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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Joe M. Crosby, Master-in-Equity

Case No. 2020-CP-22-0075

Appellate Case No. 2022-000545

MAC Coastal Properties, Inc., ... Appellant-Respondent,

v.

Shoestring Retreat, LLC, ... Respondent-Appellant.

RESPONDENT-APPELLANT'S BRIEF IN RESPONSE TO APPELLANT-RESPONDENT'S INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF ISSUES ON APPEAL

1. The Trial Court erred in concluding that the restrictive covenants run with the land and are enforceable by Appellant-Respondent, MAC Coastal Properties, Inc. ("**MAC Coastal**").

2. The Trial Court erred in concluding that there exists a common scheme by which MAC Coastal has any enforcements rights of the restrictive covenants.

3. The covenants are not enforceable by a grant to MAC Coastal from the successor to North Litchfield Beach, Inc. or Kathryn Salley because said grants conveyed no such rights of enforcement.

STATEMENT OF THE CASE

The issues in this appeal are whether MAC Coastal can enforce certain deed restrictions which appear in the chain of title to certain real estate that it owns, and whether language in a different prior deed in MAC Coastal's chain of title rises to the level of a restriction on the use of property or is merely a personal covenant between two other parties.

MAC Coastal argues that it has the right to enforce the deed restrictions because they run with the land, and because a common scheme exists which would confer such rights. The Trial Court found that a common scheme exists, under which MAC Coastal can enforce a certain deed restriction by virtue of negative reciprocal easements. However, as MAC Coastal correctly points out in its Initial Brief, and as South Carolina law makes clear, the intent of the grantor determines the purpose of a deed restriction and whether it runs with the land, thus, whether a common scheme exists resulting in the creation of negative reciprocal easements.

In this case, the evidence in the record demonstrates that the Boyle Trustees did ***not*** intend for the restrictive covenants to run with the land, did ***not*** intend to create a common scheme, and thus did ***not*** intend to create negative reciprocal easements which would be enforceable by subsequent grantees. Specifically, the Boyle Trustees: (a) intended to reserve the benefit and enforceability of the Indenture Deed Restrictions solely to themselves; (b) intended to create a

personal covenant regarding the Sand Dunes Parcel with North Litchfield Beach, Inc. that does not run with the land and is not enforceable by subsequent purchasers; and (c) intended to refer to that Sand Dunes Agreement in subsequent deeds and not create a new deed restriction. The evidence is also clear that Kathryn Wallace Salley did not intend to create a common scheme, and further did not intend to create a new deed restriction in the Salley-Haun Deed. Her own actions prove otherwise. If she had intended to, and believed she had, created a common scheme, a grant of enforcement rights 40 years later would be unnecessary.

The most compelling evidence of the Trustees' and Kathryn Wallace Salley's intent are the deeds themselves. In the Boyle Indenture Deeds, the Trustees expressly reserved the benefit and enforceability of the deed restrictions to themselves. In the case of *Heffner v. Litchfield Golf Co.*, 258 S.C. 447, 189 S.E.2d 3 (1972), the Supreme Court of South Carolina held that when language to this effect is present, no intent to create a common scheme for the benefit of future grantees is inferable. The deed from Kathryn Wallace Salley is equally clear that no intent to create a common scheme or deed restriction is discernable from the language. Also compelling is the testimony of Thomas Boyle and Kathryn Wallace Salley, wherein they each clarify their understanding and intent that the Boyle Trustees were the only people who had enforcement rights. For all of these reasons, MAC Coastal does not have the right to enforce any of the deed restrictions at issue. (All capitalized terms in this Statement of the Case are defined below).

FACTS

(a) The Boyle Trust

On December 4, 1952, Gene Boyle Brading, William B. Boyle, Edwin Boyle, Jr., Ann Boyle Pruet, Thomas B. Boyle, Jr., and E. C. McGregor Boyle, conveyed 334.25 acres in Georgetown County (the "**County**") in trust (the "**Boyle Trust**") to William B. Boyle And Thomas

B. Boyle, Jr. as Trustees for the Boyle Trust (the "**Trustees**"). (**R. pp. 291-294) ("the Trust Deed").**

The Trust Deed provides, among other things, that the Trustees had the authority and power to subdivide, develop and manage the property for sale, and to sell all or part of such property on terms which they determined in their discretion, either with or without covenants and warranty (***Id.*** **at 2; R. p. 292).**

The Trust Deed further provides that the Boyle Trust terminates upon the sale of all of the land, but no later than 21 years after its execution, which means the Boyle Trust terminated by its own terms no later than December 3, 1973. ***Id.*** Thomas B. Boyle died on September 3, 2010, and William B. Boyle died on February 20, 2013. There are no successor trustees and no assignments of enforcement rights of record. **Def.'s Tr. Ex. 1 at 5-6 (R. pp. 604-605); (R. p. 268, lines 5-12).**

The vast majority of the property comprising North Litchfield Beach derives from the Boyle Trust. From 1952 to 1959, the Trustees sold some of the Boyle Trust property in piecemeal fashion to various individuals. **(R. p. 227)**. The Trustees did not use a uniform conveyance document and instead used at least four different deed forms with differing deed restrictions, some with four, seven, nine, or thirteen restrictions, and others with no restrictions. **(R. p. 160, lines 6-12; R. p. 267, lines 7-13)**; **Def.'s Tr. Ex. 34, (R. pp. 670-673); Pl.'s Tr. Ex. 4, 5, 13, 14 (R. pp. 295-298, 299-300, 329-459, 460-466)**.

(b) Conveyance to Kate H. Wallace

In 1953, through separate deeds, the Trustees conveyed what is known as Lot 3 and the Eastern portion of Lot 2 of Block 2-S to Kate H. Wallace. **Pl.'s Tr. Ex. 4, 5 (R. pp. 295-298, 299-300)**. Both deeds contain certain restrictive covenants (the "**Indenture Deed Restrictions**") including restrictions against subdividing, and also provide that the benefit and enforcement of the restrictive covenants are reserved solely to the Grantors (the Trustees). Both deeds also contain a

reverter clause that provides that, in the event of a violation of any of the restrictive covenants, the property shall revert to the Trustees. ***Id.***

(c) Conveyance to North Litchfield Beach, Inc.

On June 1, 1959, the Trustees conveyed most of the remainder of the Boyle Trust property in North Litchfield Beach to North Litchfield Beach, Inc. (the "**North Litchfield Beach Deed**"). **Pl.'s Tr. Ex. 14 (R. pp. 460-466)**. The North Litchfield Beach Deed excluded certain lots that were reserved by the Grantors, the lots previously conveyed by the Grantors, including the conveyances to Kate H. Wallace, and any area of land between Front Beach and the Atlantic Ocean (the sand dunes area) adjacent to these lots (the "**Boyle Reserved Lots**"). ***Id.* at 2-3 (R. pp. 461-62)**. The North Litchfield Beach Deed also included an agreement between the Trustees and North Litchfield Beach, Inc. that provides, in relevant part:

> ...it being specifically agreed, however, by and between the Grantors and the Grantee that the area of land between the lots shown on said plat [the Boyle Reserved Lots] and the Atlantic Ocean shall never be used for the purpose of erecting any building or structure by the Grantors or the Grantee herein, their heirs or assigns or successors.

(the "**Sand Dunes Agreement**"). ***Id.* at 3 (R. p. 462)**. At the time MAC Coastal filed the instant action, the Boyle Trust owned no real property that was benefitted by the Indenture Deed Restrictions. Moreover, the Boyle Trust terminated by its own terms over 40 years earlier.

(d) Conveyance of the Sand Dunes Parcel and 183 Summertime Lane.

In 1963, the Trustees conveyed the remaining Western portion of Lot 2 to Edwin Boyle, Jr., Thomas B. Boyle, Jr., and E.C. McGregor Boyle, who then conveyed it to Thomas B. Boyle (individually). **Def.'s Tr. Ex. 19, 20 (R. pp. 658-659, 660-661).** Neither deed contained any restrictions. In fact, this parcel was subject to no restrictions for almost 20 years after being conveyed by the Boyle Trust.

In 1964, the Trustees conveyed the sand dunes parcel adjacent to Lot 3 (the "**Sand Dunes Parcel**") and the Eastern portion of Lot 2 of Block 2-S, to Kate H. Wallace (the "**Sand Dunes Deed**"). **Pl.'s Tr. Ex. 6 (R. pp. 301-304)**. Said Sand Dunes Deed references the Sand Dunes Agreement: "The area of land conveyed hereby, by agreement between Grantors and North Litchfield Beach, Inc., cannot be used for the purpose of erecting any building or structure." The Sand Dunes Deed describes the "Dunes Restricted" area as having an easterly boundary at the Atlantic Ocean and measuring sixty (60) feet landward (the "**Sand Dunes Restricted Area**"). ***Id***.

Kate H. Wallace died in 1969. In 1972, Thomas B. Boyle conveyed the Western portion of Lot 2 to Kathryn Wallace Salley, subject to certain deed restrictions which are different from the ones contained in the 1953 deeds to Kate Wallace. **Pl.'s Tr. Ex. 7 (R. pp. 305-309)**. In addition to creating materially different deed restrictions, Thomas B. Boyle's deed conveyed the lot to Kathryn Wallace Salley in his individual capacity (as he was the sole owner of the property), and not as a trustee of the Boyle Trust. ***Id.***

In 1974, Jean Wallace Blount and Kathryn Wallace Salley, as beneficiaries of the Estate of Kate H. Wallace, conveyed Lot 3, the Eastern portion of Lot 2, and the Sand Dunes Parcel to Kathryn Wallace Salley in a Partition Deed. This property became known as 183 Summertime Lane. **Pl.'s Tr. Ex. 8 (R. pp. 310-313)**.

(e) Property of Shoestring Retreat

In 1978, Kathryn Wallace Salley conveyed Lot 3, Block 2-S, the Eastern 20 feet of Lot 2, Block 2-S, and the related Sand Dunes Parcel, excepting the northeastern most 30 feet, to Louis and Katharine Haun (the "**Salley-Haun Deed**"). This property is hereinafter referred to as the "**Shoestring Property**". **Pl.'s Tr. Ex. 9 (R. pp. 314-317)**. This 1978 conveyance subdivided the original property conveyed to Kate H. Wallace, for which Ms. Salley sought and obtained the approval of the Trustees as shown by the *Modification of Covenants, Conditions and Restrictions*

referenced below. **Def.'s Tr. Ex. 3 (R. pp. 613-617)**. The record is devoid of any evidence showing Ms. Salley sought or obtained any approval from any other property owner in North Litchfield Beach.

Louis Haun quitclaimed his interest in the Shoestring Property to Katharine Haun in 2004. **Pl.'s Tr. Ex. 10 (R. pp. 318-322)**.

The foregoing conveyances are shown in Figure 1 attached hereto.

(f) Releases to Subdivide and Waivers by Trustees

In 1972, the Trustees recorded a *Release of Reverter, Release of Right of Re-Entry and Modification of Covenants, Conditions and Restrictions* whereby they released the right of reverter and re-entry reserved to them in the Boyle Trust deeds, including the property conveyed to Kathryn Wallace Salley, and also released all deed restrictions with respect to Block 2-S, including the Shoestring Property, to permit a re-subdivision thereof. **Def.'s Tr. Ex. 2 (R. pp. 607-612)**. In 1978, the Trustees recorded a *Modification of Covenants, Conditions and Restrictions* whereby they again released all deed restrictions with respect to Block 2-S, including the Shoestring Property, to permit a re-subdivision thereof. **Def.'s Tr. Ex. 3 (R. pp. 613-617)**.

Plaintiff offered no evidence, and the record contains no evidence, of either the Trustees or anyone else ever attempting to enforce any of the Indenture Deed Restrictions. On numerous occasions, the Trustees recorded waivers or consents of variations to the restrictions contained in various grantees' deeds for the purpose of, for example, approval of resubdivisions as evidenced in the Release and Modification described above, as well as allowing construction in the Sand Dunes Restricted Area. **Def.'s Tr. Ex. 2, 3, 14, 15, 16, and 17 (R. pp. 607-612, 613-617, 641-645, 646-651, 652-653, 654-657)**. In each of these instruments, the Trustees recorded waivers or consents to variations of the very restrictions MAC Coastal seeks to enforce. Conversely, there is

no record of any actions or lawsuits filed by the Trustees seeking to enforce any of the Indenture Deed Restrictions.

(g) Property Owned by MAC Coastal

MAC Coastal owns three of the thirteen interval timeshares of the property located at 186 Parker Drive, which is adjacent to the Shoestring Property. MAC Coastal's title derives from the Salley Family Partnership, as well as Charles W. Salley, Mark H. Salley and Julian A. Salley, Jr., to whom Kathryn Wallace Salley conveyed the property in 1991. **Pl.'s Tr. Ex. 15 (R. pp. 467-520)**. In 1999, MAC Coastal recorded a *Declaration of Covenants, Conditions and Restrictions* whereby the property was subdivided into thirteen interval timeshares. **Def.'s Tr. Ex. 13 (R. pp. 619-640)**.

As summarized above, the Covenants Conditions and Restrictions on MAC Coastal's lot derive in part from a different grantor and were imposed twenty years after those on the Shoestring Property. MAC Coastal's lot is comprised of all of Lot 1, Block 2-S, the remainder of Lot 2, and a portion of Lot 3 from the 1978 re-subdivision. Thomas Boyle owned Lot 1 and the remainder of Lot 2 from 1964 to 1972, free of any restrictions. Thomas Boyle, individually, imposed certain restrictive covenants in the deed conveying Lot 1 and the remainder of Lot 2 to Kathryn W. Salley. In addition to being imposed 20 years after Kate Wallace's lot restrictions, the covenants, conditions, and restrictions imposed by Thomas Boyle individually are substantially different in number and nature from those described in the Indenture Deed Restrictions.

(h) Purchase, Subdivision and Grading

By agreement dated February 23, 2019, Holly H. McManus contracted to purchase the Shoestring Property from Katharine Alden Haun **(R. p. 239, lines 15-17).** After signing the Purchase Agreement, Mrs. McManus contacted Greggory Cunningham of Parker Land Surveying to prepare a plat of the property **(R. p. 245)**. Mr. Cunningham prepared a draft plat on February

26, 2019, said plat depicting a sixty foot "Sand Dune Restricted Area." **Pl.'s Tr. Ex. 36 (R. p. 583)**. It can be seen in said draft plat that the eastern boundary of the "Sand Dune Restricted Area" did not begin at the high-water mark but was well over 100 feet west thereof, putting it almost in the middle of the property. Mr. Cunningham testified at trial that his reason for including the "Sand Dune Restricted Area" on said plat was solely based on such depiction appearing on prior recorded plats **(R. p. 120, line 14)**. Mr. Cunningham testified he is aware of other surveyors who do not show such a sand dunes restricted area on the plats they prepare. **(R. p. 127, line 8)**. Further, Mr. Cunningham acknowledged several recorded plats of North Litchfield Beach properties which do not include or show a sand dunes restricted area at all, including plats of the Shoestring Property. **(R. pp. 127-139)**; **Pl.'s Tr. Ex. 38 (R. pp. 585)**; **Def.'s Tr. Ex. 5, 22, 25, 31 (R. p. 618, 663, 666, 667).** Finally, Mr. Cunningham testified that he does not have an opinion on whether the Sand Dunes Restricted Area is restricted or whether there is an enforceable restriction involved **(R. p. 140, line 1)**. In addition to those about which Mr. Cunningham testified, the trial court admitted into evidence numerous recorded plats of beachfront properties, the title of which derives from the Boyle Trust, which do not depict a sand dunes restricted area at all, including plats of the Shoestring Property. **Def.'s Tr. Ex. 21, 23, 24, 32, and 33 (R. p. 662, 664, 665, 668, and 669)**.

Upon the advice of several attorneys that the Sand Dunes Agreement was unenforceable as a deed restriction, **(R. p. 241, lines 5-11; pp. 243-43; p. 246, line 20; p. 259, line 7)**, Mr. and Mrs. McManus requested that Mr. Cunningham remove the "Sand Dune Restricted Area" from the plat. **(R. p. 247, line 18)**. When he declined to do so, Mr. McManus contacted Kenneth Crawford of G3 Surveying to prepare a plat of the property, which he did on June 6, 2019. Said plat did not depict the "Sand Dunes Restricted Area" **Pl.'s Tr. Ex. 1 (R. p. 285)**; **(R. p. 247, lines 18-24)**.

On or about July 19, 2019, Ms. Haun submitted an application to the County to subdivide the Shoestring Property into two lots, which was approved on August 26, 2019. **Pl.'s Tr. Ex. 2 (R. pp. 286-290)**. On September 16, 2019, Ms. Haun conveyed the Shoestring Property to Shoestring Retreat. The deed of conveyance does not contain any specific restrictions but is subject to "all applicable restrictions and easements of record." On September 23, 2019, Shoestring Retreat recorded the subdivision plat in the Register's Office for the County. **Pl.'s Tr. Ex. 11 (R. pp. 323-328)**.[1]

In late 2019, after obtaining the requisite permits from the County, Shoestring Retreat demolished the structure located on the Shoestring Property and graded the property, including in the sand dunes area, in preparation to build a single-family home for the McManus' retirement **(R. p. 257, line 13-15, p. 258, line 14)**.

(i) Assignments to MAC Coastal Properties, Inc.

On November 11, 2009, The Litchfield Company of South Carolina Limited Partnership, the successor in interest to North Litchfield Beach, Inc., conveyed various properties to Litchfield Crossing Development Co., LLC. In conjunction with that transaction, as a catchall measure, the Litchfield Company of South Carolina Limited Partnership recorded a Quit Claim deed purporting to convey to Litchfield Crossing Development Co., LLC any remaining easements, appurtenances, and interests in land owned by the grantor in the County, if any. **Pl.'s Tr. Ex. 22 (R. pp. 544-547)**. There is no evidence in the record showing North Litchfield Beach, Inc. owned any property subject to or benefitted by the Restriction or the Sand Dunes Agreement at the time of the Quit Claim deed.

[1] Appellant's challenge of the county's approval of the subdivision plat was denied by the trial court.

On September 1, 2020, Litchfield Crossing Development Co., LLC entered into an *Assignment of Right of Abatement and Right to Enforce Compliance with Restrictions* whereby it purported to assign to MAC Coastal its right to enforce the restrictive covenants contained in the Sand Dunes Deed and the Sand Dunes Agreement. **Pl.'s Tr. Ex. 26 (R. pp. 571-574)**. Here, too, there is no evidence in the record showing, at the time of this assignment, Litchfield Crossing Development, Co., LLC owned any property subject to or benefitted by the Restrictions or the Sand Dunes Agreement.

On September 25, 2020, Charles Salley, having Kathryn Wallace Salley's power of attorney, recorded an *Assignment of Right to Enforce Compliance with Restrictions* whereby he purported to assign to MAC Coastal her right to enforce the Sand Dunes Agreement that is referenced in the Sand Dunes Deed, the Partition Deed, the Salley-Haun Deed, and the Haun Quitclaim Deed. **Pl.'s Tr. Ex. 25 (R. pp. 562-570)**. There is no evidence in the record that, at the time of the Assignment from Salley, Ms. Salley owned any real property that would be benefitted by the enforcement of any covenant or restriction or the Sand Dunes Agreement.

(j) Procedural History

On January 21, 2020, MAC Coastal filed a Verified Complaint in the Court of Common Pleas for the 15th Judicial Circuit of South Carolina for Declaratory Judgment and Injunction against Georgetown County. Upon Motion to Intervene filed on February 6, 2020, Shoestring Retreat, LLC was added as a Defendant by Consent Order. On February 28, 2020, MAC Coastal filed an Amended Complaint, along with Yancey A. McLeod, III as additional Plaintiff, against Georgetown County and Shoestring Retreat, LLC. On March 5, 2020, the case was referred to the Master in Equity for Georgetown County by consent order. On May 22, 2020, the parties filed a Stipulation of Dismissal Without Prejudice as to Defendant Georgetown County and as to Plaintiff Yancey A. McLeod, III. On June 3, 2020, Shoestring Retreat, LLC filed its Answer to the

Amended Complaint. On September 3, 2020, MAC Coastal filed a Second Amended Complaint against Shoestring Retreat, LLC. On September 29, 2020, Shoestring Retreat, LLC filed its Answer to the Second Amended Complaint. On October 7, 2020, MAC Coastal filed a Third Amended Complaint against Shoestring Retreat, LLC, and on October 19, 2020, Shoestring Retreat, LLC filed its Answer to the Third Amended Complaint. Following a full trial on the merits on April 20-21, 2021, the Trial Court entered a Final Order on March 23, 2022.

ARGUMENT

I. The Trial Court erred in concluding that any restrictive covenants run with the land and that a common plan exists by which MAC Coastal has any enforcements rights at all.

The Trial Court erred in concluding that the restrictive covenants run with the land and also that a common scheme exists through which MAC Coastal has a right of enforcement. Specifically, both conclusions require that the Grantor's clear intent to do so be shown, and because there is no evidence in the record that the Grantors either intended for the covenants to run with the land or to create a common scheme, the Trial Court committed reversible error.

a. The Trustees Did Not Intend to Create Restrictions that Run with the Land.

In determining whether a restrictive covenant runs with the land, the Supreme Court of South Carolina has held that the intent of the grantor is a controlling factor: "for a covenant to run with the land, there must also be an indication that the parties intended for the covenant to run with the land." *Harbison Community Ass'n, Inc. v. Mueller*, 459 S.E.2d 860, 862, 319 S.C. 99, 102 (S.C. App. 1995) (citing *Charping v. J.P. Scurry & Co., Inc.,* 296 S.C. 312, 314, 372 S.E.2d 120, 121 (Ct. App. 1988) ("Given the rule in South Carolina of strictly construing restrictive covenants and favoring unrestricted use of land, the burden was on Charping to prove Townsend's clear intention to create a covenant that would run with the land") (citing *Edwards v. Surratt,* 228 S.C. 512, 90 S.E.2d 906 (1956)).

As MAC Coastal cited in its Initial Brief, the Bankruptcy Court in *In re T 2 Green, LLC*, 363 B.R. 753, 766 (Bankr. S.C. 2006), relying on *Harbison*, *supra*, outlined three factors to determine if a restrictive covenant runs with the land:

> Restrictive covenants run with title to land if: (1) an ***express intention*** can be found that the original parties to the development intended for the covenants to run with title to the land; (2) the covenants touch and concern the real property; ***and*** (3) the party required to observe the covenant is on either actual or constructive notice of the covenant.

(emphasis added). *In re T 2 Green, LLC*, the Bankruptcy Court found that the Developer expressly intended for the covenant to run with the title to the property because:

> The preamble to the Recorded Declarations ***expressly states that the covenants contained therein run with the title lots*** and that use is restricted ***for the benefit of*** future owners. Paragraph 4 of Section III further ***provides that Defendants' right to use and enjoy the Club Amenities runs with the title*** to their land. Paragraphs 4 and 5 of Section IV also provide that the covenants contained in the Recorded Declarations are ***binding on the Developer's successors and all persons claiming by, through, and under the Developer*** and that the covenants run with title to the land.

(emphasis added). The two factors that the Bankruptcy Court relied upon in its determination are: (a) that the language *expressly states* that the covenants run with the land, and (b) that the use was expressly restricted *for the benefit of future owners*.

In *Harbison*, as cited by MAC Coastal in its Initial Brief, the Appellate Court relied on the same two factors and found that the restrictive covenant runs with the land because the Declaration expressly provides that: (a) "The Declaration ***runs with the title to all property*** in Harbison and establishes a common set of rights and obligations for all property owners...;" and (b) "[E]ach Owner, jointly and severally, for himself, his heirs, distributees, legal representatives, successors, and assigns...hereby covenants and agrees [to pay Association Assessments...]" *Harbison Community Ass'n, Inc.* 459 S.E.2d at 862, 319 S.C. 99 at 103). That is, the language expressly

states that the covenants run with the land, and the use was expressly restricted for the benefit of future owners.

In its Initial Brief, MAC Coastal argues that the "use of language indicating a covenant shall bind the 'heirs and assigns' of a property owner is evidence of such intent," and that the "court properly concluded that the grantor intended the covenants to run with the land." However, MAC Coastal points to **absolutely no evidence in the record of any such intent by the Boyle Trustees**, because there is none. MAC Coastal does not cite to any deed or any other document which might support its contention. The best evidence MAC Coastal has is the opinion testimony of Jimmy Moore which it quotes on page 13 of the Initial Brief, but who also does not refer or cite to any specific language in a deed or other evidence that the Boyle Trustees intended the Indenture Deed Restrictions to run with the land.

On the contrary, the 1953 deeds from the Boyle Trustees to Kate H. Wallace express their intention to ***not*** create covenants which run with the land. Both the April 2, 1953 deed and the October 27, 1953 deed from the Boyle Trustees to Kate H. Wallace provide, in relevant part:

> THIS CONVEYANCE IS MADE SUBJECT TO THE FOLLOWING CONDITIONS, COVENANTS AND RESTRICTIONS, WHICH SHALL BE BINDING ON THE GRANTEE, her HEIRS, EXECUTORS, ADMINISTRATORS AND ASSIGNS.

Both deeds include the following additional provision:

> IT IS UNDERSTOOD AND AGREED that these covenants, conditions and restrictions are made ***solely for the benefit of the grantors***, who may release or modify same in writing at any time and, in the event of violation of any of said covenants, conditions, or restrictions by grantee, her heirs or assigns, ***the grantors*** shall have the right of abatement and the right to enforce compliance by injunction or any other appropriate legal or equitable action.

Plf. Tr. Ex. 4 at 2, 5 at 2 (R. p. 296, p. 299) [emphasis added]. MAC Coastal argues in its Initial Brief (and in various pleadings in the record) that the words "her heirs" in the first part indicates

the restrictions run with the land. What is expressed in the deeds, however, is not that the restrictions can be enforced by, or were created for the benefit of, "her heirs or assigns," but that they are ***binding upon*** her heirs or assigns, and is therefore ***not*** evidence that they run with the land.

The quoted language from the 1953 deeds is also contrary to the factors relied on in *In re T 2 Green, LLC* and in *Harbison*. Unlike in those cases, the Indenture Deeds contain no statement that the Indenture Deed Restrictions run with the land. Rather than indicating that the Indenture Deed Restrictions are for the benefit of all future owners, the Boyle Trustees expressly state that the restrictions are *solely for the benefit of the grantors*. This language refutes any assertion that the covenants were intended by the Boyle Trustees to run with the land and, at the very least, creates a doubt which is to be "resolved in favor of the free use of property." *Buffington v. T.O.E. Enterprises*, 383 S.C. 388, 392, 680 S.E.2d 289, 291 (S.C. 2009) (citing *Hardy v. Aiken*, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (S.C. 2006)). "[W]ords cannot be read into a deed to impart an intent unexpressed when the deed was recorded." *Edgewater on Broad Creek Owners Ass'n, Inc. v. Ephesian Ventures, LLC*, 430 S.C. 400, 409, 845 S.E.2d 211, 216 (Ct. App. 2020) (quoting *Pee Dee Stores,* 831 S.C. at 241, 672 S.E.2d at 802). In other words, the trial court erred by finding an intent to benefit anyone than the grantors.

b. The Trustees Did Not Intend to Create a Common Scheme.

The Supreme Court of South Carolina has held that the intent of the grantor is also pivotal in the determination of whether an enforceable restrictive covenant exists in the context of a common scheme. "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.'" *Windham v. Riddle*, 381 S.C. 192, 201, 672 S.E.2d 578, 582 (2009) (citing *Wayburn v. Smith*, 270 S.C. 38, 41-42, 239 S.E.2d 890, 892 (1977)). The Court in *Edwards* held that "the court will have

recourse to every aid or canon of construction to ascertain the intention of the parties." ***Id.*** (citing 26 C.J.S., Deeds, § 163); see also *Charping,* 296 S.C. at 312, 372 S.E.2d at 120.

In particular, where an intent to create a common scheme can be ascertained, such restriction on the use of property must be created in express terms or by plain and unmistakable implication. *Edwards,* 228 S.C. at 519, 90 S.E.2d at 910 (citing 14 A.J., 1955 Cum.Sup. Sec. 196; *Starmount Co. v. Greensboro Memorial Park*, 233 N.C. 613, 65 S.E.2d 134, 25 A.L.R.2d 898 (1951)). In the absence of an express intent, the Court must determine whether or not a grantor intended, **by plain and unmistakable implication**, to create a common scheme, and the burden of proof is on the subsequent grantee to show the grantor's intention to create a common scheme. *Charping,* 296 S.C. at 314, 372 S.E.2d at 121. In any event, "[c]ovenants, expressed or implied, restricting the free use of land are not favored and must be strictly construed," and "[a]ll doubts regarding the creation of an implied reciprocal negative easement must be resolved in favor of the freedom of land from restriction." *Gambrell*, 312 S.C. at 357-358, 440 S.E.2d at 395 (citing *Bomar,* 270 S.C. at 676, 244 S.E.2d at 308).

Essential to the determination of whether intent by the grantor arises by plain and unmistakable implication is the language of the deed itself. "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." *Windham,* 672 S.E.2d at 583, 381 S.C. at 192 (citations omitted). In addition, "[i]n determining whether reciprocal negative easements have been created, resort should be had not only to the language of the deeds, but 'the circumstances surrounding the origin of covenants should also be considered.'" *Bomar*, 270 S.C. at 680, 244 S.E.2d at 310 (citing *Nance v. Waldrop*, 258 S.C. 69, 72, 187 S.E.2d 226, 228 (1972); accord, *Arrants v. Rankin*, 268 S.C. 567, 571, 235 S.E.2d 135, 136 (1977)).

In looking to the language of the deed itself, where a deed expressly limits the benefit of a restrictive covenant to the grantor and grantee in the deed, the Court in *Heffner v. Litchfield Golf Co.*, 258 S.C. 447, 189 S.E.2d 3 (1972), held that no enforceable common scheme is created among the subsequent grantees, and a remote grantee does not have standing to enforce such restrictions.

In *Heffner*, the deed at issue contained certain restrictions along with the following provision:

> It is understood and agreed that these covenants, conditions and restrictions are made solely for the benefit of the Grantor and Grantee herein and may be changed at any time by mutual consent in writing of the parties hereto, their heirs, successors or assigns.

Id. at 449, 189 S.E.2d at 4. The Supreme Court held that the suit brought by the remote grantee to enforce the deed restrictions "must fail unless it is supported by the doctrine of reciprocal negative easements by implication," *Id.* at 450, 189 S.E.2d at 4. The Court then explained the doctrine of reciprocal negative easements by implication as follows:

> Where a common grantor opens a tract of land to be sold in lots and blocks, and before any lots are sold inaugurates a general scheme of improvement, and thereafter sells each lot subject to such scheme of improvement, mutuality of covenant and consideration exists among the various purchasers of the lots, and they each have an interest in the negative equitable easement thus created.

Id. at 451, 189 S.E.2d at 5 (citing *Stanton v. Gulf Oil Corporation*, 232 S.C. 148, 152, 101 S.E.2d 250, 251-252 (1957). This holding is consistent with the rule set out in *Bomar*, 244 S.E.2d at 310, 244 S.E.2d at 679: "Where they arise by implication, the restrictions are said to create a reciprocal negative easement." (citing 20 Am.Jur.2d Covenants, Conditions and Restrictions, § 173 (1965)).

Of key importance, however, the *Heffner* Court held:

> Mutuality of covenant and consideration, which are essential to the existence of a general scheme of development enforceable, Inter se, by the purchasers of lots in a subdivision, ***may be implied only when***

> ***the common grantor manifests his intention to subject the parcels conveyed to common restrictions for the benefit of all grantees***. By the express terms of the twentieth provision, uniformly included in the Litchfield deeds, ***the benefit of the restrictions in each is limited to the parties thereto***, who reserve the right to modify or abrogate by mutual assent. ***This directly precludes an implication that the grantor intended to create restrictions for the benefit of all purchasers in the subdivision. By near unanimous authority, no enforceable general scheme of development is inferable in the face of a provision of this tenor.***

Id. at 451, 189 S.E.2d at 5 (emphasis added). The rule articulated here by the Court is that no implied intent exists and no negative reciprocal easements arise where the grantor has expressly reserved the benefit of the deed restrictions to itself.

In the present appeal, the 1953 deeds to Kate H. Wallace contain the following provision, as quoted above:

> IT IS UNDERSTOOD AND AGREED that these covenants, conditions and restrictions are made ***solely for the benefit of the grantors***, who may release or modify same in writing at any time and, in the event of violation of any of said covenants, conditions, or restrictions by grantee, her heirs or assigns, ***the grantors*** shall have the right of abatement and the right to enforce compliance by injunction or any other appropriate legal or equitable action.

Plf. Tr. Ex. 4 at 2, 5 at 2 (R. p. 296, p. 300) [emphasis added]. This deed from the Boyle Trust uses nearly identical language as the *Heffner* deed, *supra*. As a result, as in *Heffner*, it is clear that the Boyle Trustees did not intend to subject the parcel to common restrictions for the benefit of all grantees. The Trustees expressly limited the benefit of the deed restrictions therein and reserved the enforceability thereof solely to themselves.

MAC Coastal argues that somehow the rule in *Heffner* should not apply to the present appeal because the facts of that case are different. MAC Coastal is correct in pointing out that, in *Heffner*, the common grantor also happened to stand in the shoes of a subsequent grantee, however this is irrelevant to the Court's analysis. The Court's analysis is simple – to create a common

scheme, a common grantor must intend for the covenant to benefit all future grantees, and where the grantor reserves the benefit to itself (or itself and another party), "[t]his directly precludes an implication that the grantor intended to create restrictions for the benefit of all purchasers in the subdivision." *Id*. If Heffner is factually different, it is because this case has an even smaller class of benefitted parties – the grantors only.

MAC Coastal continues, arguing that the present appeal is similar to a situation where a developer subdivides property with common restrictions, which it reserves the right to modify, and then conveys all the property. In the present appeal, there is no uniformity or consistency in the number of restrictions in the different deeds, which confirms a lack of intention by the Boyle Trustees to create a common scheme. Nevertheless, MAC Coastal contends that, in such a situation, the grantees should be *presumed* to have enforcement rights, citing a New York case, *Richmond v. Pennscott Builders, Inc*., 43 Misc.2d 602, 251 N.Y.S.2d 845 (Sup. Ct. Queens Cnty. 1964).

What MAC Coastal fails to point out, however, is that in the *Richmond* case, the covenants at issue *expressly provided* that the restrictions run with the land:

> And the party of the second part for its heirs and assigns does hereby covenant to and with the party of the first part [Kew Gardens Corporation] that neither the party of the second part nor its heirs or assigns shall or will without the consent by written instrument of the party of the first part at any time hereafter erect or permit upon any part of the land conveyed by the present indenture any slaughter house, [etc.]...and further that the present covenants on the part of the party of the second part ***shall run with the land intended to be affected hereby and may be enforced by action injunction or otherwise.***

Id. [Emphasis added]. The Court's analysis in *Richmond* mirrors the analysis in the cases where the deed expressly states the restrictions run with the land. Language that *expressly provides* that the covenants run with the land is evidence of a common grantor's intent that they do so. In the present appeal, the Indenture Deeds contain no such language, and rather than indicating that the

Indenture Deed Restrictions are for the benefit of all future owners, the Boyle Trustees expressly state that they are *solely for the benefit of the grantors*. The *Richmond* case, therefore, does not support MAC Coastal's position, and as stated above, this language refutes any assertion that the covenants were intended by the Boyle Trustees to run with the land.

i. The Trust Deeds Themselves Show the Trustees' Intent not to Create a Common Scheme.

In its analysis, the Trial Court incorrectly relies on the termination of the Trust as leaving the door open for the existence of a common scheme of development. The Trial Court held:

> If the Trustees had still owned Shoestring's lot and decided to subdivide the lot, they could have done so over the objections of MAC. The Court agrees with this point but it does not alter the determination that the Trust is defunct and MAC cannot enforce the Covenants as a Trustee. The now extinguished power of the Trust to make changes is not fatal to the existence of a common plan or scheme of development.

Final Order at 11, ¶55 (R. p. 11, ¶55). The extinguished power of the Trust to make changes, such as subdividing property it owns, may or may not be fatal to the existence of a common plan; however, what *is certainly* fatal to the existence of a common plan or scheme of development is that the Trustees *expressly* reserved the benefit and enforceability of the deed restrictions to themselves. According to the *Heffner* Court, "no enforceable general scheme of development is inferable in the face of a provision of this tenor." ***Id.***

The Trial Court's reliance on *McLeod v. Baptiste*, 315 S.C. 246, 433 S.E.2d 834 (1993) is similarly misplaced, when it held that:

> the remedy of mutual reciprocal negative easements is equitable and was created to protect the expectation and reliance interests of purchasers in a subdivision or common plan. Therefore, the focus should be on the equitable rights and remedies of the purchasers and not a developer (or in this case trustees who conveyed away all property interest.)

Final Order at 11-12, ¶56 (R. pp. 11-12, ¶56). This conclusion misstates the holding of *McLeod* and contradicts the holding of *Heffner*. The issue in *McLeod v. Baptiste*, 315 S.C. 246, 433 S.E.2d 834, was whether "respondent (trustee), the original grantor of a restrictive covenant, has standing to enforce that covenant against a remote grantee when the trust no longer owns any real property which would be benefitted by its enforcement." *Id*. at 246-247, 433 S.E.2d at 834. The *McLeod* Court noted that "a person seeking to enforce a covenant must be benefitted by that act," and that "the trustee lacked standing to enforce this covenant against appellants since the trust no longer owns any real property which would benefit from the covenant's enforcement." *Id*. The only relevance of the *McLeod* decision in the present appeal is that even the original Trustees would lack standing to enforce the Indenture Deed Restrictions because the Trust no longer owns any real property which would be benefitted by their enforcement. Nowhere in the *McLeod* decision does the Court address the theory of reciprocal negative easements or the expectations of a remote grantee, and the proposition that MAC Coastal should have such a right, simply because it hopes to, is completely unfounded. The Court in *Edwards* makes clear that it is the intent of the *grantor* that is the controlling factor, and in accordance with the *Heffner* decision, no intent to create a common scheme can be found where the grantor clearly and expressly reserves the benefit of the deed restrictions to itself.

ii. The Circumstances Surrounding the Creation of the Indenture Deed Restrictions Corroborate the Trustees' Intent not to Create a Common Scheme.

There is no evidence in the record that would show an intent by the Trustees to create a common scheme. To the contrary, the testimony of Kathryn Salley and Tom Boyle (a Trustee) both agree that the Trustees were the sole enforcers of the covenants, conditions and restrictions. In transcript testimony admitted by the Trial Court, Kathryn Salley testified that the Boyle Trust, and no one else, had the power to modify and to enforce:

Q. Now, you don't believe that Ms. Boyle has a right to come in and change your lot lines, do you, on your property?

A. No. She – no I do not believe she has a right to come change my lot lines, but if I want to change my lot lines myself, I do feel like I have to ask her.

Q. All right. So if you want to change it you think you have to get permission of whoever has the right to enforce restrictive covenants?

A. Well, it so happens it was the Boyle Trust.

Q. That was Mr. Hinds' opinion at that time, but --

A. Well, I mean, that's the only way we got them changed.

Q. Did you go to the, for example, Litchfield Beach Company or the North Litchfield Beach Company and ask their permission?

A. No. We were told that we had to have the Boyles permission.

Q. Okay. But you didn't seek the permission of anybody else?

A. No.

Def.'s Tr. Ex. 37 at 19:2-23 (R. p. 677, lines 2-23). Later, Mrs. Salley again testified that the Boyle Trust was the sole source of permission for subdivision:

Q. And did Mr. Hinds attempt to record the plat?

A. It's my -- let me just explain to you exactly what I remember because I remember that he called and said that I could not -- that he could not get the plats recorded at the courthouse as such unless I had the permission of the Boyles.

Q. Okay. As a result of what Mr. Hinds told you, okay, what did he have -- what did he do for you?

A. Well, at that point, I called Tom Boyle and he said to talk to Gene Pruet. And Gene had the Trustees to sign an agreement that I could do that.

Def.'s Tr. Ex. 37 at 32:13-24 (R. p. 678, lines 13-24). The record includes evidence that other property owners sought and obtained consents or waivers of these restrictive covenants from the Boyle Trustees. **Def.'s Tr. Ex. 2-3, 14-17 (R. pp. 607-612, 613-617, 641-645, 646-651, 652-653, 654-657)**.

Tom Boyle's testimony confirms the "grantors" referenced in the reservation language were the Trustees:

> Q. … Would you publish paragraph one [of the deed restrictions]?
>
> A. "This lot shall be restricted to residential purposes only and shall not be subdivided or reduced in size by the grantee, their heirs or assigns, without the written consent of the grantors, their successors and assigns."
>
> Q. And you and Bill Boyle were the grantors in this deed?
>
> A. Yes.

Def.'s Tr. Ex. 36 at 16:2-10 (R. p. 675, lines 2-10). Mr. Boyle testified more specifically that the rights in the deed restrictions were reserved solely to the Trustees:

> Q. … Now, it provides – and let me read to you. I know it's awful. But after restriction No. 10 it is provided, "It is understood and agreed that these covenants, conditions and restrictions are made solely for the benefit of the grantors" – that's the Trust?
>
> A. Yes.
>
> Q. -- "who may release or modify same in writing at any time and, in the event of violation of any of said covenants, conditions and restrictions, their heirs or assigns have the right of abatement and the right to enforce compliance by injunction or other appropriate legal or equitable action." **Was that right reserved solely to the Trustees?**
>
> **A. Yes.**
>
> Q. All right, sir.
>
> A. That's the purpose of it.

Def.'s Tr. Ex. 36 at 19:8-25 (R. p. 676, lines 8-25) (emphasis added). In summary, the Trustees intended themselves, ***and no one else***, to be the sole beneficiaries and enforcers of the restrictions. MAC Coastal's predecessor in title, Kathryn Salley, considered the Trustees to be the sole enforcers. The circumstances surrounding the origin of the covenants, as considered in light of *Bomar*, as outlined above and including that the Trustees used many different forms of deeds and not a uniform one, indicate no intent by the Trustees to create a common scheme. Of key

importance, because the reservation language does not mention other owners or future purchasers or heirs or assigns, there can be no implied right of enforcement in favor of MAC Coastal under *Heffner.* As the Court held in *Gambrell*, 312 S.C. at 358, 440 S.E.2d at 395, "[a]ll doubts regarding the creation of an implied reciprocal negative easement must be resolved in favor of the freedom of land from restriction."

II. The covenants are not enforceable by virtue of a grant to MAC Coastal from the successor to North Litchfield Beach, Inc. and Kathryn Salley because said grant conveyed no such rights of enforcement.

The September 1, 2020 assignment from Litchfield Crossing Development Co., LLC to MAC Coastal conveyed no right of enforcement. North Litchfield Beach, Inc., and its successors and grantees, had no right to enforce the Sand Dunes Agreement against grantees of the Boyle Trustees generally due to a lack of privity between the parties. The Sand Dunes Agreement in the Trust Deed is a personal covenant between the Boyle Trustees and North Litchfield Beach, Inc. under which the Boyle Trustees may enforce the building restriction as against properties it owns and under which North Litchfield Beach, Inc. may enforce the building restriction as against properties it owns. Nowhere in the record is there an assignment of the Boyle Trustees' enforcement rights to North Litchfield Beach, Inc. North Litchfield Beach, Inc., and its successors and grantees, had no right to enforce the Sand Dunes Agreement against Shoestring Retreat specifically because the Shoestring Property was expressly excluded from the Trust Deed. The September 1, 2020 assignment from Litchfield Crossing Development Co., LLC to MAC Coastal conveyed no right of enforcement because it did not exist.

Additionally, there is no evidence in the record that, at the time of the September 1, 2020 assignment, Litchfield Crossing owned any property affected by the activities of Shoestring Retreat such that it had no right to enforce any deed restriction or the Sand Dunes Agreement. See

McLeod v. Baptiste, 315 S.C. 246, 247, 433 S.E.2d 834, 835 (1993) ("[A] grantor lacks standing to enforce a covenant against a remote grantee when the grantor no longer owns real property which would benefit from the enforcement of that restrictive covenant.").

At best, any right of enforcement under the Sand Dunes Agreement by North Litchfield Beach, Inc. arose on June 1, 1959. However, North Litchfield Beach, Inc. and its successors never once raised or enforced the Sand Dunes Agreement for more than 61 years. For that reason, the assignment to MAC Coastal after the onset of the current litigation, fails, as does the purported assignment of enforcement rights from Kathryn Wallace Salley, due to waiver, acquiescence, abandonment, and laches. Because there has been an undue, unreasonable and unexplained lapse of time in enforcement, the opportunity to enforce and the neglect thereof;[2] has prejudiced Shoestring Retreat.[3]

CONCLUSION

The law in South Carolina is clear that the intent of the grantor defines the existence of a deed restriction and a common scheme. The evidence in the record shows absolutely no intent, express or implied, by the Trustees to create restrictions that run with the land or to create a common scheme that would give rise to negative reciprocal easements enforceable by MAC Coastal. The record also shows that the covenants are not enforceable by a grant to MAC Coastal from the successor to North Litchfield Beach, Inc. and Kathryn Salley because said grants conveyed no such rights of enforcement. Finally, the record shows that the Trustees put the reference to the Sand Dune Agreement in the Sand Dune Deed, and that Kathryn Wallace Salley included the reference to the Sand Dunes Agreement in the Sally-Haun Deed, not as an additional,

[2] *Strickland v. Strickland*, 375 S.C. 76 (S.C. 2007); *Ramantanin v. Poulos*, 240 S.C. 13 (S.C. 1962); *Babb v. Sullivan*, 43 S.C. 436 (S.C. 1895).
[3] *Arceneaux v. Arrington*, 284 S.C. 500 (S.C. App. 1984).

independently enforceable deed restriction, but as notice to grantees of the agreement among the Trustees and North Litchfield Beach, Inc. The Trial Court erred in concluding that the Trustees created a common scheme and that the reference to the Sand Dunes Agreement in the Salley-Haun Deed created a new deed restriction. Shoestring Retreat prays that this Court REVERSE the Trial Court's decision for the reasons set forth herein.

s/ Bruce Wallace
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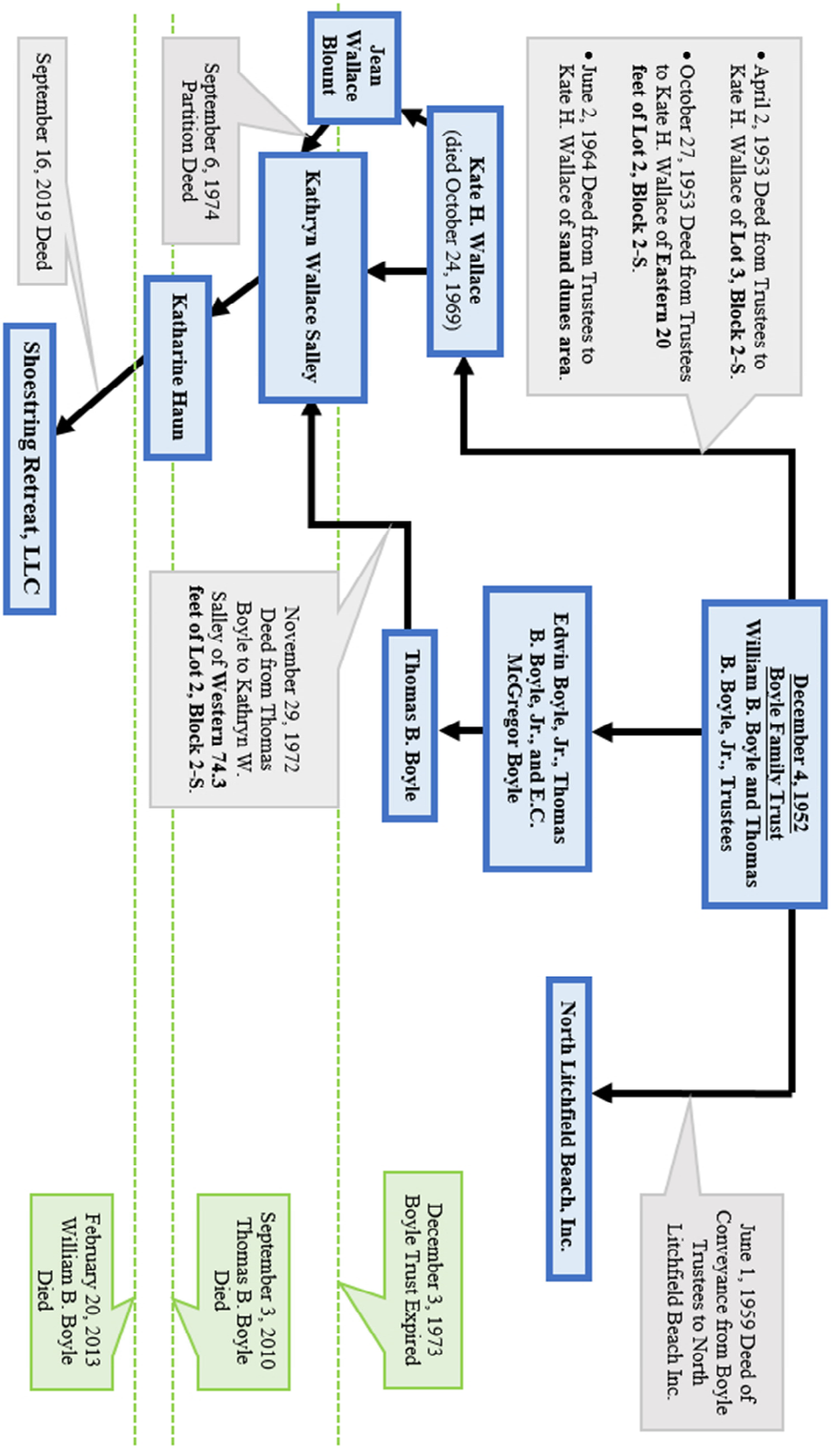
I, Bruce Wallace, certify to the best of my knowledge, this brief complies with SCACR 211(b).
s/ Bruce Wallace
R. Bruce Wallace, SC Bar No. 11653

December 6, 2022

Fig. 1


December 4, 1952
Boyle Family Trust
William B. Boyle and Thomas B. Boyle, Jr., Trustees
• April 2, 1953 Deed from Trustees to Kate H. Wallace of Lot 3, Block 2-S.
• October 27, 1953 Deed from Trustees to Kate H. Wallace of Eastern 20 feet of Lot 2, Block 2-S.
• June 2, 1964 Deed from Trustees to Kate H. Wallace of sand dunes area.
Kate H. Wallace (died October 24, 1969)
Jean Wallace Blount
Kathryn Wallace Salley
Katharine Haun
Shoestring Retreat, LLC
September 6, 1974 Partition Deed
September 16, 2019 Deed
Edwin Boyle, Jr., Thomas B. Boyle, Jr., and E.C. McGregor Boyle
Thomas B. Boyle
November 29, 1972 Deed from Thomas Boyle to Kathryn W. Salley of Western 74.3 feet of Lot 2, Block 2-S.
North Litchfield Beach, Inc.
June 1, 1959 Deed of Conveyance from Boyle Trustees to North Litchfield Beach Inc.
December 3, 1973 Boyle Trust Expired
September 3, 2010 Thomas B. Boyle Died
February 20, 2013 William B. Boyle Died

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Joe M. Crosby, Master-in-Equity

Case No. 2020-CP-22-0075

Appellate Case No. 2022-000545

MAC Coastal Properties, Inc., ... Appellant-Respondent,

v.

Shoestring Retreat, LLC, ... Respondent-Appellant.

CERTIFICATE OF SERVICE

I certify that the foregoing **RESPONDENT-APPELLANT'S BRIEF IN RESPONSE TO APPELLANT-RESPONDENT'S INITIAL BRIEF** was served on Appellant-Respondent on December 6, 2022 by emailing a copy of the same to the following counsel of record using the primary email address listed in the Attorney Information System:

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