

The Supreme Court of South Carolina

In the Matter of Thomas Patrick Keeler, Petitioner

Appellate Case No. 2014-000064

ORDER

The records in the office of the Clerk of the Supreme Court show that on August 4, 1999, Petitioner was admitted and enrolled as a member of the Bar of this State.

By way of a letter addressed to the Clerk of the Supreme Court of South Carolina, dated December 26, 2013, Petitioner submitted his resignation from the South Carolina Bar. We accept Petitioner's resignation.

Petitioner shall, within fifteen (15) days of the issuance of this order, deliver to the Clerk of the Supreme Court his certificate to practice law in this State.

In addition, Petitioner shall promptly notify, or cause to be notified, by certified mail, return receipt requested, all clients currently being represented in pending matters in this State, of his resignation.

Petitioner shall file an affidavit with the Clerk of the Supreme Court, within fifteen (15) days of the issuance of this order, showing that he has fully complied with the provisions of this order. The resignation of Thomas Patrick Keeler shall be effective upon full compliance with this order. His name shall be removed from the roll of attorneys.

s/ Jean H. Toal C.J.

s/ Costa M. Pleicones J.

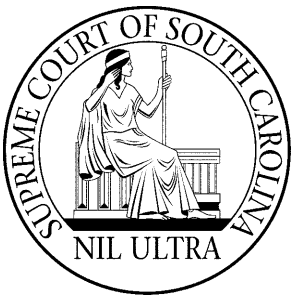
s/ Donald W. Beatty J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

Columbia, South Carolina

January 22, 2014



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OF

THE SUPREME COURT

AND

COURT OF APPEALS

OF

SOUTH CAROLINA

ADVANCE SHEET NO. 4
January 29, 2014
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Columbia, South Carolina
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Morris Antonio Sullivan, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2010-151951

ON WRIT OF CERTIORARI

Appeal From Greenville County
D. Garrison Hill, Trial Judge
G. Edward Welmaker, Post-Conviction Relief Judge

Opinion No. 5190
Heard November 5, 2013 – Filed January 29, 2014

AFFIRMED

Deputy Chief Appellate Defender Wanda H. Carter, of Columbia, for Petitioner.

Assistant Attorney General Karen Christine Ratigan, of Columbia, for Respondent.

FEW, C.J.: Morris Antonio Sullivan shot and killed Jervis Powers, and a jury convicted Sullivan of voluntary manslaughter, possession of a weapon during the

commission of a violent crime, and possession of a pistol under the age of twenty-one. Sullivan filed an application for post-conviction relief (PCR) alleging his trial counsel was ineffective for not making a sufficient request to the trial court to include language from *State v. Burriss*, 334 S.C. 256, 513 S.E.2d 104 (1999), in its jury charge on involuntary manslaughter. Because there is no evidence that Sullivan shot Powers unintentionally, we find Sullivan was not entitled to an involuntary manslaughter charge, and thus was not prejudiced by any alleged error of his trial counsel. We affirm.

I. Facts and Procedural History

On the afternoon of January 16, 1998, Sullivan fired three shots in Powers' direction after the two exchanged angry words. According to eyewitness testimony, Sullivan and Powers began arguing over whether Sullivan fired gunshots into Powers' home earlier that day. After Powers took his jacket off like "he was ready to fight," Sullivan walked down the hallway to the back bedroom. Powers followed Sullivan, and they were still arguing when they entered the bedroom. A few minutes later, Sullivan entered the living room, holding a gun and walking backwards away from Powers, while Powers advanced towards Sullivan. Sullivan told Powers to "get out of here," but Powers said, "I don't give a f*** about that gun" and that "if [Sullivan] had the gun out he better use it." Sullivan then fired a "warning shot" into the floor. Powers "kept walking toward [Sullivan], so he shot again" in a downward direction, hitting Powers in the leg. Powers "continued to walk toward [Sullivan]," and Sullivan fired a third shot that hit Powers in the chest. According to one witness, Powers "was falling over holding his leg" when Sullivan fired the third shot.

The State introduced notes an officer took during Sullivan's interview with police. According to the notes, Sullivan asked Powers to come with him to the back bedroom to settle their dispute "man to man." Once there, Powers pushed Sullivan. Sullivan then reached for his gun and "asked [Powers] to please leave several times." Powers responded, "I'm not afraid to die," and walked toward Sullivan. Sullivan then "shot in the floor to scare [Powers]," and shot two more times.

The State also introduced Sullivan's written statement to police, in which he stated Powers followed him to the back bedroom, where they continued to argue. He then told police,

> [W]e both grabbed for the gun, but I got it and went back toward the front [of the house], . . . and I kept asking him to leave. And then he replied that he isn't scared to die, and then I shot him -- I shot down once and then I shot two more times. Then I saw him fall.

The court charged the jury on murder, voluntary manslaughter, involuntary manslaughter, self-defense, defense of habitation, and necessity. However, when the court charged the jury on involuntary manslaughter, it did not include language explaining that a person can be acting lawfully if he is entitled to arm himself in self-defense at the time of the shooting. *See Burriss*, 334 S.C. at 262, 513 S.E.2d at 108 ("[A] person can be acting lawfully, even if he is in unlawful possession of a weapon, if he was entitled to arm himself in self-defense at the time of the shooting."). The jury found Sullivan guilty of voluntary manslaughter and the two weapons charges, and the trial court sentenced him to eighteen years in prison.

After this court dismissed his direct appeal pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), *see State v. Sullivan*, Op. No. 2008-UP-478 (S.C. Ct. App. filed Aug. 11, 2008), Sullivan filed this PCR action. He claimed his trial counsel was ineffective for not sufficiently requesting an involuntary manslaughter charge that included the language from *Burriss*. The PCR court dismissed the application, finding Sullivan failed to prove either prong of the test from *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

II. No Evidence of Unintentional Killing

This court will affirm if there is any evidence to support the PCR court's ruling. *Moore v. State*, 399 S.C. 641, 646, 732 S.E.2d 871, 873 (2012). We find there is evidence to support the PCR court's finding under the second prong of *Strickland*—that Sullivan was not prejudiced by any alleged error of trial counsel—because Sullivan was not entitled to an involuntary manslaughter charge in the first place. *See Harris v. State*, 354 S.C. 382, 389, 581 S.E.2d 154, 157 (2003) (finding defendant not prejudiced by counsel's failure to request an involuntary manslaughter charge where evidence did not warrant such a charge).

Involuntary manslaughter is defined as the unintentional killing of another without malice while engaged in (1) an unlawful activity not naturally tending to cause

death or great bodily harm or (2) a lawful activity with reckless disregard for the safety of others. *State v. Smith*, 391 S.C. 408, 414, 706 S.E.2d 12, 15 (2011). To warrant a jury charge on involuntary manslaughter under either definition, there must be some evidence that the killing was unintentional. *See Douglas v. State*, 332 S.C. 67, 74, 504 S.E.2d 307, 310 (1998) (stating "involuntary manslaughter is at its core an unintentional killing"); *State v. Gibson*, 390 S.C. 347, 357, 701 S.E.2d 766, 771 (Ct. App. 2010) (stating "the essence of involuntary manslaughter is the involuntary nature of the killing").

Sullivan asserts he was prejudiced because there is evidence to support that he fired the gun while lawfully armed in self-defense. However, whether he was engaged in a lawful activity is of no consequence if he intentionally fired the gun. When the victim was killed by a gunshot, and no evidence is presented showing the defendant fired the gun unintentionally, the defendant is not entitled to a charge of involuntary manslaughter. *See Douglas*, 332 S.C. at 74-75, 504 S.E.2d at 310-11 (holding involuntary manslaughter charge not warranted when defendant admitted he intentionally fired his gun in self-defense); *State v. Pickens*, 320 S.C. 528, 531-32, 466 S.E.2d 364, 366-67 (1996) (holding defendant who admitted intentionally shooting the gun was not entitled to involuntary manslaughter charge); *State v. Cooney*, 320 S.C. 107, 112, 463 S.E.2d 597, 600 (1995) (holding defendant not entitled to involuntary manslaughter charge when he intentionally shot towards the ground at the victim's feet); *Bozeman v. State*, 307 S.C. 172, 177, 414 S.E.2d 144, 147 (1992) (explaining involuntary manslaughter charge inappropriate when defendant "only meant to shoot over the victim's head" because he intended to shoot the gun); *Gibson*, 390 S.C. at 357-58, 701 S.E.2d at 771-72 (holding defendant not entitled to involuntary manslaughter charge where defendant intentionally fired the gun); *State v. Morris*, 307 S.C. 480, 484, 415 S.E.2d 819, 821-22 (Ct. App. 1991) (holding defendant who intentionally fired the gun not entitled to an involuntary manslaughter charge).

The record demonstrates conclusively that Sullivan intentionally fired the gun three times, and we find no evidence to the contrary. The fact that all three shots were fired downward in an attempt to scare Powers does not change the fact that the shots were fired intentionally. *See Harris*, 354 S.C. at 389, 581 S.E.2d at 157 (finding defendant not entitled to involuntary manslaughter charge when he intentionally fired warning shots in the victim's direction); *Cooney*, 320 S.C. at 112, 463 S.E.2d at 600 (finding no evidence to support involuntary manslaughter when defendant "admitted shooting the gun towards the ground at the victim's

feet"); *Bozeman*, 307 S.C. at 177, 414 S.E.2d at 147 (citing *State v. Craig*, 267 S.C. 262, 227 S.E.2d 306 (1976), for the contention that an involuntary manslaughter charge is unwarranted "when the defendant admitted intentionally firing the gun, but claimed he only meant to shoot over the victim's head").

Sullivan cites several cases in support of his position. In each of these cases, however, there was evidence the defendant fired the gun unintentionally. *See State v. Brayboy*, 387 S.C. 174, 178, 182, 691 S.E.2d 482, 484, 486 (2010) (holding involuntary manslaughter charge appropriate when defendant claimed gun "just went off"); *State v. Light*, 378 S.C. 641, 644-46, 649, 664 S.E.2d 465, 466-67, 469 (2008) (holding involuntary manslaughter charge warranted when gun "went off" immediately after defendant "jerked it away from [the victim]"); *State v. Crosby*, 355 S.C. 47, 52-53, 584 S.E.2d 110, 112-13 (2003) (holding defendant's statement that he "didn't even know he pulled the trigger" was sufficient to warrant an involuntary manslaughter charge); *Burriss*, 334 S.C. at 263, 265, 513 S.E.2d at 108, 109 (holding involuntary manslaughter charge appropriate where gun "went off" and defendant claimed "[i]t was an accident").

III. Conclusion

Because there was no evidence Sullivan fired the gun unintentionally, he was not entitled to a jury charge on involuntary manslaughter. Therefore, he was not prejudiced by trial counsel's omission of the *Burriss* language from his written request to charge. Thus, the ruling of the PCR court is **AFFIRMED**.

PIEPER and KONDUROS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Jacqueline Y. Carter, Respondent,

v.

Verizon Wireless and American Home Assurance Co., Appellants.

Appellate Case No. 2012-212924

Appeal From Greenville County
D. Garrison Hill, Circuit Court Judge

Opinion No. 5191
Heard December 11, 2013 – Filed January 29, 2014

AFFIRMED IN PART, REVERSED IN PART

Grady Larry Beard and Nicolas Lee Haigler, both of Sowell Gray Stepp & Laffitte, LLC, of Columbia, for Appellants.

Jeremy Andrew Dantin, of Harrison White Smith & Coggins, PC, of Spartanburg, for Respondent.

CURETON, A.J.: After the Appellate Panel of the Workers' Compensation Commission (Appellate Panel) denied Jacqueline Carter (Claimant) benefits for an alleged change of condition to her injured knee, the circuit court reversed. Verizon Wireless Southeast and American Home Assurance Company (collectively Employer) appeal, arguing the circuit court erred in reversing the Appellate Panel's

determinations concerning a change in Claimant's condition, intervening causes,[1] and future medical treatment. Employer further argues the form of the circuit court's order adversely affected its ability to comply with appellate court rules. We affirm in part and reverse in part.

FACTS

On December 27, 2006, Claimant suffered a work-related injury to her left knee. After Dr. Walter Grady performed surgery on her knee in June 2007, Claimant reached maximum medical improvement (MMI) on March 3, 2008. At that time, Dr. Grady assigned Claimant an 18% impairment rating.

In February 2009, Claimant fractured her right ankle and returned to Dr. Grady for care. She was wheelchair-bound for six to eight months while it healed. At her October 2009 workers' compensation hearing, Claimant stated her right ankle had healed completely. On December 3, 2009, Commissioner Barden awarded Claimant workers' compensation benefits for a 25% permanent partial disability to her left lower extremity, including causally-related medical care and treatment. Commissioner Barden found Claimant "had pre-existing advanced degenerative joint disease." Additionally, Commissioner Barden concluded Claimant was "entitled to causally-related future medical treatment that may tend to lessen her period of disability, as recommended by the authorized treating physician, *including* Darvocet or comparable medication."[2] (emphasis added).

In the summer of 2010, Claimant claimed to have noticed increased pain and swelling in her left knee. On November 4, 2010, she returned to Dr. Grady, who examined her and increased her impairment rating from 18% to 42%. On November 29, 2010, Claimant filed a Form 50, alleging she needed additional medical treatment due to a change of condition.

I. Testimony

On February 3, 2011, the parties deposed Dr. Grady. Dr. Grady testified he typically told patients that if their pain level was constantly above a level five, they

[1] We view the Appellate Panel's findings on intervening causes as alternative findings.

[2] Commissioner Barden's decision was apparently affirmed by the Appellate Panel.

should consider a knee replacement. Although Claimant's pain level was constantly at level five or above in 2008, Dr. Grady did not recommend knee replacement to her at that time because (1) she was only forty-nine years old and (2) he believed a patient knew better than anyone else when he or she reached the point of needing a knee replacement. According to Dr. Grady, Claimant was eligible for a knee replacement going back to 2008, but whether or when to undergo the surgery was up to Claimant.

Dr. Grady opined that from the last time he saw Claimant in January 2008 to the date of his deposition, her knee had "materially worsened" due to natural degeneration. Based on his November 2010 examination, Dr. Grady determined Claimant's knee had materially worsened because her joint space had narrowed, the medial tibial femoral joint compartment had collapsed, and she reported increased pain. He calculated her increased disability level based solely upon the two-millimeter narrowing of her joint space.

Dr. Grady testified he lacked sufficient information to determine whether any of Claimant's new complaints originated before or after the October 2009 hearing. Nonetheless, he stated his medical opinion, "within a reasonable degree of medical certainty," was that Claimant experienced "a natural progression of her disease process from the time that [he] did surgery on her until the time that [he] saw her on November 4th, 2010." He agreed that Claimant's worsening condition was "more of a degenerative[,] insidious, slow problem" rather than "acute in nature." Dr. Grady acknowledged his opinion was influenced by the nature of the exercise routine Claimant was participating in at the time she realized her knee pain was increasing. However, although Dr. Grady conceded her exercise possibly could have accelerated the deterioration in her condition, he believed the end result would have been the same, whether she exercised or not.

On February 16, 2011, the parties appeared before Commissioner Wilkerson. Claimant testified she was working as a bank teller and was able to sit or stand as needed to do her job. Claimant explained that after her right-ankle fracture healed and she was released from the wheelchair, she began exercising at the gym in order to lose weight and strengthen her knee. She became aware of increased problems with her left knee in June of 2010, after she started water aerobics. Claimant chose water aerobics over other exercise options because it limited the pressure on her knee, and Dr. Grady had recommended it for her after her surgery.

Claimant denied ever injuring herself while doing water aerobics. She was still doing water aerobics at the time of the hearing, despite the pain in her knee, and had lost forty-eight pounds since the previous summer. Claimant's pain level was an eight on a ten-point scale at the time of the hearing. Because Darvocet was no longer available, Claimant's family physician prescribed Tramadol for her. Claimant testified Tramadol did not adequately handle her pain. Claimant admitted the following statements from her 2009 hearing remained true: (1) she felt pain every day and every night, (2) the pain was "an uncomfortable throbbing feeling" that worsened the more she worked, (3) she was unable to sleep without prescription medication, (4) she had difficulty walking long distances, (5) she could not walk more than about ten minutes without problems, and (6) she could not maneuver stairs without support.

However, according to Claimant, several of her complaints at the time of the hearing differed from her 2009 complaints. Specifically, the pain she felt at the time of the hearing was "[a]bsolutely" worse than the pain she felt in 2009, having risen from a five to an eight on a ten-point scale. She had crepitus on flexion and extension, evident by the crunching sound in her knee. Finally, her leg would not bend or flex as much as it had in 2009, and she had fluid on her left knee.

In an order dated April 18, 2011, Commissioner Wilkerson denied Claimant's request for benefits, finding she "did not sustain a compensable change of condition with regard to her left knee." He found "at least two intervening causes – Zumba [classes] as well as a broken right ankle in February of 2009 . . . caused [Claimant] to place more weight on her left knee" and her "current problems are not related to her 2006 accident with Verizon." Furthermore, Commissioner Wilkerson concluded Commissioner Barden's order of December 3, 2009, entitled Claimant "to causally-related future medical treatment that may tend to lessen her period of disability, as recommended by the authorized treating physician, *specifically restricted* to Darvocet or a comparable medication." (emphasis added).

II. Appeals

Claimant appealed, and the Appellate Panel affirmed Commissioner Wilkerson's order in its entirety. The Appellate Panel restated the findings of fact and conclusions of law from Commissioner Wilkerson's order, including the specific restriction of Claimant's future medical treatment to "Darvocet or a comparable medication."

Claimant appealed to the circuit court,[3] which, in an order dated July 16, 2012, reversed the decision of the Appellate Panel. After reviewing the evidence in the record, the circuit court concluded the Appellate Panel's findings were affected by errors of law. In particular, the circuit court ruled the record contained "no substantial evidentiary or legal support" for the Appellate Panel's finding that Claimant did not suffer a change of condition. Next, it ruled the Appellate Panel's finding of two intervening causes of Claimant's change of condition was "both an error of law and clearly erroneous in light of the evidence." Finally, the circuit court reversed the Appellate Panel's modification to the provision in the December 3, 2009 order allowing for future medical treatment, specifically stating Claimant

> is entitled to the treatment recommended by the authorized treating physician relative to [her change of] condition, namely a total knee arthroplasty to be performed at a suitable time as determined by [Claimant] and the authorized treatment physician, as well as other medications or treatment as recommended by the authorized treating physician.

This appeal followed.

STANDARD OF REVIEW

The Administrative Procedures Act ("APA") provides the standard for judicial review of decisions by the Appellate Panel. *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 540, 689 S.E.2d 615, 618 (2010). Under the APA, an appellate court may reverse or modify the decision of the Appellate Panel if the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. S.C. Code Ann. § 1-23-380(5)(d), (e) (Supp. 2012);

[3] Because Claimant's injury occurred in 2006, her appeal was to the circuit court under former section 42-17-60 of the South Carolina Code (1985). The current version, under which appeals from the Appellate Panel are to the court of appeals, applies only to injuries sustained on or after July 1, 2007. 2007 Act No. 111, Pt. I, Section 30.

Transp. Ins. Co. v. S.C. Second Injury Fund, 389 S.C. 422, 427, 699 S.E.2d 687, 689-90 (2010).

The Appellate Panel is the ultimate factfinder in workers' compensation cases. *Shealy v. Aiken Cnty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). As a general rule, an appellate court must affirm the findings of fact made by the Appellate Panel if they are supported by substantial evidence. *Pierre*, 386 S.C. at 540, 689 S.E.2d at 618. "Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion the [Appellate Panel] reached." *Hill v. Eagle Motor Lines*, 373 S.C. 422, 436, 645 S.E.2d 424, 431 (2007). "The possibility of drawing two inconsistent conclusions from the evidence does not prevent the [Appellate Panel's] finding from being supported by substantial evidence." *Id.*

LAW/ANALYSIS

I. Change of Condition

Employer first asserts the circuit court erred in reversing the Appellate Panel's determination Claimant did not suffer a change of condition. We agree.

Section 42-17-90(A) of the South Carolina Code (Supp. 2012) permits the review of a previous workers' compensation award "on proof by a preponderance of the evidence that there has been a change of condition caused by the original injury, after the last payment of compensation." A change of condition in a workers' compensation claim is "a change in the claimant's physical condition as a result of the original injury, occurring after the first award." *Causby v. Rock Hill Printing & Finishing Co.*, 249 S.C. 225, 227, 153 S.E.2d 697, 698 (1967).

"In workers' compensation cases, this [c]ourt, as well as the circuit court, serves only to review the factual findings of the Appellate Panel and to determine whether the substantial evidence of record supports those findings." *Mungo v. Rental Unif. Serv. of Florence, Inc.*, 383 S.C. 270, 285, 678 S.E.2d 825, 833 (Ct. App. 2009).

Commissioner Barden's decision of December 3, 2009, states she considered not only medical records dated up to and including March 3, 2008, but also the testimony Claimant gave on October 15, 2009, which included statements about her condition on that date. Accordingly, we find Commissioner Barden made

Claimant's initial award based upon a determination of Claimant's condition as of October 15, 2009.

We do not view the change of condition issue in this case to be as difficult as the parties view it. Clearly Commissioner Barden determined Claimant "had pre-existing advanced degenerative joint disease." A careful reading of Dr. Grady's testimony reflects there was a "natural progression" of her disease.[4] At one point, he testified that Claimant's condition was "more of a degenerative[,] insidious, slow problem." He opined, "It's my professional medical opinion within a reasonable degree of medical certainty that [Claimant] per my examination, history, physical, etc.[,] had a natural progression of her disease process from the time that I did surgery on her until the time that I saw her on November 4th, 2010." He also stated that while it was possible Claimant's exercising may have accelerated her condition, he believed "we are going to arrive at the same end result whether it would have been six months later, eight months later, or [twelve] months later, as we did when I saw her on November 4." Finally, while Dr. Grady and Claimant disagreed as to her level of pain when he saw her on November 4, 2010, he testified that it remained the same as when he saw her in 2008. Of course, questions of credibility rest within the discretion of the Appellate Panel, not the circuit court or this court.

Accordingly, we hold Dr. Grady's testimony and portions of Claimant's testimony constitute substantial evidence supporting the Appellate Panel's decision that Claimant did not suffer a change of condition. Further, any change in Claimant's condition was the result of the natural progression of her pre-existing degenerative joint disease and not the result of her original injury. *See Brown v. R.L. Jordan Oil Co.*, 291 S.C. 272, 275, 353 S.E.2d 280, 282 (1987) ("[A] condition due *solely* to natural progression of a preexisting disease is not compensable.").

[4] Claimant may have confused the degeneration of her condition caused by her injury with the degeneration of her condition resulting from the natural progression of her pre-existing degenerative joint disease.

II. Future Medical Treatment

Employer asserts the circuit court erred in reversing the Appellate Panel's modification of the language in the December 3, 2009 order concerning the extent of Claimant's future medical benefits. We disagree.

An appellate court may reverse or modify the decision of the Appellate Panel if the substantial rights of the appellant have been prejudiced because the decision is affected by an error of law or not supported by substantial evidence in the record. S.C. Code Ann. § 1-23-380(5)(d), (e) (Supp. 2012).

In December 2009, after reciting Claimant was taking Darvocet for both her left knee injury and her non-work-related right ankle fracture, Commissioner Barden found Claimant was "entitled to receive *Dodge*[5] medicals that may tend to lessen her period of disability, as recommended by the authorized treating physician, *including* Darvocet or comparable medication." (emphasis added). In April 2011, Commissioner Wilkerson stated Dr. Grady had testified Claimant's treatment had not changed, found "Darvocet or a comparable medication [wa]s the only compensable medication," then concluded:

> Under § 42-17-60 and *Dodge v. Bruccoli, Clark, Layman, Inc.*, . . . and pursuant to the Order of Commissioner Barden filed December 3, 2009, [C]laimant is entitled to causally-related future medical treatment that may tend to lessen her period of disability, as recommended by the authorized treating physician, *specifically restricted* to Darvocet or a comparable medication.

(emphasis added).

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[5] *Dodge v. Bruccoli, Clark, Layman, Inc.*, 334 S.C. 574, 582, 514 S.E.2d 593, 597 (Ct. App. 1999) (holding employers are obligated to provide injured workers with medical treatment beyond the date of MMI upon a finding by the Workers' Compensation Commission that the treatment "would tend to lessen the period of disability").

Although the Appellate Panel did not explain why it imposed this restriction on Claimant's future medical care, it echoed Commissioner Wilkerson's decision to replace "including" with "specifically restricted to," adding only that its finding "that Darvocet or a comparable medication is the only compensable medication" "clarifie[d] any earlier decision on that point."

We find the Appellate Panel's order misstates Dr. Grady's opinions and deposition testimony. At his deposition, Dr. Grady testified "within a reasonable degree of medical certainty" that Claimant experienced "a natural progression of her disease process from the time that [he] did surgery on her until the time that [he] saw her on November 4th, 2010." He repeatedly opined that from the last time he saw Claimant in January 2008 to the date of his deposition, the condition of Claimant's knee had materially worsened due to natural degeneration. According to Dr. Grady, Claimant was already eligible for a knee replacement in 2008, but he left the decision to her because he believed a patient knew best whether she needed surgery.

The replacement of "including" with "specifically restricted to" deprived Claimant of the opportunity to seek any medical treatment besides pain medications for her deteriorating knee condition. We find Appellate Panel's restriction affected Claimant's substantial right to receive future medical care and treatment that would tend to lessen the period of her disability. Accordingly, the circuit court did not err in striking the restriction.

CONCLUSION

We reverse the circuit court's determination that substantial evidence in the record does not support the Appellate Panel's finding that Claimant suffered no change of condition. Furthermore, we find the circuit court did not err in reversing the Appellate Panel's modification of Commissioner Barden's decision governing Claimant's future medical care and treatment in the 2009 award. We conclude Employer's remaining issues on appeal are moot in view of this decision.

AFFIRMED IN PART AND REVERSED IN PART.

HUFF and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Larry E. Kinard, Appellant,

v.

Douglas S. Richardson and Julie D. Richardson,
Respondents.

Appellate Case No. 2013-000162

Appeal From Dorchester County
The Honorable Maite D. Murphy, Master-in-Equity

Opinion No. 5192
Heard December 12, 2013 – Filed January 29, 2014

REVERSED AND REMANDED

John R. Polito, Esquire, of Goose Creek, for Appellant.

P. Brandt Shelbourne, Esquire, of Summerville, for Respondents.

GEATHERS, J.: Appellant Larry E. Kinard (Owner) challenges an order of the Master-in-Equity declining to enjoin Respondents Douglas S. Richardson and Julie D. Richardson (Neighbors) from leasing their property to a third party for the purpose of horse grazing. We reverse and remand.

BACKGROUND

This case revolves around the intent of developers James and Delene Barnes (Developers) to restrict the use of property within Senrab Farms subdivision as well as certain property adjacent to Senrab Farms. Developers originally owned a 49.7 acre parcel near Summerville from which they created Senrab Farms. After carving out and conveying approximately 5.5 acres of the 49.7 acre parcel to James and Helen Madison, Developers subdivided most of the remainder into lots "A" through "I" of Senrab Farms, together with "14.19 acres Residual," as shown on a plat dated July 5, 1997. All lots in Senrab Farms were restricted to residential use, but lot owners were permitted to keep one horse on their respective lots subject to certain conditions.

In January 1998, Developers sold lot "F" at 217 Saddle Trail to Owner. Developers subsequently sold to Neighbors' building contractor 7 acres from the "Residual," located at 124 Saddle Trail and across the street from Owner's lot. This property was designated as "Tract L" on a plat dated December 29, 1997. Tract L was immediately east of and adjacent to the Madisons' 5.5 acre parcel. After Neighbors acquired Tract L in December 1998, they subdivided it and leased part of it to other individuals for horse grazing.

Specifically, on April 1, 2003, Neighbors filed a plat showing the subdivision of Tract L into two smaller tracts, Tract A and Tract B, so that they could use part of their property, i.e., Tract B, for horse grazing. By this time, Helen Madison had sold the 5.5 acre parcel adjacent to Tract L to Hoa Van Nguyen and Xuan Thi Nguyen, two of the original defendants to this action. While this parcel was not part of Senrab Farms, its use had been restricted to residential or agricultural, and it had an existing barn on it when the Nguyens purchased it.

Neighbors also incorporated a leasing business by the name of "Greener Pastures," which generated gross income of $6,825.00 from 2003 through early 2008. On their 2009 tax return, Neighbors reported "Gross farm rental income" of $3,050. Neighbors leased Tract B to certain individuals, and the Nguyens allowed these individuals to operate the business "Senrab Equestrian Center" out of the barn on the Nguyens' property.[1]

[1] The record reflects that Charity Filmore operated Senrab Equestrian Center for a time and, subsequently, Madeline Ingalls operated the business. The exact dates that these individuals operated the business are unclear, although the record

During the years that Greener Pastures leased Tract B, Owner noticed an increase in (1) the number of horses grazing on Tract B; (2) horse manure buildup on Tract B; (3) vehicle and horse traffic in the subdivision streets; and (4) litter, dust clouds, noise, odors, and insects in the area. In 2007, Owner reported to Dorchester County officials his suspicion that a business was being operated on the Nguyens' property. However, the county zoning administrator determined that the operation was not a business because there was "no evidence of money changing hands." In 2009, Owner discovered that Senrab Equestrian Center was selling horses on the Internet at "senrabfarm.com." The center's website stated that it was "located on 15 acres in the middle of the Senrab Farm[s] subdivision in Summerville, SC" and noted "We have two large grass pastures . . . ." One of these pastures was Neighbors' Tract B.

After Owner reported this discovery to the County, the zoning administrator sent a "cease and desist" letter to the Nguyens. After a hearing before the Board of Zoning Appeals, the Board found that Senrab Equestrian Center advertised horse sales, horse jumping, dressage, and horse care services. The Board ordered the Nguyens to immediately cease and desist operating the business. According to Owner's original Complaint in this action, the Nguyens did not appeal the Board's order. However, the Nguyens filed a petition for annexation into the Town of Summerville and for agricultural conservation zoning, which allowed certain commercial operations. Summerville Town Council granted the petition.

On December 8, 2009, Owner filed a Complaint against the Town of Summerville, the Nguyens and Senrab Farms Homeowners Association, asserting the following causes of action: (1) "Declaratory Judgment—Unlawful Annexation;" (2) "Declaratory Judgment—Unlawful Zoning;" (3) "42 United States Code Section 1983;" and (4) "Breach of Covenants Against Hoa Van and Xuan Thi Nguyen." Owner based the Breach of Covenants cause of action on a document entitled "Reciprocal Covenants," which restricted the use of the Nguyens' property to residential or agricultural use. Owner sought damages and an injunction against the Nguyens' use of their property for business purposes.

On January 10, 2010, Greener Pastures executed a written lease, entitled "Commercial Lease," for Tract B to Madeline Ingalls, who was operating Senrab Equestrian Center at that time. The lease agreement provided for the use of Tract

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indicates that Ingalls was operating the business in January 2010 when she executed a written commercial lease for the use of Tract B as a horse pasture.

B as a horse pasture. Subsequently, Owner filed his Amended Complaint, adding Madeline Ingalls and Neighbors as defendants. The Amended Complaint sought declaratory and injunctive relief, asserting the following causes of action: (1) "Declaratory Judgment—Unlawful Annexation;" (2) "Declaratory Judgment—Unlawful Zoning;" (3) "Breach of Covenants and Easement Rights Against the Nguyens;" and (4) "Breach of Covenants by [Neighbors]." Owner based the Breach of Covenant cause of action against Neighbors on the Restrictive Covenants governing the permitted use of the lots in Senrab Farms.

On November 17, 2010, Owner and the Nguyens entered into a settlement agreement amending the original Reciprocal Covenants concerning the 5.5 acre parcel. This amendment restricted the leasing of the barn, stable and pasture on the property to boarding purposes only, with a boarding limit of ten horses.[2] On April 19, 2010, Neighbors filed their Answer, asserting the affirmative defenses of "Unclean Hands" and "Statute of Limitations." On April 29, 2010, Neighbors filed their Amended Answer, admitting that at that time they were leasing Tract B to Madeline Ingalls in support of equestrian business operations. On May 11, 2010, Owner and Neighbors filed cross-motions for summary judgment.

Owner's memorandum of law in support of his summary judgment motion asserted the following grounds: (1) Neighbors were not using Tract B as a single-family residential building lot, as required by the subdivision's Restrictive Covenants; (2) a purported amendment to the Restrictive Covenants that allowed up to six horses on Neighbors' property ("Amendment to Restrictions") was invalid; and (3) even if the amendment was valid, Neighbors' subdivision of their property from Tract L into Tracts A and B destroyed their right to have six horses on their property pursuant to the amendment. The record does not indicate the grounds for Neighbors' summary judgment motion.

The presiding circuit judge, the Honorable Edgar Warren Dickson, issued an order concluding that Tracts A and B were "subject to any covenants and restrictions that applied to the original Tract L . . . ." However, Judge Dickson also ruled that whether the original Restrictive Covenants or the Amendment to Restrictions applied to Neighbors' property was an issue to be determined at trial, and, thus, he denied the "remaining portions" of the cross-motions for summary judgment. Judge Dickson later denied Owner's motion for reconsideration.

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[2] According to the parties' briefs, Owner also settled with the Town of Summerville and the Senrab Farms Homeowners Association.

Subsequently, the case was referred to the Master-in-Equity for a merits hearing. On September 28, 2012, the master signed an order denying Owner's request for declaratory and injunctive relief. In this order, the master acknowledged Judge Dickson's order on the cross-motions for summary judgment and stated "[t]he questions of fact that remained . . . were whether [Neighbors] are or were in compliance with the terms of the applicable covenants and restrictions and which of the restrictions apply." The master concluded that the original Restrictive Covenants did not apply to Neighbors' property. She reasoned that an amendment was required to make any additional property subject to the Restrictive Covenants and after Developers sold the last of the six lots that were originally subject to the Restrictive Covenants, they no longer held a sufficient property interest to effect an amendment to the Restrictive Covenants.

Based on this reasoning, the master concluded that the restrictions set forth in the "Amendment to Restrictions," dated February 25, 1998, were actually original restrictions on the property.[3] The master also concluded that Owner was not in privity with Neighbors and had no authority to enforce the restrictions applicable to Neighbors' property. The master found that Neighbors' leasing of their property to third parties for horse grazing was not a commercial use and, thus, Neighbors had complied with the restriction requiring single-family residential use.

Owner filed a motion for reconsideration of the master's order, or, in the alternative, a motion for a new trial. On December 6, 2012, the master signed an order denying the new trial motion and upholding the September 28, 2012 order. However, the master set forth additional findings of fact and conclusions of law in the December 6, 2012 order.

The master found that Tract B was "akin to [Neighbors'] yard of their residence." The master further stated "The fact that the actual residence does not occupy both lots does not mean that [Neighbors] are not using their property for residential purposes. They live there." The master also stated "The [c]ourt finds credible [Neighbors'] argument that they do not keep more than six horses at a time on their property and that nothing in [the] restrictions prevents a neighbor from riding their horse over for a visit. A visit is vastly different from continuous keeping of a horse." The master also stated "The [c]ourt finds not credible [Owner's] claim that [Neighbors'] keeping of six horses on their property is ruining [his] quality of life."

[3] This document restricted the use of Neighbors' property to residential but allowed for up to six horses to be kept on the property.

The master based this statement on Owner's settlement of his litigation with the Nguyens. This appeal follows.

ISSUES ON APPEAL

1. Did the master err in declaring that Neighbors' Tract B was not subject to the original Restrictive Covenants?

2. Did the master err in finding that Owner lacked privity of contract or standing to enforce the Restrictive Covenants?

3. Did the master err in concluding that the "Amendment to Restrictions" was an original restriction on Neighbors' property?

4. Did the master err in finding that Neighbors used Tract B as their yard and that they lived there?

5. Did the master err in concluding that Neighbors complied with the covenant restricting the use of their property to single-family residential use?

6. Did the master err in concluding that Neighbors complied with the covenant restricting the number of horses allowed on the property?

7. Do the equities warrant enjoining Neighbors from continued covenant violations?

STANDARD OF REVIEW

"Declaratory judgments in and of themselves are neither legal nor equitable." *Campbell v. Marion Cnty. Hosp. Dist.*, 354 S.C. 274, 279, 580 S.E.2d 163, 165 (Ct. App. 2003). "The standard of review for a declaratory judgment action is therefore determined by the nature of the underlying issue." *Id.* Here, Owner seeks the enforcement of his subdivision's restrictive covenants. An action seeking an injunction to enforce restrictive covenants sounds in equity. *S.C. Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 622, 550 S.E.2d 299, 302 (2001). In an equitable action, this court may make findings according to its own view of the preponderance of the evidence. *Id.* However, this court is not required to disregard the master's factual findings or ignore the fact that the master was in the better position to assess the credibility of the witnesses. *Oskin v. Johnson*, 400 S.C. 390, 397, 735 S.E.2d 459, 463 (2012).

LAW/ANALYSIS

I. Applicability of Restrictive Covenants

Owner argues the master erred in declaring that Neighbors' Tract B was not subject to the original Restrictive Covenants. On the other hand, Neighbors argue that their Tracts A and B, previously designated as "Tract 'L', Senrab Farms," were never included in the subdivision. We agree with Owner that Tract L was always part of the subdivision and was subject to the original Restrictive Covenants.

We first review the law governing restrictive covenants and the interpretation of language in restrictive covenants and in deeds. Restrictive covenants, sometimes referred to as "real covenants," are agreements "to do, or refrain from doing, certain things with respect to real property." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 361, 628 S.E.2d 902, 913 (Ct. App. 2006) (citation and quotation marks omitted).

> Therefore, covenants, in a sense are contractual in nature and bind the parties thereto in the same manner as would any other contract. Restrictive covenants are construed like contracts and may give rise to actions for breach of contract. However, restrictive covenants affecting real property cannot be properly and fully understood without resort to property law.
>
> Restrictive covenants differ from contracts in that they run with the land, meaning that they are enforceable by and against later grantees.

Id. (citations and quotation marks omitted). "There are several ways in which restrictive covenants may be created. The most common means are: (1) by deed; (2) by declaration; and (3) by implication from a general plan or scheme of development." *Id.* at 362, 628 S.E.2d at 913.

"Words of a restrictive covenant will be given the common, ordinary meaning attributed to them at the time of their execution." *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998). "[T]he paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document." *Id.* at 4, 498 S.E.2d at 863-64 (quotation marks omitted). When "the

language imposing restrictions upon the use of property is unambiguous, the restrictions will be enforced according to their obvious meaning." *Shipyard Prop. Owners' Ass'n v. Mangiaracina*, 307 S.C. 299, 308, 414 S.E.2d 795, 801 (Ct. App. 1992). "A restriction on the use of 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." *Taylor*, 332 S.C. at 5, 498 S.E.2d at 864 (citation and quotation marks omitted). However, this rule of strict construction "'should not be applied so as to defeat the plain and obvious purpose of the instrument.'" *McClellanville*, 345 S.C. at 622, 550 S.E.2d at 302 (quoting *Taylor*, 332 S.C. at 4-5, 498 S.E.2d at 863-64).

Likewise, in construing a deed,

> the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy. In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law. The intention of the grantor must be found within the four corners of the deed.

Windham v. Riddle, 381 S.C. 192, 201, 672 S.E.2d 578, 582-83 (2009) (citations and quotation marks omitted).

Here, the subdivision's Restrictive Covenants, deeds, and plats clearly and unambiguously show Developers' intent to include Tract L in the subdivision and to subject Tract L to the subdivision's Restrictive Covenants. A brief history of the subdivision follows.

On September 8, 1997, Developers executed the Restrictive Covenants for Senrab Farms. The Restrictive Covenants state, in pertinent part:

> KNOW ALL MEN BY THESE PRESENTS, that James M. Barnes and Delete [sic] B. Barnes (hereinafter referred to as "Declarant"), the owners of the property described herein **or made subject hereto from time to time**, hereby covenant and agree . . . with persons who shall hereafter purchase the property described in the attached Exhibit A, as follows:

> 1. Whenever used herein, the term "Lots" shall refer to lots which are subject hereto, whether by specific reference in this instrument, or to **lots made subject to the provisions of this instrument by separate legal instrument recorded in the Dorchester County RMC Office**.
>
> . . .

(emphases added).

Exhibit A to the Restrictive Covenants references a plat dated July 5, 1997 and entitled "Plat Showing Eleven Lots of Senrab Farms[,] A Subdivision Owned by James M. Barnes and Delene Barnes." Exhibit A also designated the lots subject to the Restrictive Covenants at that point in time as lots D, E, F, G, H, and I.[4] From September 8, 1997 through January 21, 1998, Developers conveyed these lots to several couples, respectively, including Owner and his wife, who purchased Lot F. During this time period, the majority of lot owners gave written consent to amend the Restrictive Covenants concerning the type of fencing allowed. Owner later purchased the adjoining Lot G from the initial purchasers.

On February 25, 1998, Developers executed a document entitled "Amendment to Restrictions" in anticipation of their conveyance of Tract L to a builder hired by Neighbors to construct a home on the property. On this same date, Developers conveyed Tract L to the builder, Steve Hill/Habersham Builders, Inc. (Hill), and on December 23, 1998, Hill conveyed Tract L to Neighbors. As we will explain in section III of this opinion, the Amendment to Restrictions was likely invalid. In any event, this document sought to allow Hill to subdivide Tract L and to allow Hill and his successors to keep up to six horses on the property. The document also included the following language: "EXCEPT AS HEREINABOVE MODIFIED AND SET OUT, and by acceptance hereof, undersigned do hereby agree and consent that the property shall be restricted in accordance with the restrictive covenants, dated September 8, 1997 and recorded in the RMC Office for Dorchester County in Book 1821, Page 331."

[4] The record does not indicate when, or if, Developers sold lots A through C. Likewise, the record does not indicate what, if any, restrictions were placed on those lots.

In this document, Developers confirmed their intent to include Tract L in the subdivision by (1) the title of the document itself, i.e., "Amendment to Restrictions;" (2) limiting the use of the property to single-family residential; and (3) designating the property in Exhibit A as "Tract L, Senrab Farms."

Further, the deeds to Hill and to Neighbors pair the designation "Tract L" with the subdivision's name, i.e., "Tract L, Senrab Farms." These deeds also reference the Restrictive Covenants, which clearly contemplated the growth of the subdivision beyond the six lots that were specifically referenced. The deeds to Hill and to Neighbors also reference the three subdivision plats, dated July 5, 1997, December 29, 1997, and May 5, 1998, respectively. These plats are consistent with the position that Tract L was already contemplated as part of the subdivision's general plan of development in phases. Notably, the July 5, 1997 plat designates what later became Tract L and Tract M as "14.19 acres Residual." The use of the term "residual" indicates that Developers viewed this property as the undesignated remainder of some defined quantity, that quantity being all of the subdivision property.[5]

The July 5, 1997 plat also designates the lots by consecutive lettering, i.e., lots "A" through "K," which is continued with Tract "L" and Tract "M" in the plat dated December 29, 1997 and with Tracts "M" through "Q" in the plat dated May 5, 1998. Consecutive lettering has been noted in at least one South Carolina case as evidence of a single scheme of development. *See Slear v. Hanna*, 329 S.C. 407, 409-11, 496 S.E.2d 633, 634-35 (1998) (holding there was evidence to support the special referee's finding that a developer intended to dedicate an access point to the Intracoastal Waterway to all property owners in a development, which in turn was based on the referee's findings that (1) the development consisted of Blocks A through O, as depicted on the tax map, and (2) the consecutive lettering of the blocks evidenced a single scheme of development).

In sum, the Restrictive Covenants, deeds, and plats clearly and unambiguously show Developers' intent to maintain a residential neighborhood and to exclude commercial activities from the neighborhood. *Cf. Easterly v. Hall*, 256 S.C. 336, 343-44, 182 S.E.2d 671, 674 (1971) (reviewing deeds, plats and protective covenants and holding that all conveyances made by the common grantor "manifested a definite plan and purpose to develop her subdivision as a residential neighborhood").

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[5] "Residual," when used as a noun, is defined as "[a] leftover quantity; a remainder." *Black's Law Dictionary* 1424 (9th ed. 2009).

Neighbors, however, insist that to add property to Senrab Farms beyond the six lots referenced in Exhibit A to the Restrictive Covenants, Developers were required to execute an amendment to the Restrictive Covenants. Neighbors further argue that Developers did not follow the required amendment procedure to subject Tract L to the Restrictive Covenants when they conveyed Tract L to Hill. In support of this argument, Neighbors cite paragraph 18 of the Restrictive Covenants, which states that an amendment of the Restrictive Covenants must be implemented by the written consent of a majority of the owners of lots subject to the Restrictive Covenants. By the time Developers conveyed Tract L to Hill, they had sold the six lots that were originally subject to them. Hence, Neighbors argue that because Developers did not obtain the consent of a majority of the new lot owners, Developers could not amend the Restrictive Covenants to make Tract L subject to the Restrictive Covenants. Neighbors also cite *Queen's Grant*, 368 S.C. at 362-63, 628 S.E.2d at 913-14, for the proposition that when a developer fails to expressly reserve a right to amend the covenants, amendments are not allowed.

Neighbors conflate the concept of subjecting additional property to the Restrictive Covenants with amending the actual content of the Restrictive Covenants' **terms**. The terms of the original Restrictive Covenants already provided for additional subdivision property to be subjected to them by **any** separate legal instrument, such as the deed from Developers to Hill, and, hence, those terms did not need to be amended for them to govern the additional property. The deed to Hill subjected Tract L to the Restrictive Covenants and brought Tract L within the definition of "Lots" set forth in the Restrictive Covenants by including the following language within the property description: "SUBJECT TO: Restrictive Covenants dated September 8, 1997 . . . Amendment to restrictions dated February 25, 1998 . . . Amendment to restrictions dated November 25, 1997 . . . ." Likewise, the deed conveying Tract L to Neighbors included similar language within the property description: "SUBJECT TO: Restrictive Covenants and amendments thereto . . . ."

Based on the foregoing, the master erred in ruling that Neighbors' Tract B was not subject to the original Restrictive Covenants.

II. Standing

Owner argues the master erred in finding that Owner lacked privity of contract or standing to enforce the Restrictive Covenants. We agree.

In her order, the master stated that to add property beyond the six lots referenced in Exhibit A to the Restrictive Covenants, Developers were required to amend the Restrictive Covenants. The master also stated that Developers did not follow the required amendment procedure to subject Tract L to the Restrictive Covenants when they conveyed Tract L to Hill. The master ruled that Developers did not lawfully amend the Restrictive Covenants to make Tract L subject to them and, hence, the restrictions in the Amendment to Restrictions were in fact original restrictions on Tract L. She then concluded that there was no covenant relationship between Neighbors and Owner.

Similarly, Neighbors argue that even if Developers effectively subjected Tract L to the Restrictive Covenants, the fact that Developers "used the same Restrictive Covenants on two (2) distinct properties [Owner's property and Neighbors' property] does not necessarily place the properties and their owners in a covenant relationship." Neighbors base this argument on their assertion that their property was never part of the Senrab Farms subdivision and, thus, there was no contractual agreement between Owner and Neighbors.

"Restrictive covenants differ from contracts in that they 'run with the land,' meaning that they are enforceable **by** and against **later grantees**." *Queen's Grant*, 368 S.C. at 361, 628 S.E.2d at 913 (emphases added); *cf. Bomar v. Echols*, 270 S.C. 676, 679, 244 S.E.2d 308, 310 (1978) (explaining restrictive covenants arising by implication and stating, "where the owner of a tract of land subdivides it and sells the distinct parcels thereto to separate grantees, imposing restrictions on its use pursuant to a general plan of development or improvement, such restrictions may be enforced by any grantee against any other grantee"). As expressed in section I of this opinion, Developers intended for Neighbors' property to be part of Senrab Farms subdivision, and Developers expressed that intention in the Restrictive Covenants, deeds, and plats affecting the property. Therefore, the master erred in concluding that Owner did not have privity of contract or standing to enforce the Restrictive Covenants against Neighbors. *See Windham*, 381 S.C. at 201, 672 S.E.2d at 582 (holding that in construing a deed, the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well-settled rule of law or public policy); *Taylor*, 332 S.C. at 4, 498 S.E.2d at 863-64 (holding that the paramount rule of construction of a restrictive covenant is to ascertain and give effect to the intent of the parties as determined from the whole document).

III. Validity of Amendment as Original Restrictions

Owner contends the master erred in concluding that the restrictions set forth in the "Amendment to Restrictions" were original restrictions on Neighbors' property. We agree.

A. Law of the case

Initially, we address Neighbors' contention that Judge Dickson's December 20, 2011 order upheld the applicability of the Amendment to Restrictions to Neighbors' property and, because Owner did not appeal that ruling, he is now barred from raising this issue. *See Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance."). We disagree for two reasons. First, we do not interpret Judge Dickson's ruling as having upheld the applicability of the Amendment to Restrictions. Rather, his order as a whole indicates that he found this to be a question for trial. The master also interpreted Judge Dickson's order as leaving the issue of the applicability of the Amendment to Restrictions to be determined at trial.

Second, Owner first challenged the applicability of the Amendment to Restrictions in his summary judgment motion, and Judge Dickson's reference to this issue was made in an order denying Owner's summary judgment motion, which is never appealable. *See Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 168, 580 S.E.2d 440, 444 (2003) ("[T]he denial of a motion for summary judgment is not appealable, even after final judgment.").

Based on the foregoing, Owner is not barred from assigning error to the master's conclusion that the Amendment to Restrictions applied to Neighbors' property as original restrictions.

B. Merits

Although the master acknowledged the definition of "Lots" in the original Restrictive Covenants,[6] she concluded that Developers never executed a separate legal instrument bringing additional property within the Restrictive Covenants. The master based this conclusion on the theory that Developers had to amend the

[6] This definition states: "Whenever used herein, the term "Lots" shall refer to lots which are subject hereto, whether by specific reference in this instrument, or to lots made subject to the provisions of this instrument by separate legal instrument recorded in the Dorchester County RMC Office."

Restrictive Covenants before the covenants could apply to additional property. However, the terms of the Restrictive Covenants **already** provided for additional subdivision property to be subjected to them whenever Developers executed **any** legal instrument, such as a deed, that, by its terms, made a lot subject to the Restrictive Covenants. Hence, the Restrictive Covenants' terms did not need to be amended in order for them to govern the additional property.

Further, the deeds to Hill and to Neighbors clearly required Tract L to be subject to the original Restrictive Covenants and valid amendments to those covenants. Yet, because the Amendment to Restrictions was not lawfully executed according to the terms of the Restrictive Covenants, i.e., by a majority of owners of lots subjected to the Restrictive Covenants, the plain language of the deeds to Hill and to Neighbors required the property to be subject to only the terms of the original Restrictive Covenants and the November 25, 1997 amendment concerning fencing. *See Brown v. Bass*, 276 S.C. 211, 213, 277 S.E.2d 480, 480 (1981), cited in 17 S.C. Jur. *Covenants* § 68 (affirming the trial court's order finding invalid an attempt to amend a restrictive covenant prohibiting trailers on lots and ordering a trailer removed from a restricted lot; plaintiff was entitled to have the disputed petition declared an ineffective amendment and to enforce the original covenant forbidding trailers).[7]

Based on the foregoing, the master erred in concluding that the restrictions in the Amendment to Restrictions were original restrictions on Neighbors' property.

IV. Compliance with Covenants

Owner maintains the master erred in finding that Neighbors used their Tract B as their yard and that they lived there. Owner also argues the master erred in declaring that Neighbors' use of Tract B complied with the restrictions regarding residential use and the number of horses allowed on the property. We agree.

[7] *See also Hynes Family Trust v. Spitz*, 384 S.C. 625, 629, 682 S.E.2d 831, 833 (Ct. App. 2009) ("Restrictive covenants are construed like contracts . . . . 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." (citations and quotation marks omitted)); *id.* ("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." (citation and quotation marks omitted)).

Paragraph five of the Restrictive Covenants prohibits any use other than single-family residential use.[8]

"Single-family residential use" involves the act of residing in a single-family dwelling. *See Easterly*, 256 S.C. at 342-44, 182 S.E.2d at 674 (interpreting a restriction providing that no structure "shall be erected upon any of [the] residential lots other than one single family private *dwelling house*" and stating, "No apartment house or duplex of any type shall be erected or maintained on any of the lots" and holding that the general plan of the *residential* neighborhood had been maintained since its inception because only single family dwellings had been erected on the lots (emphases added)); *Maxwell v. Smith*, 228 S.C. 182, 193-94, 89 S.E.2d 280, 285 (1955) (interpreting a covenant restricting use of lots to "residential purposes" and stating that a lake stocked with minnows and pools holding minnows for ultimate sale in a nearby city were elements of a commercial installation in violation of the covenant); *id.* at 194-95, 89 S.E.2d at 286 (holding that even if the commercial use stopped, the lake and pools were on vacant lots and, therefore, must be viewed as "not incident to residential use").

In her December 6, 2012 order, the master stated that Tract B was "akin to [Neighbors'] yard of their residence." The master also stated "[t]he fact that the actual residence does not occupy both lots does not mean that [Neighbors] are not using their property for residential purposes. They live there." As to her conclusion in her September 28, 2012 order that Neighbors' leasing of Tract B did not violate the residential use requirement, the master reasoned that the requirement for single-family residential use "does not prohibit the leasing of real property or having horses on that leased real property." She further stated "there is nothing in the restrictions requiring that those six (6) horses belong to [Neighbors]." The master also cited paragraph 13(j) of the Restrictive Covenants,

[8] Even the invalid Amendment to Restrictions explicitly prohibited any use of Tract L other than as a single-family residential building tract. The document also conditioned the subdivision of Tract L on the use of the subdivided tracts being residential. Although this instrument purported to allow Hill, and ultimately Neighbors, to keep six horses, one two-story detached barn, and certain farm equipment, there is nothing to indicate that these modifications were meant to convert the permitted use from residential to commercial.

which allows "For Rent" signs on lots, to support her reasoning.[9] She went on to state "There is no . . . restriction in the Amendment to Restrictions or the original Restrictive Covenants that prohibits leasing the property to a third party who places horses on the property."

Likewise, Neighbors argue that paragraph 13(j) of the Restrictive Covenants recognizes that property subjected to the Restrictive Covenants can be "leased." Assuming the accuracy of this argument, it does not negate the residential **use** requirement. In other words, even if subdivision property is properly leased to a third party, the lease must not permit the lessee to use the property for a commercial venture or for any purpose other than residential housing.

There is no question that Neighbors leased all of their Tract B to the operators of "Senrab Equestrian Center" for the purpose of using Tract B as a horse pasture to enhance their equestrian business. Therefore, Neighbors' Tract B was not used for residential purposes; rather, it was used for a commercial venture. At trial, one of the Neighbors, Douglas Richardson, admitted under cross-examination that he was not using Tract B for residential purposes. Further, during oral arguments, Neighbors conceded that leasing real property for commercial purposes is different from leasing for the purpose of inhabiting a dwelling.

Based on the foregoing, the master erred in finding that Neighbors used Tract B as their yard and "lived there," and in declaring that Neighbors' use of Tract B complied with the restrictions regarding residential use and the number of horses allowed on the property.

V. Balancing of the Equities

Owner argues that the equities in this case require Neighbors' current use of their Tract B to be enjoined. We agree.

Because an action seeking an injunction to enforce restrictive covenants sounds in equity, upon a finding that a restriction has been violated, a court may not enforce the restriction **as a matter of law** but must consider equitable doctrines asserted by a party when deciding whether to enforce the covenant. *Matsell v. Crowfield Plantation Cmty. Servs. Ass'n, Inc.*, 393 S.C. 65, 71, 710 S.E.2d 90, 93-94 (Ct.

[9] Paragraph 13(j) states: "The only signs permitted on the lots are those reading "For Sale" or "For Rent", or appropriate signs of the building contractor during the period of construction . . . ."

App. 2011) (emphasis added). The equities in the present case require Neighbors' leasing of Tract B for horse grazing to be permanently enjoined.

In *Buffington v. T.O.E. Enterprises*, 383 S.C. 388, 680 S.E.2d 289 (2009), our supreme court reviewed an order enjoining the operators of a Toyota dealership from using their property across from the dealership, and within a subdivision, for commercial purposes. Certain lots within the subdivision, including the property owned by the dealership operators, were subject to a restrictive covenant limiting their use to residential purposes. 383 S.C. at 390-91, 680 S.E.2d at 290. In examining the equities relating to enforcement of the covenant, the court concluded that 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 restriction prohibiting any use other than residential when they purchased the land. 383 S.C. at 393, 680 S.E.2d at 291. The court also concluded 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." 383 S.C. at 393-94, 680 S.E.2d at 291-92.

Like the dealership operators in *Buffington*, when Neighbors purchased Tract L, they were on notice of the requirement that the use of Tract L must be residential. As to the attempt to amend the original Restrictive Covenants to allow Neighbors to have six horses on their property, they were on notice of the provision in the original Restrictive Covenants requiring the vote of a majority of the owners of property subject to the Restrictive Covenants to legally amend the Restrictive Covenants.

Further, we see nothing in the record to support a deviation from the restriction regarding residential use. Neighbors argue that when Owner purchased his property, there were already horses that lived in the barn and grazed on the "fourteen (14) residual acres" and, thus, "[i]t is disingenuous for [Owner] to attempt to argue that he had the right to assume that the property eventually conveyed to [Neighbors] was restricted to prohibit horses or somehow limit those horses to one (1) horse for the entire fourteen (14) acres." However, there is nothing in the record to indicate that when Owner purchased his property in January 1998, there was the extent of customer traffic and its accompanying nuisances that occurred years later.

In fact, the covenants governing the property eventually purchased by the Nguyens in 2003 prohibited any commercial use of that property, and the covenants expressly stated that they were burdening the property for the benefit of the

remainder of Developers' 49.7 acre parcel, which included the residential lots in Senrab Farms subdivision. These covenants were recorded in the RMC office on October 8, 1992. Therefore, Owner had a right to rely on these covenants in making his purchasing decision. The mere presence of horses in the area when Owner purchased his property was consistent with the agricultural use permitted on the property eventually purchased by the Nguyens (and not yet prohibited on the property eventually purchased by Neighbors). The mere presence of horses would not have necessarily placed Owner on notice that these properties were being used for a commercial venture.

Neighbors also argue that Owner's settlement with the Nguyens allowing up to ten horses on their property shows that Owner is not negatively affected by Neighbors' use of their Tract B. However, the settlement expressly prohibits the use of the Nguyens' property for any commercial purpose other than boarding horses at the barn. Further, the record shows that if the court prohibits any commercial use of Neighbors' Tract B, it will eliminate the extra grazing land available to Senrab Equestrian Center, which will, in turn, eliminate the center's attractiveness to its customers—Douglas Richardson testified that his leasing of Tract B for horse grazing helped facilitate customer traffic by making the center more appealing to horse owners.

Moreover, Owner testified that he agreed to the allowance of up to ten horses on the Nguyens' property because he did not think the Nguyens could fit that many horses on their one acre of grazing land. Therefore, despite the master's finding to the contrary, this court may find that Owner's settlement agreement with the Nguyens did not diminish the credibility of his claim that Neighbors' leasing of Tract B for horse grazing has adversely affected Owner's quality of life.[10] *See*

[10] The master's credibility finding was based on her incorrect assumption that the settlement would allow Senrab Equestrian Center to continue all of its commercial uses of the Nguyens' property rather than just boarding: "[Owner] settled with the equestrian center . . . to allow keeping up to ten horses on the property. An active equestrian center would certainly have a greater impact on traffic and activity in the neighborhood[] than [Neighbors] . . . allowing six horses to graze." Therefore, we do not believe it is appropriate to give deference to this credibility finding despite the statement in prior case law that an appellate court is not required to ignore the fact that the master was in a better position to assess the credibility of the witnesses. *See Santoro v. Schulthess*, 384 S.C. 250, 261, 681 S.E.2d 897, 902 (Ct. App. 2009) ("[T]his broad scope of review does not require this Court to

McClellanville, 345 S.C. at 622, 550 S.E.2d at 302 (holding that an action seeking an injunction to enforce restrictive covenants sounds in equity and, therefore, this Court may make findings according to its own view of the preponderance of the evidence).

Based on the foregoing, the master erred in failing to balance the equities. The master also erred in finding that Owner's settlement with the Nguyens will allow a greater impact on traffic and activity in the neighborhood than Neighbors' leasing of their property for horse grazing.

CONCLUSION

Accordingly, we **REVERSE** the master's September 28, 2012 and December 7, 2012 orders and **REMAND** for entry of an order permanently enjoining Neighbors from leasing their property in Senrab Farms for any purpose other than residential housing.

HUFF and LOCKEMY, JJ., concur.

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disregard the findings at trial or ignore the fact that the master was in a better position to assess the credibility of the witnesses.").