South Carolina Law Review

Volume 40
Issue 1 *ANNUAL SURVEY OF SOUTH CAROLINA LAW*

Article 13

Fall 1988

Property Law

Gwendelyn Geidel

Jeffrey A. Winkler

Allison M. Carter

PROPERTY LAW

I. COURT APPLIES DOCTRINE OF *Lis Pendens* IN FRAUDULENT CONVEYANCE CLAIM

Section 27-23-10 of the South Carolina Code, codifying the English Statute of Elizabeth,[1] provides that a debtor's conveyance that was intended to defraud his creditors and others shall be void.[2] In *Lebovitz v. Mudd*[3] the South Carolina Supreme Court determined the elements required to sustain an action for fraudulent conveyance under this statute in light of the recent adoption of the South Carolina Rules of Civil Procedure. Additionally, the court approved the application of the doctrine of *lis pendens* to a tort case of fraud and deceit and a separate alleged fraudulent conveyance.

The court held that the causes of action for fraudulent conveyance could be sustained when the plaintiff-appellants properly alleged that they were within the Statute of Elizabeth[4] and could claim a cause of action as "other types of parties."[5] Further, the appellants were not required to reduce the debt to judgment and obtain a *nulla bona*[6] return prior to bringing the action for fraudulent conveyance under the current South Carolina Rules of Civil Procedure[7] or under the common law for ac-

---

1. An Act Against Fraudulent Deeds, Alienations, & c., 13 Eliz., ch. 5 (1570).

2. S.C. CODE ANN. § 27-23-10 (Law. Co-op. 1976) provides in part:

> Every feoffment, gift, grant, alienation, bargain and conveyance of lands, . . . made to or for any intent or purpose to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties and forfeitures shall be deemed and taken . . . to be clearly and utterly void, frustrate and of no effect . . . .

3. 293 S.C. 49, 358 S.E.2d 698 (1987).

4. S.C. Code Ann. § 27-23-10.

5. 293 S.C. at 52-53, 358 S.E.2d at 700.

6. *Nulla bona* signifies that there are no goods that the defendant can levy upon in satisfaction of a judgment. W.J. Klein Co. v. Kneece, 239 S.C. 478, 123 S.E.2d 870 (1962).

7. S.C.R. CIV. P. 18(b), effective July 1, 1985, states in part: "In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money."

This is the same language as the current FED. R. CIV. P. 18(b), and the last sentence is in accordance with the UNIF. FRAUDULENT CONVEYANCE ACT, 7A U.L.A. 430 (1985).

tual fraud.[8] The interpretation of the South Carolina Rule of Civil Procedure 18(b) and the reaffirmance of common law indicates the court's willingness in cases of actual fraud to minimize the hardships imposed on a creditor by delays in obtaining a judgment and the numerous lawsuits required to obtain a remedy.

The court also held that the notices of *lis pendens* should not have been stricken from the property transferred by the respondents and that when the court granted a request for extraordinary relief, that the *lis pendens* be cancelled, the effect of the order was pendente lite. In construing the *lis pendens* statute,[9] the court followed a North Carolina case, *North Carolina National Bank v. Evans*,[10] which construed a similar North Carolina statute.[11]

In this consolidated case, plaintiff-appellants Lebovitz and Ender claimed that the defendant-respondents committed fraud and unfair trade practices while acting as agents for the plaintiffs in the purchase of lands on Daufuskie Island, South Carolina.[12] The respondents were also partners in a South Carolina partnership (LUCAB). It was alleged that at approximately the same time this case was filed, LUCAB, which would have been liable to Lebovitz and Ender if the case were decided in appellants' favor, transferred its property to the partners. The partners then transferred the assets to a newly formed Illinois partnership (DASOCA) of which they were the exclusive partners. The appellants alleged that the transfers were made without consideration, rendering LUCAB insolvent. Further, it was alleged that the transfers were made with knowledge of appellants' fraud and unfair trade practices claims and, thus, were made with the actual intent to defraud the appellants.

To provide notice of their claims to set aside the alleged

8. Dennis v. McKnight, 161 S.C. 209, 159 S.E. 555 (1931).

9. S.C. CODE ANN. § 15-11-10 (Law. Co-op. 1976).

10. 296 N.C. 374, 250 S.E.2d 231 (1979).

11. N.C. GEN. STAT. § 1-116 (1983).

12. The amended complaint alleged five causes of action: 1) actual fraud, 2) constructive fraud, 3) unfair and deceptive trade practices, 4) negligence, and 5) fraudulent conveyances. The individual defendants Mudd, Mudd, Jr., and Heltzer are alleged to have schemed to defraud the appellants by inducing the appellants to purchase property (and the respondents then purchasing the property at a price well below that quoted to the appellants), transferring the property through a straw man to the appellants at a much higher price, and retaining the profits. Record at 8 to 39.

fraudulent conveyances from LUCAB to DASOCA, the appellants filed and served notice of *lis pendens* covering ten parcels of property previously owned by LUCAB. Of these ten, only one, which the respondents and appellants jointly owned, was connected with the tort cause of action consisting of fraud and unfair trade practice.

The circuit court, on a motion to dismiss, determined to rule as a matter of law and exclude evidentiary materials.[13] Therefore, under South Carolina Rule of Civil Procedure 12(b), all properly pleaded allegations in the complaints were accepted as true, but they were not accepted as legal conclusions.[14] The circuit court dismissed the two causes of action alleging fraudulent conveyances because (1) the appellants did not assert that they were creditors or others and (2) the debt had not been reduced to judgment. The court ordered that the notices of *lis pendens* be stricken.

The supreme court reversed, holding that the complaints stated a cause of action for fraudulent conveyances. Under the Statute of Elizabeth,[15] a cause of action is not limited to judgment creditors. The court relied on *Dennis v. McKnight*[16] for the proposition that tort claimants alleging a fraudulent conveyance also come within protection of the statute. In this case, the conveyances from LUCAB to DASOCA are alleged to have been made without consideration, thereby rendering LUCAB insolvent (establishing legal fraud) and, furthermore, were made with the intent to defraud appellants (establishing actual fraud). The complaint, therefore, was sufficient to bring the appellants within the statute.

The court also evaluated the fraudulent conveyances claim under the South Carolina Rule of Civil Procedure 18(b), which allows joinder of claims when one claim is for money damages (the initial fraud and unfair trade practice claim) and another is to have a fraudulent claim set aside (the conveyance from LU-

13. Record at 5.

14. H. LIGHTSEY & J. FLANAGAN, SOUTH CAROLINA CIVIL PROCEDURE 276 (1985) (citing DeBerry v. McCain, 275 S.C. 569, 274 S.E.2d 293 (1981)).

15. S.C. CODE ANN. § 27-23-10 (Law. Co-op. 1976).

16. 161 S.C. 209, 159 S.E. 555 (1931). The court upheld the application of the *lis pendens* statute when a widow, bringing a suit for wrongful death of her husband, also stated a cause of action to have set aside as fraudulent a deed conveying property from the defendant to his wife.

CAB to DASOCA). The court, in construing the rule to apply in this situation, held that even in the absence of South Carolina Rule of Civil Procedure 18(b), the debt did not have to be reduced to judgment and a *nulla bona* returned.[17]

Under the Statute of Elizabeth,[18] protection is afforded to creditors and others when a fraudulent conveyance claim is properly alleged. Although the respondents maintained that the claims were based on the appellants' "information and belief"[19] and lacked the requisite facts to sustain the pleading,[20] the court correctly held that the allegations of backdated deeds, for nominal or no consideration, and the execution of deeds with specific intent to defraud are sufficient to meet the statute's requirements[21] when they are presented to the court on a motion to dismiss.

Although courts have been reluctant to find actual fraud in fraudulent conveyances,[22] the determination that the allegations supported a finding of actual fraud and adherence to the South Carolina Rule of Civil Procedure 18(b) follows the common law of this state[23] and other jurisdictions.[24]

The court also held that notices of *lis pendens* were properly filed against the DASOCA property. The *lis pendens* statute[25] provides that notice may be filed in "an action affecting title to real property"; it has no limitation that the property in-

17. *Id. See also* Temple v. Montgomery, 157 S.C. 85, 153 S.E. 640 (1930); Miller v. Hughes, 33 S.C. 530, 12 S.E. 419 (1890). The court realized, however, that in cases of constructive fraud, the reduction to judgment had previously been required. Dillon Tire Serv. v. Pope, 243 S.C. 293, 133 S.E.2d 813 (1963).

18. 13 Eliz. ch. 5 (1570) (codified at S.C. CODE ANN. § 27-23-10 (Law. Co-op. 1976)).

19. Brief of Respondents at 5.

20. *See, e.g.*, Lamar & Rankin Drug Co. v. Jones, 155 Ala. 474, 46 So. 763 (1908), which held that information and belief must be supported by facts supplying the basis for the belief.

21. *See* Record at 35, 36, and 37 (allegations in complaint).

22. Tuller v. Nantahala Park Co., 276 S.C. 667, 281 S.E.2d 474 (1981).

23. 161 S.C. 209, 159 S.E. 555 (1931).

24. 37 C.J.S. *Fraudulent Conveyances* § 75, at 915 (1955) ("[T]he well-neigh universal rule is that claims for damages arising from torts and not yet reduced to judgment are within the protection of the statutes against fraudulent conveyances . . . .") In Note, *Fraudulent Conveyances*, 34 S.C.L. REV. 195, 199 (1982), a similar observation was made that FED. R. CIV. P. 18(b) would allow recovery under an alleged fraudulent conveyance, whether actual or constructive fraud, while South Carolina (prior to the adoption of the FED. R. CIV. P. 18(b) as the S.C.R. CIV. P. 18(b)) would not allow the cause of action until the judgment had been rendered and *nulla bona* execution returned.

25. S.C. CODE ANN. § 15-11-10 (Law. Co-op. 1976).

volved with the tort claim must be the same property attached as a result of the fraudulent conveyances. In this case, however, one of ten parcels did fit this dual role. The court cited with approval *North Carolina Bank v. Evans*,[26] which construed a statute similar to the South Carolina *lis pendens* statute,[27] and concluded that notice was properly filed against property that was the subject of a fraudulent conveyance action.[28]

Although *lis pendens* would not be an appropriate remedy if the appellants were seeking only money damages in a fraud action,[29] the appellants in *Lebovitz* also were seeking to have the fraudulent conveyances between LUCAB and DASOCA set aside[30] and, therefore, come within the purview of the *lis pendens* doctrine. The use of *lis pendens* in such circumstances is in accordance with the common law[31] and is supported by reference to Federal Rule of Civil Procedure 18(b), from which South Carolina Rule of Civil Procedure 18(b) is derived. As discussed in *Moore's Federal Practice*:

> Joinder in one action of a claim against the debtor and a claim against the fraudulent transferee will serve (1) to save expenditure of time and money heretofore necessitated by separate actions; and (2) to establish a lis pendens as against the particular property involved in the conveyance which should prevent further disposal of that property while the creditor is establishing his claim against the debtor.[32]

---

26. 296 N.C. 374, 250 S.E.2d 231 (1979). The bank brought an action against a debtor and a purchaser of property to set aside the sale as a fraudulent conveyance and also filed the notice of *lis pendens*. The court held that the debtor was not able to establish that value was given for the property and that the conveyance was not fraudulent. Also, the bank's claim of relief to have the conveyance set aside was an action that affected title to real property and was, therefore, within the *lis pendens* statute.

27. N.C. GEN. STAT. § 1-116 (1983).

28. 293 S.C. at 54, 358 S.E.2d at 701.

29. *See* 51 AM. JUR. 2D *Lis Pendens* § 21, at 969 (1970) (citing Parker v. White, 235 N.C. 680, 71 S.E.2d 122 (1952)) (involving alleged fraud in sale of real property). In a situation where only money damages were sought, the prejudgment attachment statutes would normally be used. Here, however, the appellants asserted the requisite elements of *lis pendens*.

30. Record at 39.

31. *See* Coleman v. Law, 170 Ga. 906, 154 S.E. 445 (1930); N.C. Nat'l Bank v. Evans, 296 N.C. 374, 250 S.E.2d 231 (1979); Annotation, *Doctrine of Lis Pendens as Applicable to Actions to Avoid Conveyance or Transfer in Fraud of Creditors or to Prevent Such Conveyance or Transfer*, 74 A.L.R. 690 (1931).

32. 3A J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE, ¶ 18.11, at 18-89 (1987).

The *lis pendens* remedy has been available in South Carolina for over two hundred years[33] to put persons on notice of a creditor's claim regarding a fraudulent conveyance and recently has been upheld.[34] The application of this doctrine to the present case follows the general policies to allow notice to be placed on the DASOCA property to alert potential purchasers of the pending case.

Finally, the court held that the effect of cancellation of the notice of *lis pendens* pursuant to a petition requesting such extraordinary relief, was pendente lite only pending the determination of the merits of the *lis pendens* issue.

The general rule, although subject to exceptions, is that once the "doctrine of lis pendens comes into operation in connection with a particular litigation, it remains in operation until the rendition of a final decision that puts a definite end to the litigation."[35] In this case, the *lis pendens* issue had been the subject of three prior orders of the supreme court. In April 1986, the court held that the cancellation was void and the notice would remain in effect during the pendency of the appeal. In a second order, dated July 9, 1986, the court denied the motion for relief from *lis pendens*. On November 20, 1986, the court entered a third order in response to a motion seeking *extraordinary* relief cancelling the notice of *lis pendens*. This order, however, merely had the effect of staying resolution of the *lis pendens* issue until the appeal on the merits. The fourth, and final decree, issued in June 1987 was in response to an appeal on the merits and held that the *lis pendens* notice was properly entered.

In conclusion, the supreme court construed South Carolina Rule of Civil Procedure 18(b) in accordance with the law construing the Federal Rule of Civil Procedure 18(b), resulting in a change in the common law of South Carolina regarding the joinder of tort and fraudulent conveyance claims. Within the con-

---

33. *See* Watlington v. Hanley, 1 S.C. Eq. (1 DeS.) 167 (1787); Reply Brief of Appellants at 8.

34. *See* Hursey v. Hursey, 284 S.C. 323, 326 S.E.2d 178 (Ct. App. 1985), in which a *lis pendens* was sought on property that was subject to both a fraudulent conveyance and a divorce proceeding. *Lebovitz* appears to expand this doctrine by applying *lis pendens* to property that was not the object of the fraud cause of action.

35. *See* 51 AM. JUR. 2D *Lis Pendens* § 32, at 979 (1970) (citing decisions in nine various states, not including South Carolina).

text of claims of fraudulent conveyances, the court's analysis of the appropriateness of the application of the *lis pendens* doctrine was equitable and followed law construing similar statutes in other states.

Gwendelyn Geidel

II. LIBERAL CONSTRUCTION OF RESTRICTIVE COVENANT BASED ON DEVELOPER'S INTENT

Satellite dish antennas[36] are new on the residential scene. Recently the South Carolina Court of Appeals decided a novel question concerning the applicability of a subdivision's restrictive covenant to the installation of a satellite antenna. In *Midway Properties v. Pfister*[37] the court of appeals held that the language of the particular restrictive covenant[38] required approval of all construction on the lots, the defendants violated the covenant by installing an unapproved dish antenna, and the antenna had to be removed.[39] The main issue was the construction of the language of the covenant. The *Pfister* court reached the same result as courts of other jurisdictions faced with the same issue,[40] but for very different reasons.

Philip and Patricia Pfister, the defendants, knew that the lot they purchased from Midway Properties in Anderson County was subject to a restrictive covenant.[41] They built a house and later installed an outdoor video dish[42] without first submitting

---

36. In this article the terms "satellite dish antenna," "satellite dish," "dish," "video antenna," and "video dish" are used interchangeably. All of these terms refer to television signal receiving devices used in a residential, rather than commercial, setting.

37. 292 S.C. 104, 354 S.E.2d 926 (Ct. App. 1987).

38. Section XIII of the restrictive covenant reads:

> A. No *building* shall be erected or placed on any lot until the construction plans and specifications and a plan showing the location of the *structure* have been approved by the developer as to the quality of workmanship and materials, harmony of external design with existing structures and as to location with respect to topography and finish grade elevation. . . .
>
> C. No fence, wall, or *barrier* shall be erected, placed or altered on any lot unless similarly approved by the Architectural Committee.

Id. at 105-06, 354 S.E.2d at 927 (emphasis added in part.)

39. *Id.*

40. *See* cases cited *infra* notes 63, 65.

41. Record at 19 (Mr. Pfister's testimony admitting he knew of the covenant).

42. The dish was eleven feet in diameter, fifteen feet high, and made of black wire mesh. Record at 8, 20.

plans to the plaintiff developer. The Architectural Control Committee[43] notified the defendants that their dish, an unapproved barrier, violated Section XIII (C) of the covenant[44] and had to be removed. The Pfisters' refusal of this request gave rise to this action by the developer for a declaratory judgment and for an injunction to remove the dish.[45]

The Pfisters made two arguments. First, they argued that the specific wording of the covenant did not control the construction of the antenna and that the covenant should be strictly construed against the drafter, Midway Properties, to allow the least restricted use of the property.[46] Alternatively, the Pfisters argued that "[i]n balancing the equities,[47] it would be inequitable for the Court to require the removal of the satellite antenna [because they] spent significant sums of money in purchasing

---

43. The Architectural Control Committee was a five-member committee organized by Midway Properties to regulate the development of the subdivision. Midway's president chaired the committee. Record at 10, 16.

44. See the relevant wording of the covenant, *supra* note 3. The attorney for the Architectural Committee wrote the Pfisters a letter on behalf of the committee stating: "This satellite dish is certainly a barrier for sight, sound and air and also should . . . be approved or disapproved by the Architectural Committee from that standpoint." Record at 35.

45. 292 S.C. at 105, 354 S.E.2d at 927.

46. *Id.* at 106, 354 S.E.2d at 927. The rule of strict construction is well established in South Carolina. Generally, "[r]estrictive covenants are to be strictly construed, with doubts resolved in favor of a free use of property." Butler v. Sea Pines Plantation Co., 282 S.C. 113, 120, 317 S.E.2d 464, 468 (Ct. App. 1984)(citing Hamilton v. CCM, Inc., 274 S.C. 152, 263 S.E.2d 378 (1980)); *see also* Edwards v. Surratt, 228 S.C. 512, 90 S.E.2d 906 (1956). Note, however, this general rule is limited: "[C]ovenants . . . should not be construed so as to defeat the plain and obvious purpose of the contractual instrument." Donald E. Blatz, Inc. v. R.V. Chandler & Co., 248 S.C. 484, 487, 151 S.E.2d 441, 443 (1966) (citations omitted). *Cf. Hamilton*, 274 S.C. at 157-58, 263 S.E.2d at 381 ("where the language of a restrictive covenant is equally capable of two or more constructions, that construction will be adopted which least restricts the property").

47. In Wynock v. Carroll, 289 S.C. 338, 345 S.E.2d 503 (Ct. App. 1986), the court stated the following equitable test:

> [I]n determining the appropriateness of injunctive relief, the courts balance the equities between the parties and are committed to the relative hardship or balance of convenience standard. So, . . . the court will, in the exercise of the wide discretion with which it is vested, take into consideration the relative inconvenience, hardship, or injury, which the parties will sustain by the granting or refusal of an injunction.

Id. at 340, 345 S.E.2d at 504 (citation omitted). In *Wynock* the defendant landowner was forced to remove a parking lot facility built in violation of the local zoning code. But see Hunnicutt v. Rickenbacker, 268 S.C. 511, 234 S.E.2d 887 (1977) for a case in which the balance of equities favored the landowner over land use restrictions.

and installing this antenna."[48] The court of appeals, relying heavily on the trial court's reasoning, rejected both of these arguments. The *Pfister* court "agree[d] with the trial judge that the instrument, read as a whole, evidence[d] a plain intent to place all construction under the control of the Architectural Committee."[49] In essence, the court looked past the express wording of the documents to Midway's intent to restrict the land's use.[50] Further, reasoned the court, the drafter would be burdened if required "to expressly list every conceivable item which could be placed on a piece of property."[51] In rejecting the defendants' balancing of the equities argument, the court focused on the fact that the Pfisters had freely subjected themselves to the restrictions and that other landowners in the subdivision had relied on the restrictions in purchasing their own properties.[52]

Pfister represents the great lengths to which South Carolina courts will extend themselves to enforce restrictive covenants. Admittedly, interpretation of restrictive covenants is not an exact science.[53] Modern courts, including the *Pfister* court, are

---

48. Brief of Appellant at 4.

49. 292 S.C. at 106, 354 S.E.2d at 927. The trial judge arguably based his ruling on an interpretation of the express wording of the covenant—whether the satellite dish was a "building," "structure," or "barrier." The judge relied heavily on the authority of two annotations in rendering his opinion. Record at 28 (trial judge's "Conclusions of Law"). Both these annotations focus entirely on the use of specific words in various covenants. *See* Annotation, *What Constitutes a "Structure" Within Restrictive Covenant*, 75 A.L.R.3D 1095 (1977); Annotation, *What Constitutes a "Building" Within Restrictive Covenant*, 18 A.L.R.3D 850 (1968). Note that the language of the covenant, *supra* note 38, includes both the words "building" and "structure." "Structure," however, does not have a separate and distinct meaning because it clearly refers back to the term "building." Thus, any attempt to classify the dish as a "structure" is an error. The *Pfister* court, although it agreed with the trial judge, neither expressly accepted nor rejected the trial judge's focus on the exact wording of the covenant.

50. The trial judge relied on the following factors to determine the developer's intent, which was "to create and maintain a high quality, pleasant and appealing community": (1) the testimony describing the nature of the subdivision; (2) the entire covenant; (3) the requirements that all lots be more than one acre, that permissible activities be controlled, and that the houses be large; and (4) the control of all streets by the homeowners. Record at 29 (trial judge's "Conclusions of Law").

51. 292 S.C. at 106, 354 S.E.2d at 927.

52. *Id.*

53. Donald E. Blatz, Inc. v. R.V. Chandler & Co., 248 S.C. 484, 489, 151 S.E.2d 441, 444 (1966) ("It has frequently been pointed out that cases involving restrictive covenants present such wide differences in circumstances that . . . each case must be decided on its own facts.").

turning away from strict construction.[54] The *Pfister* court cited *Davey v. Artistic Builders, Inc.*[55] as its source of the governing law. Yet, the court relied on only a part of the *Davey* rule,[56] excluding an essential portion of that rule: "[W]here the language of the restrictions is equally capable of two or more different constructions that construction will be adopted which least restricts the use of the property."[57] Under *Davey*, a party wishing to have a covenant strictly construed can show that two or more constructions exist because two or more reasonable inferences can be drawn from the disputed language of the instrument.[58] Apparently, at the trial level in *Pfister* there was considerable dispute as to whether the words "building," "barrier," or "structure" could be construed to include a dish antenna. The *Pfister* court did not decide which section of the covenant was violated or which term applied to the dish.[59] Yet, isn't it reasonable that a satellite dish is not a "building" or a "barrier" as these words are used in Section XIII of the covenant? If so, under the rule of *Davey* the instant covenant gives rise to two or more different constructions and should be construed *against* Midway—the opposite result from the actual holding. By deciding that the developer's intent, rather than any particular word or wording of the covenant, prohibited the video dish, the court of appeals encourages drafting of restrictions in indefinite terms—a step toward imprecision.

The court of appeals also reasoned that requiring express restrictions in covenants might create a significant burden on the drafter.[60] There is no burden, however, if all that is required for clarity is a simple catchall phrase. For example, consider a suggested revision of Section XIII (A) of the *Pfister* covenant

---

54. 20 AM. JUR. 2D *Covenants, Conditions, and Restrictions* § 187 (1986). Even under the modern approach, however, courts employ strict construction where ambiguous language creates a doubt as to the intentions of the parties.

55. 263 S.C. 431, 211 S.E.2d 235 (1975).

56. The court only quotes *Davey* as follows: "The general rule of strict construction of restrictions . . . is not applicable if it will defeat the plain and obvious purpose of the restrictions." 292 S.C. at 106, 354 S.E.2d at 927.

57. 263 S.C. at 436-37, 211 S.E.2d at 237 (citations omitted).

58. *Id.* at 436, 211 S.E.2d at 236. Construing an ambiguous land plat, the *Davey* court stated that "there is nothing on the plat to give rise to any *inference* . . . and to the contrary at least one *reasonable inference* . . . is that . . . ." *Id.* (emphasis added).

59. *See supra* note 49.

60. *See supra* text accompanying note 51.

(with the revisions indicated by italics): "No building *or other structure* shall be erected . . . until a plan . . . showing the location of the *building or* structure has been approved . . . ."[61] Only five words were added, but the word "structure" takes on a separate meaning from the word "building."[62] Other jurisdictions consider this "structure" wording determinative when ordering the removal of residential dish antennas.[63] These recent cases demonstrate that the inclusion of the "structure" wording into Section XIII (A) of Pfister's covenant would have greatly reduced the ambiguity of the document without burdening the drafter.[64] Still other jurisdictions have required more precise language to justify removing unauthorized dishes.[65] No cases could be found holding a dish to be a "building" as was suggested by the findings of the trial court in *Pfister*.[66]

Perhaps most troublesome for the practitioner is the somewhat circular reasoning used in *Pfister* to balance the equities against the defendants. The Pfisters lost because they freely subjected themselves to the restrictions on which fellow property owners also relied.[67] Yet if the intent of the developer, and not the express wording of the covenant, ultimately defines the restriction, did the Pfisters knowingly and freely subject them-

---

61. Compare this revised covenant with the actual *Pfister* covenant, *supra* note 38.

62. In the original text the terms "building" and "structure" are synonymous. *See supra* notes 38, 49.

63. In Prinzing v. Jockey Club of North Port Owners Ass'n, 483 So. 2d 833 (Fla. Dist. Ct. App. 1986), the court held that the unauthorized installation of a satellite dish as a "structure" violated the following restrictive covenant: "No building, fence, wall or *other structure* shall be . . . erected . . . until the plans . . . have been . . . approved . . . by the Environmental Control Committee." *Id.* at 834 (emphasis added). Again, directly on point is the Oregon Court of Appeals' decision in Shoreline Estates Homeowners Ass'n v. Loucks, 84 Or. App. 302, 733 P.2d 942 (1987). In *Loucks* an injunction forced the defendant property owners to remove unapproved dish antennas because they were "other structures" prohibited by the following covenant restriction: "No dwelling house . . . fence, wall or *other structures* . . . shall be erected . . . unless a . . . plan[] therefor . . . shall have been . . . approved by the homeowners association . . . ." *Id.* at 304, 733 P.2d at 942-43 (emphasis added.)

64. *See supra* note 63.

65. *See, e.g.*, Schreiber v. Cicconi, 351 Pa. Super. 1, ____, 504 A.2d 1327, 1328 (1986) (a satellite dish is a "tower" and is prohibited by a covenant restricting construction of radio, television, or shortwave reception towers); DeNina v. Bammel Forest Civic Club, 712 S.W.2d 195, 198 (Tex. Ct. App. 1986) (satellite dish violated restrictive covenant because it was both a "television or radio aerial wire" and an "improvement" as prohibited by the restrictions).

66. *See supra* note 49.

67. 292 S.C. 104, 106, 354 S.E.2d 926, 927 (Ct. App. 1987).

selves to these restrictions? Rather, it is likely that they never would have interpreted the word "building" or "barrier" to mean dish antenna. Similarly, if the developer intended the restrictive covenant to regulate more than the common meaning of the words would indicate, could the other property owners realistically argue that they relied on the restrictions in purchasing their property?

South Carolina courts favor restrictive covenants; thus, the practitioner can learn two lessons from *Pfister*. First, when drafting a restrictive covenant requiring approval of construction to be undertaken on subdivision lots, use simple catchall phrases to cover the myriad of different circumstances; draft covenants to provide for future technological advances. Second, when representing clients as buyers in real estate transactions involving restrictive covenants, warn them that the covenant may be enforceable in situations beyond the common meaning of the words of the document.

Jeffrey Albert Winkler

III. COURT REFUSES TO ANALYZE FACTS WITH RESPECT TO EACH ELEMENT OF ADVERSE POSSESSION

Adverse possession is an area of the law that requires very specific elements to be proven before a claim will be upheld. The possession must be actual, open, notorious, hostile, continuous, and exclusive.[68] In *Butler v. Lindsey*[69] the South Carolina Court of Appeals was faced with a claim of adverse possession and an interesting fact situation. While the decision does not seem to change the law in South Carolina, the court's refusal to analyze the facts with respect to each required element of adverse possession may have muddied the waters. This survey analyzes these elements in view of the specific facts of this case.

The property in dispute consists of a one-acre tract of land located on Yonges Island in Charleston County. Butler, the plaintiff, is the titled owner of the property. He uses the land primarily for hunting. Lindsey, the defendant, is the party claiming adverse possession. When Lindsey acquired his land,

68. *See* Mullis v. Winchester, 237 S.C. 487, 491, 118 S.E.2d 61, 63 (1961).
69. 293 S.C. 466, 361 S.E.2d 621 (Ct. App. 1987).

which adjoins Butler's property, from Riser, the prior owner, in 1964, the disputed parcel was included in the conveyance.[70] Lindsey then used the disputed land for camping and made some improvements prior to 1977, at which time he built a dock. In December 1985 Butler sued Lindsey for trespass. Lindsey counterclaimed, alleging he owned the property by adverse possession. The Master found that Lindsey had trespassed on Butler's property and did not uphold the claim of adverse possession. The court of appeals affirmed the findings of the Master that Lindsey had not acquired the land by adverse possession.[71]

The Master concluded, and the court of appeals agreed, that Lindsey's open, notorious, and visible use of the property did not begin until 1977 when he built a dock on the disputed property.[72] Therefore, Lindsey's possession was only considered open for eight years instead of the required ten years.[73] There were, however, many other facts in this case which indicate that Lindsey's occupation was open, notorious, and visible as early as 1975. Lindsey testified that in 1966 he placed a mobile home on the disputed property and installed a culvert under a marsh area so he could drive his tractor onto the disputed property to clear the land. Lindsey also paid taxes on the property and introduced tax receipts beginning in 1972.[74] To determine if possession is open, notorious, and visible, the facts and circumstances of each case must be examined. Acts of a possessory nature should be considered collectively rather than independently.[75] Considering these facts collectively, Lindsey seems to have a strong case for open, notorious, and visible possession.

An even stronger case can be made for open, notorious, and visible possession when the parties have been involved in dis-

---

70. Although Lindsey claimed diligently in his brief to the court that the land was his by way of his chain of title, the court did not view this as an issue.

71. The Master awarded Butler damages of $900. He also ruled that Butler should compensate Lindsey in the amount of $4,500 for improvements made to the property under the Betterment Act. S.C. CODE ANN. §§ 27-27-10 to 27-27-100 (Law. Co-op. 1976).

72. 293 S.C. at 471, 361 S.E.2d at 626.

73. S.C. CODE ANN. § 15-67-210 (Law. Co-op. 1976).

74. The payment of taxes is not sufficient by itself to establish adverse possession; however, many courts weigh this fact heavily in support of adverse possession. *See* 3 AM. JUR. 2D *Adverse Possession* § 165 (1986). Many courts also view the failure to pay taxes as a circumstance that weakens a claim of adverse possession. Harrelson v. Reaves, 219 S.C. 394, 401, 65 S.E.2d 478, 481 (1951).

75. 2 C.J.S. *Adverse Possession* § 49 (1972).

putes or controversies regarding the property, and the person claiming adverse possession maintains his right to possession throughout the dispute.[76] In 1975 Butler's attorney wrote Lindsey a letter which stated that Lindsey was trespassing upon Butler's property and that if he continued to trespass, appropriate legal action would be taken. While this letter alone may not have been sufficient to prove Lindsey's possession was open, notorius, and visible,[77] viewed in light of the other facts of this case, the evidence seems to weigh in his favor.

In his dissenting opinion, Justice Gardner took a much stronger stand on the issue of the 1975 letter from Butler's attorney to Lindsey.[78] He based his opinion on the rule that an "owner's actual knowledge of adverse possession is equivalent to and dispenses with the necessity of open and notorious possession."[79] Since Butler's attorney found Lindsey's deed from Riser,[80] which clearly showed the disputed property as being conveyed to Lindsey, Butler had actual notice that Lindsey was claiming his land. Under the rule, Butler's knowledge of Lindsey's adverse possession dispenses with the need to prove open, notorious, and visible possession.

Although the rule that actual notice of the true owner dispenses with the requirement for open possession has not been adopted in South Carolina as such, some cases have alluded to it. In *Graniteville Co. v. Williams*[81] the court found that although the true owner did not have actual knowledge of the adverse claim, the possession was so open, notorious, and visible that the true owner should have had knowledge of the adverse possession.[82] This seems to imply that if the true owner did have actual knowledge of the adverse possession, it would not have been necessary to prove the possession was open, notorious, and visible. The supreme court and the court of appeals, however, have made it clear that included in the elements of adverse possession are the requirements that the possession be open, notori-

76. *Id.*
77. *Id.* § 52.
78. 293 S.C. at 479-80, 361 S.E.2d at 629 (Gardner, J., dissenting).
79. *Id.* at 484, 361 S.E.2d at 632 (citing 2 C.J.S. *Adverse Possession* § 51 (1972)).
80. 293 S.C. at 479, 361 S.E.2d at 629.
81. 209 S.C. 112, 39 S.E.2d 202 (1946).
82. *Id.* at 120-21, 39 S.E.2d at 206.

ous, and visible.[83] A person claiming adverse possession should not rely on the fact that the true owner had actual knowledge, although this might strengthen his claim.

The court also discussed whether Lindsey's possession was continuous and exclusive. The court held that Lindsey's acts of possession did not meet the necessary requirement of exclusive possession because of evidence that Butler continued to use the property as well.[84] Butler testified that he and his sons occasionally hunted on the property. He also said that he had lived on Edisto Island for thirty-four years and had returned to his farm, which supposedly included the disputed property, about three years before the institution of the action against Butler. In his dissent, Justice Gardner argued that, "the hunting excursions several times a year which Butler maintains are an effective assertion of his ownership are too sporadic to defeat Lindsey's claim of exclusivity."[85]

The dissenting opinion presents the interesting question of whether it takes more for the true owner to interrupt continuous possession than for the adverse possessor to meet the required element of continuous possession. The general rule is that adverse possession must be continuous and uninterrupted for the full statutory period. The moment possession is interrupted, the law immediately returns constructive possession to the true owner.[86] On the other hand, "[a]cts of adverse possession, or acts of ownership, with regard to open, wild, unfenced lands, . . . are only required to be exercised in such way and in such manner as is consistent with the use to which the lands may be put."[87]

The property in this case is suited only for recreational pur-

---

83. *See* Mullis v. Winchester, 237 S.C. 487, 491, 118 S.E.2d 61, 63 (1961) (adverse possession must be actual, open, notorious, hostile, continuous, and exclusive for entire statutory period); King v. Hawkins, 282 S.C. 508, 511, 319 S.E.2d 361. 363 (Ct. App. 1984) (all elements of adverse possession must exist). *See also* 3 AM. JUR. 2D *Adverse Possession* § 8 (1986) (footnotes omitted) ("If any one of the elements necessary to constitute adverse possession is absent, title by adverse possession cannot be gained.").

84. 293 S.C. at 472, 361 S.E.2d at 624.

85. *Id.* at 482, 361 S.E.2d at 631 (Gardner, J., dissenting). In support of this proposition, the dissenting judge cited a "long list of cases cited in West's South Carolina Digest, *Adverse Possession*, Key No. 24 (1952)." *Id.* The digest cites five cases, all of which stand for the proposition that occasional and temporary use or occupation does not *constitute* adverse possession, not whether it is capable to *defeat* adverse possession.

86. 237 S.C. at 496, 118 S.E.2d at 65.

87. *Id.*

poses such as hunting or boat-docking. The dissent seems to be saying that the true owner of this type of land has to prove more than the fact that he hunted on it to interrupt the continuous possession of the adverse possessor. If this is the case, adverse possession can be used as a weapon against any owner of wild, uncultivated land. In order to defeat a claim of adverse possession, an owner of land that is suited only for seasonal or recreational activities should only have to prove that he used the land for those activities. Anything more would be too great a burden on owners of this type of land and would be inconsistent with the policy behind adverse possession.

Adverse possession is based on the theory that the true owner of property has failed to protect his rights in ownership for the statutory period and, thus, has acquiesced in the transfer of ownership.[88] Therefore, an owner who uses his property in the manner for which it is suited has not acquiesced in the transfer of ownership to an adverse possessor. In cases involving adverse possession, the courts give nearly every presumption to the true owner.[89] For this reason, a greater burden should not be placed on the true owner than on a person claiming adverse possession when the property involved only can be used for seasonal or recreational purposes. The majority's decision that Lindsey's possession was not exclusive because Butler continued to use the property is consistent with the law in this state and the policy behind adverse possession.

The majority did not discuss the issue of whether Lindsey met the requirement of hostile possession. The supreme court in *Brown v. Clemens*[90] reaffirmed its position that possession under a mistaken belief that property is one's own cannot constitute hostile possession.[91] The court of appeals gave its opinion of this position in *Lusk v. Callaham*:[92] "South Carolina's law on adverse possession apparently favors intentional wrongdoers [over

88. 3 AM. JUR. 2D *Adverse Possession* § 4 (1986).

89. *See* Mullis v. Winchester, 237 S.C. at 491, 118 S.E.2d at 63 (the burden of proof of adverse possession is on the party relying thereon); Knight v. Hilton, 224 S.C. 452, 456, 79 S.E.2d 871, 873 (1954) (possession is presumed to follow the legal title to land); King v. Hawkins, 282 S.C. 508, 511, 319 S.E.2d 361, 363 (Ct. App. 1984) (doctrine of adverse possession must be strictly construed in favor of the owner of the title to land).

90. 287 S.C. 328, 338 S.E.2d 338 (1985).

91. *See id.* at 331, 338 S.E.2d at 339.

92. 287 S.C. 459, 339 S.E.2d 156 (Ct. App. 1986).

honest, mistaken entrants] and . . . our powers, as an intermediate appellate court do not permit us to change [the law as it stands]."[93] If the court of appeals had addressed the issue of hostile possession, undoubtedly Lindsey's possession would not have been characterized as hostile. In his brief to the court, Lindsey testified that he believed the land was his; he went to great lengths to prove his title to the property. Therefore, since Lindsey was operating on the mistaken belief that he owned the disputed property, his possession was not hostile.

The court of appeals in this case decided that Lindsey did not meet the requirements for adverse possession, especially the requirement of exclusivity. By not analyzing the facts of this case carefully in view of the elements required to prove adverse possession, however, the court has made it difficult for future parties to predict whether or not their actions constitute adverse possession.

Allison Molony Carter

93. *Id.* at 462, 339 S.E.2d at 461 (citation omitted). *See also* 3 AM. JUR. 2D *Adverse Possession* § 56 (1986). "It is widely held that possession is not the less hostile because the claimant takes possession of the land innocently and through mistake or ignorance as to ownership." *Id.* This section noted that most cases holding that possession of land under mistake or ignorance is not hostile possession generally are older cases.