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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

MIKELL R. SCARBOROUGH, Master in Equity

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Appellate Case No. 2019-001289

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Raven’s Run Homeowners Association, Inc., ..... Appellant/Respondent,  
v.

Crown Pointe Association, Inc., Lois K. Novak as Trustee of the Lois K. Novak Living Trust dated 10/14/2013; Laurie T. Herron and Mark D. Herron; James B. Kubu and Melissa F. Kubu; Leila June Johnson; Danny Ta and Anita McCauley; Robert E. Luby, Jr., and Barbara Luby; Joshua D. Coonce; Lucius Roy Junevicius; Katherine Kinlaw; Thomas K. Kuyk and Melissa Ward; Roland Franklin Wooten, III, and Teresa Key Wooten; Michael P. Horvath; Timothy E. Moylan and Karen G. Moylan; Carl A. Counasse and Maureen Counasse; David A. Frielinghaus and Holly C. Frielinghaus; Christopher S. Finley and Holly M. Finley; Shirley D. Spigner a/k/a Shirley Deanna Spigner, Deirdre C. Knight; Robert Shane Johnson; Eric R. Sigman; Lamar R. Graves, Jr., and Terry W. Graves; Mary Elizabeth Gladden; Philip Wallace and Naomi Grad; Thomas Edwin Davis and Luis Miguel Gonzalez Melchor; John R. Funkhouser and Jennifer L. Funkhouser; Gregory S. Cooper and Jane B. Cooper; Frank C. Jones, Jr., and Elise Ubele Jones; William P. Topping and Kris B. Topping; LaRhonda S. Ptichko; Kenneth L. Tully and Anna J. Tully; Defendants,

Of Whom James B. and Melissa F. Kubu, and  
Leila June Johnson are the ..... Respondents

And Katherine Kinlaw is the ..... Respondent/Appellant.

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**FINAL OPENING BRIEF OF APPELLANT/RESPONDENT**

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## STATEMENT OF THE ISSUES ON APPEAL

1. Did the master-in-equity err in granting summary judgment to Respondents on the grounds that a plat dedicating a drainage easement conveyed fee simple title in the buffer strip to Crown Pointe Association, Inc.?
2. Is Appellant-Respondent Raven's Run Homeowners Association, Inc., entitled to a declaratory judgment that it has fee simple title to the buffer strip?

## STATEMENT OF THE CASE

This appeal arises from a dispute over ownership of land between two Low Country neighborhoods.

### I. FACTS

The Raven's Run Subdivision is separated from the Crown Point Subdivision by a small lake (the "Raven's Run lake"), which is undisputedly owned by Appellant/Respondent Raven's Run Homeowners Association, Inc. ("Raven's Run"). Respondents Leila June Johnson and James B. and Melissa F. Kubu, and Respondent/Appellant Katherine Kinlaw (collectively, "Respondents"), are the owners of three lots in Crown Point Subdivision (Lots 39E, 40E, and 45E), each of which is adjacent to the Raven's Run lake. The parties' dispute concerns ownership of a 10- to 12-foot-wide buffer strip of dry land lying between Respondents' rear lot lines and the waterline of the Raven's Run lake. The buffer strip is intended to provide a screen of trees and greenery that enhances the value of the lots in Raven's Run by creating a feeling that its lots and houses are located in a secluded woodland. (R. p. 296 (MSJ Ex. 10).)<sup>1</sup>

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<sup>1</sup> The Charleston County Zoning Ordinance defines the term "Landscape Buffer" as, "A vegetated area of varying width (ranging from five to 100 feet) designed exclusively to provide screening between adjoining properties, rights-of-way, parking lots and structures." Charleston Cty. Zoning & Land Dev. Regs. art. 12.1. Similarly, the Ordinance defines the term "Wetland Buffer" as, "An area of varying width (ranging from 15 to 35 feet), providing a visual, spatial, and ecological transition zone between the OCRM Critical Line and land development, as described in Article 9.7. The wetland buffer is designed to protect water quality and wildlife habitat." *Id.*

Raven's Run's ownership of the buffer strip and the Raven's Run lake is established through a chain of title that begins with a deed from Yaupon Plantation Investors to RAC Enterprises, Inc., conveying approximately 117 acres of land south of Rifle Range Road in Mt. Pleasant. (R. p. 72 (Deed T130/205<sup>2</sup>, MSJ Ex. 1(I).) The parcel is rectangular in shape and oriented at an angle going from northwest to southeast. RAC Enterprises developed three subdivisions on this land. East Crossing Subdivision, containing 65 lots, is located in the northwest corner of the parcel. (R. p. 346 (Plat BK-3<sup>3</sup>, Recons. Ex. 3).) Crown Pointe Subdivision, containing 79 lots, is located to the southeast of East Crossing Subdivision and is separated from it by a "green area" of trees and greenery. (R. p. 380 (Plat BK-1, Attachment F to Affidavit of E.M. Seabrook, III)<sup>4</sup>; R. p. 345 (Plat BK-2, Recons. Ex. 3); R. p. 340 (Plat BP-161, MSJ Ex. 4(B)).) Raven's Run Subdivision, the largest and oldest of the three, lies to the southeast of Crown Pointe Subdivision and is separated from it by the Raven's Run lake. (R. p. 265 (MSJ Ex. 1(A)).)

**A. Conveyance of Raven's Run Lake and the Buffer Strip**

RAC Enterprises began developing the Raven's Run Subdivision in the mid-1980s. In 1985, in connection with its development of the first portion of the subdivision, RAC

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<sup>2</sup> "Deed T130/205" refers to the deed recorded in Deed Book T130, at page 205.

<sup>3</sup> "Plat BK-3" refers to the plat recorded in Plat Book BK, at page 3.

<sup>4</sup> Plat BK-1 was presented to the master and discussed by the parties during the summary judgment hearing. (R. pp. 142-146, 151, 182 (MSJ Tr. at 14-18, 23, 54); *see also* R. p. 254 (Recons. Tr. at 56).)

Enterprises conveyed certain land to Raven's Run (the "1985 Deed"). (R. p. 268 (Deed E150/875, MSJ Ex. 1(F)).) The 1985 Deed conveyed all "parcels or strips of land [and] bodies of water ... below described," including all "lakes, fingers, coves and other bodies of water" as shown on Plat BG-52, 53, and 54. (R. p. 268 (Deed E150/875, at 1).) The 1985 Deed also conveyed "two irregular strips of land situate to the east and west of the intersection of Omni Boulevard and Rifle Range Road" lying "[along] the southern right-of-way of Rifle Range Road." (*Id.*) The 1985 Deed states that the parcel being conveyed is designated as tax map number 561-01-00-093. (*Id.*) Charleston County's GIS system shows that the parcel designated as tax map number 561-01-00-093 consists of the Raven's Run lake and the buffer strip. (R. p. 265 (MSJ Ex. 1(A)).) There is no dispute that Raven's Run has paid the property taxes on this parcel since 1985. (R. p. 351 (Recons. Ex. 7).)

In 1987, RAC Enterprises made another conveyance to Raven's Run in connection with further development of the Raven's Run Subdivision (the "1987 Deed"). (R. p. 118 (Deed R163/134, MSJ Ex. 1(C)).) Like the 1985 Deed, the 1987 Deed conveyed certain property, including "all lakes and bodies of water." (R. p. 118 (Deed R163/134, at 1).) The 1987 Deed incorporates Plat BL-57, which shows the part of Raven's Run lake that lies between Raven's Run Subdivision and lots 37E through 66E of the Crown Pointe Subdivision. (R. p. 120 (Plat BL-57, MSJ Ex. 1(E)).) The 1987 Deed also notes that the property being conveyed is designated as tax map number 561-01-00-093, *i.e.*, the lake and the buffer strip. (R. p. 118 (Deed R163/134, at 1).)

**B. Crown Pointe Restrictive Covenants**

On August 21, 1986, RAC Enterprises recorded plats for the East Crossing and Crown Pointe Subdivisions. (R. pp. 380-383 (Plat BK-1 to -3, Attachment F to Seabrook Aff.)) The following week, RAC Enterprises recorded restrictive covenants for the Crown Pointe Subdivision. (R. pp. 38-47 (Deed O158/414, MSJ Ex. 5).)

The restrictive covenants address owners' rights with respect to "lakes and bodies of water" in the Crown Pointe and Raven's Run Subdivisions, clearly distinguishing between them:

The lakes, canals or other bodies of water *in Crown Pointe Subdivision* and/or adjacent to any residential lot are designed solely for the purpose of drainage. ...

No owner shall have access to or use of said bodies of water, except for view. Prohibitions shall specifically include fishing, boating and/or swimming. ...

No use may be made by any owner, family member or invitee *of lake systems of Raven's Run Subdivision which abut Lots 37E through 66E of Crown Pointe*; this total prohibition of use shall specifically include boating, swimming and fishing. *The portion of land between the rear lot lines of such lots and the water line of the Raven's Run lakes is owned by the Raven's Run Homeowners Association, Inc.*

(R. pp. 43-44 (Deed O158/414, at 6-7) (emphasis added).)

**C. Conveyance of the East Crossing/Crown Pointe Lake and Green Area**

The master-in-equity rested his decision, in part, on conveyances specific to the East Crossing and Crown Pointe Subdivisions. There is another small lake adjacent to the East Crossing Subdivision and the western side of the Crown Pointe Subdivision, as well

as a “green area” separating those two subdivisions. On December 18, 2001, two quitclaim deeds (the “2001 Quitclaim Deeds”) were executed conveying these areas. In the first quitclaim deed, RAC Enterprises conveyed to East Crossing-Crown Pointe Association, Inc., the following property:

ALL that certain common area, including any “lake” and “green area”, located in East Crossing Subdivision ... as shown on [Plat BK-3] ...

**ALSO**

ALL that certain common area, including any “lake” and “green area”, located in Crown Pointe Subdivision ... as shown on [Plat BK-2] ....

TMS # 561-05-00-145

(R. pp. 84-85 (Deed C392/756, Recons. Ex. 4); *see* R. p. 346 (Plat BK-3); R. p. 345 (Plat BK-2).)

On the same day, East Crossing-Crown Pointe Association, Inc. executed a quitclaim deed conveying a portion of the property conveyed in the first quitclaim deed to Crown Pointe Association, Inc.:

ALL that certain common area, including any “lake” and “green area”, located in Crown Pointe Subdivision ... as shown on [Plat BK-2] ....

....

TMS # 561-05-00-145 (a portion)

(R. p. 332 (Deed H394/181).)

The Charleston County GIS map shows that parcel number 561-05-00-145 lies entirely to the north and west of Crown Pointe Subdivision and is entirely distinct from

parcel number 561-01-00-093 *i.e.*, the buffer strip owned by Raven's Run. (R. p. 358 (Recons. Ex. 11).)

## II. PROCEDURAL HISTORY

### A. Claims Asserted by Raven's Run

Beginning in 2015, some of the owners of Crown Pointe Lots 37E through 66E began cutting down trees and greenery growing on the buffer strip and started trespassing across it and using the lake for canoeing and fishing. (R. pp. 320-328 (MSJ Ex. 11).) These activities violated Raven's Run's property rights in the buffer strip. Additionally, such conduct is expressly prohibited by the restrictive covenants for the Crown Pointe Subdivision, which impose a "total prohibition" on any use of "lake systems of Raven's Run Subdivision which abut Lots 37E through 66E of Crown Pointe ... includ[ing] boating, swimming, and fishing." The covenants unequivocally declare that the buffer strip "*is owned by the Raven's Run Homeowners Association, Inc.*" (R. p. 44 (emphasis added).) However, the Crown Pointe Association failed to enforce the covenants.

Raven's Run filed suit on January 31, 2017, naming the Crown Pointe Association and the owners of Lots 37E through 66E as defendants. (R. pp. 24-37 (Complaint).) Raven's Run's amended complaint—the operative pleading at the time of summary judgment—sought a declaratory judgment, injunctive relief, and damages for trespass and nuisance. (R. pp. 89-103 (Am. Complaint).) These claims were premised on Raven's

Run's ownership of the buffer strip. In particular, Paragraph 44 of the complaint and the amended complaint alleges that the rear lot lines of Lots 37E through 66E "abut common areas owned by the Plaintiff," *i.e.*, the buffer strip. (R. p. 33; *see also* R. pp. 99-102 (Am. Compl. ¶¶ 51, 56-58, 63, 66, 71-72, 76-77).).

By August 2018, all but three of the lot owners had reached settlements with Raven's Run, leaving as defendants only the Crown Pointe Association and the owners of three lots: James and Melissa Kubu (Lot 39E), Leila June Johnson (Lot 40E), and Katherine Kinlaw (Lot 45E) (collectively, "Respondents"). *Neither* Crown Pointe *nor* any of the Respondents ever claimed *ownership* of the buffer strip. Rather, all of them answered Paragraph 44 by denying the allegations and demanding proof of Raven's Run's ownership of the buffer strip. (R. p. 65 (Johnson Answer); R. p. 63 (Kubu Answer); R. p. 68 (Kinlaw Answer).)

## **B. Summary Judgment Order**

Shortly before the scheduled trial date in August 2018, Raven's Run moved for summary judgment. (R. pp. 114-116 (Raven's Run MSJ).)<sup>5</sup> In moving for summary judgment, Raven's Run contended that its ownership of the buffer strip was established by:

1. Charleston County Parcel I.D. Map for Parcel 561-01-00-093;

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<sup>5</sup> On Raven's Run's motion, the matter was referred to the Honorable Mikell R. Scarborough, master-in-equity for Charleston County. (R. p. 3 (Order of Reference).)

2. Deed recorded in Book R163 at Page 134 transferring all right title and interest in the subject property from RAC Enterprises, Inc., to Raven's Run Homeowner's Association, Inc., as set forth there including all bodies and water;
3. Plat recorded in Plat Book BL at Page 057;
- ...
7. The Covenants and Restrictions for Crowne Point Subdivision recorded in Book O158 at Page 414 and as amended in Book 0159 at Page 492 and Book 1392 at Page 700 as relates to the use of the lakes systems and land at the rear of the Lot lines of the Defendants remaining in this case[.]

(R. p. 115 (Raven's Run MSJ, at 2).) The map, deed, and plat were attached as exhibits to the motion. (R. pp. 117-120 (Exs. 1-3).)

The master heard argument on the summary judgment motions on August 28, 2018. At the beginning of the hearing, the Crown Pointe Association and Raven's Run informed the master that they had reached a settlement, which they memorialized in open court. (R. pp. 132-136 (MSJ Tr. at 4-8).) As part of the settlement, Crown Pointe agreed:

[S]hould [it] be determined ... that [Raven's Run] actually own[s] the land around the lake [*i.e.*, the buffer strip], ... it is agreed that Crown Pointe Association, Inc. will not object to the use by Raven's Run [of access easements] to access their property along the lake for purposes of effecting repairs there.

(R. p. 137 (MSJ Tr. at 5); *see also* R. pp. 354-356 (Recons. Ex. 9).) In light of the settlement with Crown Pointe, the only parties at the time of summary judgment were Raven's Run and the three individual Respondents.

Although Raven's Run's claims only asserted rights based on its ownership of the buffer strip, Respondents' arguments during the summary judgment hearing focused instead on a 60-foot public drainage easement that that lies "20 feet within" each platted lot and "40 feet towards the lakes." (R. p. 345 (Plat BK-2).) At the conclusion of the hearing, the master granted summary judgment to Respondents on the grounds "that Crown Pointe Subdivision has the ownership and use not exclusively with the homeowners of those 60-foot easements outside the parameter essentially of the lots in Crown Pointe Subdivision." (R. p. 193 (MSJ Tr. at 65).)

The master explained his reasoning in an order entered on November 8, 2018. (R. pp. 9-18 (MSJ Order).) The master found that Plat BK-2, recorded in 1986, shows "lakes and drainage easements ... immediately to the east of" Respondents' lots and that "RAC Enterprises, Inc., the common owner of the two subdivisions" dedicated "'the green areas and lakes shown'" on Plat BK-2 "'to the use of the East Crossing Subdivision and the Crown Pointe Subdivision Homeowners Association forever.'" (R. p. 10-11 (MSJ Order, at 2-3 (quoting plat BK-2)).)

The master recognized that Raven's Run claimed title to the buffer strip adjacent to Respondents' rear lot lines under the 1987 Deed. (R. p. 11 (MSJ Order, at 3).) However, the master found that plat BL-57 "shows no land in Crown Pointe Subdivision, and neither the deed nor the plat references Crown Pointe Subdivision, its lands, lakes, or easements," and therefore "neither implicitly nor explicitly convey[s] the disputed

property.” (R. p. 11 (MSJ Order, at 3).)

The master ruled that Plat BK-2, which shows the property conveyed in the 2001 Quitclaim Deeds, was dispositive as to ownership of the buffer strip:

RAC dedicated the lakes and green areas on Plat BK-2 recorded August 21, 1986 to Crown Pointe. This dedication predates the conveyance [in] the deed into Raven’s Run relied on by Raven’s Run. As between the private parties, this dedication is complete when made. *This dedication effectively conveys the portion of Plat BK-2 that shows the 60 foot drainage easement on the lot lines to Crown Pointe.*

(R. p. 16 (MSJ Order at 8 (citation omitted; emphasis added)).) The master further found that the 2001 Quitclaim Deed from RAC Enterprises to East Crossing-Crown Pointe Association, Inc., referencing Plats BK-2 and BK-3, “show[ed] the intent of RAC [Enterprises] to convey everything on the plat pages of BK-2 to Crown Pointe. This undoubtedly includes the portion of the 60 foot easement that extends 40 feet into the lake.” (R. p. 17 (MSJ Order, at 9).) On this basis, the master found “that Crown Pointe has ownership and a non-exclusive right to use this 40-foot wide area as depicted on Plat BK-2, and has a non-exclusive drainage easement of 20 feet.” (*Id.*)

### **C. Order on Reconsideration**

Raven’s Run moved for reconsideration, arguing that the summary judgment order was contradicted by Deed R163/134, Plat B-57, and tax map number 561-01-00-093. (R. p. 127 (Mot. for Recons., at 2).) Raven’s Run also argued that the master had failed to consider the 1985 Deed (Deed E150/875), recorded on December 11, 1985. (R. p. 127 (Mot.

for Recons., at 2).) In the 1985 Deed, RAC Enterprises conveyed to Raven's Run all "pieces, parcels or *strips of land* ... bodies of water," and all "lakes fingers, coves, and other bodies of water," as shown on Plats BG-52, -53, and-54. (R. p. 268 (emphasis added).) The deed references and incorporates tax map number 561-01-00-093. (R. p. 268.)

At the hearing on the motion for reconsideration, Raven's Run argued that RAC Enterprises had conveyed the lake, which is a single continuous body of water, and the buffer strip to Raven's Run by the 1985 Deed in 1985. (R. pp. 211-212 (Recons. Tr. at 13-14); *see also* R. p. 246 (Recons. Tr. at 48 ("Your Honor, it's actually all connected in one body of water. This deed says all lakes[.]").) The conveyance by the 1985 Deed was completed by the 1987 Deed, and Raven's Run's ownership of the entire buffer strip was confirmed by the Crown Pointe restrictive covenants recorded in 1986. Raven's Run also argued that the 2001 Quitclaim Deeds conveyed only the lake and green areas located within the East Crossing and Crown Pointe Subdivisions, not the Raven's Run lake. (R. pp. 212-213 (Recons. Tr. at 14-15).)

The master orally granted reconsideration in part, holding that Raven's Run owned the entire lake as a result of the conveyance in the 1985 deed (*i.e.*, the 1985 Deed). (R. p. 258 (Recons. Tr. at 60).) The master nevertheless denied reconsideration as to ownership of the buffer strip, stating that title to the buffer strip was "in Crown Pointe free and clear of Ravens Run." (R. p. 258 (Recons. Tr. at 60).)

In a written order entered on July 10, 2019, the master ruled that "[b]ased on the

language in the 1985 and 1987 deeds, the accompanying plats, and the Covenants,” the lake is owned by Raven’s Run and that “Crown Pointe residents cannot use the Lake for swimming, boating, and fishing.” (R. p. 22 (Recons. Order, at 4).) However, the master ruled that “the Covenants do allow [Crown Pointe residents] to use the Lake for water views.” (R. p. 22 (Recons. Order, at 4).)<sup>6</sup>

As to the buffer strip, the master ruled:

the land behind these Defendants’ Lots, which was not conveyed by deed either to Crown Pointe Association or the three Defendants, and which is burdened by Crown Pointe’s Restrictive Covenants, is burdened by the nonexclusive drainage easement which was dedicated to the public, *and on that basis is owned by Crown Pointe.*

(R. p. 22 (Recons. Order, at 4) (emphasis added).) However, and inconsistent with this holding, the master also stated that Respondents—*i.e.*, the Kubus, Ms. Johnson, and Ms. Kinlaw, individually—“have fee simple title to their parcels of land all the way to the waterline.” (R. p. 23 (Recons. Order, at 5).)<sup>7</sup>

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<sup>6</sup> This statement appears to rest on a misreading of the restrictive covenants for Crown Pointe. As noted in Part I(B), *supra*, the covenants allow Crown Pointe owners to use “[t]he lakes, canals or other bodies of water *in Crown Pointe Subdivision*” for water views. (R. p. 43 (emphasis added).) The covenants do not allow Crown Pointe owners to use the Raven’s Run lake for water views. (R. p. 44.) Such a right would be inconsistent with the purpose of having trees and greenery growing in the buffer strip, namely, to create a feeling of seclusion for owners of lots in Raven’s Run Subdivision.

<sup>7</sup> In other words, the master held that *both the Crown Point Association and the three individual Respondents* own the buffer strip.

Raven's Run timely filed a notice of appeal. Thereafter, Respondent Katherine Kinlaw filed a notice of cross-appeal.

## SUMMARY OF ARGUMENT

The master's summary judgment order suffers from two fundamental flaws. First, the master erroneously identified the property at issue as the 60-foot drainage easement dedicated on plat BK-2. In fact, the only real property at issue is the 10- to 12-foot buffer strip between Respondents' rear lot lines and the waterline of the Raven's Run lake. Second, although an easement is not an ownership interest in property, the master nevertheless treated the dedication of the drainage easement as a conveyance. On the basis of this error of law, the master wrongly concluded that Crown Pointe acquired title to the property at issue (incorrectly defined by the master as the 60-foot drainage easement) when plat BK-2 was recorded in 1986.

The master's order on reconsideration repeats the errors from the summary judgment order, and adds another error by concluding that Respondents have "fee simple title" all the way to the waterline. This conclusion contradicts the master's holding in the summary judgment order and the reconsideration order, albeit incorrectly, that Crown Pointe owns the buffer strip. Moreover, *no* evidence was presented to support such a finding, and Respondents have *never* claimed ownership of the buffer strip.

The master should have granted summary judgment to Raven's Run because the grantor, RAC Enterprises, clearly intended for Raven's Run to own the buffer strip. In determining the grantor's intent, a deed must be construed as a whole and all parts of it must be given effect. Both of the deeds on which Raven's Run relies reference and

incorporate tax map number 561-01-00-093, a parcel that plainly includes the lake and the buffer strip. At the same time, the 2001 Quitclaim Deeds on which the master relied reference and incorporate tax map number 561-05-00-145. This parcel encompasses the lake adjacent to Crown Pointe Subdivision and East Crossing Subdivision, *not* Raven's Run Subdivision. (R. p. 358 (Recons. Ex. 11).) *No* part of the parcel identified by tax map number 561-05-00-145 is adjacent to Respondents' lots. Therefore, considering the entirety of the relevant deeds, it is clear that title to the buffer strip lies with Raven's Run.

In addition to remanding with instructions to grant summary judgment to Raven's Run, the Court should remand the claims for trespass and nuisance for further proceedings.

## ARGUMENT

### I. STANDARD OF REVIEW

When a case is heard by a master-in-equity who enters a final judgment, this Court's review "is the same as that for review of a case heard by a circuit court without a jury." *Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989). The primary claim alleged by Raven's Run was for a declaratory judgment determining ownership of the buffer strip. "A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Query v. Burgess*, 371 S.C. 407, 410, 639 S.E.2d 455, 456 (Ct. App. 2006). "Where, as here, the main purpose of the complaint concerns the determination of title to real property, it is an action at law." *Id.*

When reviewing the grant of a summary judgment motion, this Court applies the same standard that governs the trial court under Rule 56(c), SCRPC. *See Simmons v. Berkeley Elec. Coop., Inc.*, 419 S.C. 223, 228, 797 S.E.2d 387, 390 (2016). Summary judgment is proper only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.* "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Fleming v. Rose*, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002). "Where cross motions for summary judgment are filed, the parties concede the issue before [the court] should be decided as a matter of law." *Wiegand v. U.S.*

*Auto. Ass'n*, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011).

## **II. THE MASTER-IN-EQUITY ERRED IN GRANTING SUMMARY JUDGMENT TO RESPONDENTS**

In granting summary judgment to Respondents, the master failed to recognize that the property at issue is the buffer strip between Respondents' rear lot lines and the waterline. Instead, the master incorrectly focused on the 60-foot drainage easement, which is totally irrelevant to the parties' dispute. The master further erred in holding that RAC Enterprises' dedication of the drainage easement had the effect of conveying title to the Crown Pointe Association, which never claimed ownership and which had previously settled and was no longer a party to the litigation.

The master repeated these errors on reconsideration and then compounded them by concluding—contrary to the evidence,<sup>8</sup> his own findings, and the parties' arguments—that Respondents *also* own fee simple title to the buffer strip.

### **A. The Property at Issue Is the Buffer Strip, Not the Drainage Easement**

The master erroneously equated the drainage easement and the buffer strip. (R. p. 17 (MSJ Order, at 9) (describing the property at issue as “the portion of land and water depicted as the 60 foot drainage easement that extends 20 feet onto the lot owners property and 40 feet into the lake”).) However, they are not the same. The property at

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<sup>8</sup> As discussed in Part III, the undisputed facts show that Raven's Run owns the buffer strip.

issue is the buffer strip, which is 10- to 12-feet wide and lies between Respondents' rear lot lines and the waterline of the lake.<sup>9</sup> This is confirmed by Raven's Run's amended complaint, which alleges a dispute "as to the location of the rear lot lines for ... Lots 37E through 65E of Crown Pointe Subdivision *as they abut common areas owned by [Raven's Run].*" (R. p. 98 (Am. Compl. ¶ 44 (emphasis added)); *see also* R. pp. 101-102 (Am. Compl. ¶¶ 66, 72) (alleging that "the Crown Pointe Owners all own lots along the property owned by Raven's Run" and that they have "trespass[ed]" on "and have damaged the property *which they do not own*" (emphasis added)).)

Respondents' arguments during the summary judgment hearing further establish that the property at issue is the buffer strip, not the drainage easement. (R. pp. 158-159 (MSJ Tr. at 30-31) ("[T]he back 20 feet of their yard they're in the drainage easement. If there's still dirt beyond that point and they step over it before they get to the water's edge, they're now on somebody else's property."); *see also* R. pp. 138, 156, 164, 176, 180 (MSJ Tr. at 10, 28, 36, 48, 52).)

#### **B. Dedication of a Drainage Easement Is Not a Conveyance of Title**

The master further erred in finding that the dedication of the drainage easement

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<sup>9</sup> The introductory section of the summary judgment order correctly recognizes that "Raven's Run claim[s] ownership of all the land up to the lot lines of the individual lot owners of Crown Pointe, including a strip of land and bodies of water." (R. p. 10 (MSJ Order, at 2).) The master's findings of fact and conclusions of law, however, fail to distinguish between the buffer strip and the drainage easement.

on plat BK-2 “effectively convey[ed] the portion of Plat BK-2 that shows the 60-foot drainage easement ... to Crown Pointe.” (R. p. 16 (MSJ Order, at 8)). Based on this erroneous finding, the master concluded “that Crown Pointe Subdivision has the ownership and use not exclusively with the homeowners of those 60-foot easements outside the parameter essentially of the lots in Crown Pointe Subdivision.” (R. p. 193 (MSJ Tr. at 65).) The master repeated this error in his order on the motion for reconsideration, holding that “the land behind these Defendants’ Lots ... is burdened by the nonexclusive drainage easement which was dedicated to the public, *and on that basis is owned by Crown Pointe.*” (R. p. 22 (Recons. Order, at 4 (emphasis added)).) Thus, the master erroneously reasoned that because the buffer strip is burdened by the easement for drainage of surface water from Crown Pointe, Crown Pointe is the owner of the buffer strip.<sup>10</sup>

The critical fallacy in the master’s reasoning is his failure to recognize that dedication of an easement does *not* convey title to land. “An easement is a right which one person has to *use* the land of another for a specific purpose.” *Steele v. Williams*, 204 S.C. 124, 132, 28 S.E.2d 644, 647 (1944) (emphasis added); *see also* Charleston Cty. Zoning & Land Dev. Regs. art. 12.1. (defining the term “Drainage Easement” as, “The right of

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<sup>10</sup> On this reasoning, Crown Pointe also owns the rear 20 feet of each Respondent’s lot, *i.e.*, the portion burdened by the easement. Of course, this is not correct, but it demonstrates the error in the master’s reasoning.

access of stormwater runoff from the adjacent natural drainage basin into the drainageway within the drainage easement”). An easement “gives *no title* to the land on which the servitude is imposed.” *Morris v. Townsend*, 253 S.C. 628, 635, 172 S.E.2d 819, 822 (1970) (emphasis added). Because dedication of an easement does not convey title to land, RAC Enterprises’ dedication of the drainage easement in Plat BK-2 could not have conveyed title in the buffer strip to Crown Pointe.<sup>11</sup>

**C. Nothing Supports the Master’s Inexplicable Statement that Respondents Own the Buffer Strip**

The master’s order on reconsideration reiterated his prior ruling that Crown Pointe owns the buffer strip but then, inexplicably, concludes that *Respondents* “have fee simple title to the parcels of land that they each own *up to the waterline of the lake,*” *i.e.*, that Respondents own the buffer strip. (R. p. 23 (Recons. Order, at 5).) To begin, this statement is inconsistent with the rest of the order on reconsideration and the summary judgment order, both of which first concluded (albeit erroneously) that Crown Pointe owns the buffer strip.

The master’s statement is also contrary to the evidence. Respondents’ deeds reference certain plats, which are thereby incorporated into the deeds. (R. p. 79 (Plat BP-

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<sup>11</sup> Additionally, Raven’s Run is unaware of any authority for the proposition that a plat can convey title to land under any circumstance.

161 (Ex. C to Kubu Motion to Dismiss)); R. p. 281 (Plat BN-177).<sup>12</sup> These plats define the lots by metes and bounds, not by terms like “to the waterline.” *Cf. Turner Subdivision Prop. Owners Ass’n v. Schneider*, 4 Mich. App. 388, 390–91, 144 N.W.2d 848, 850 (1966) (holding that deed conveying property by a metes-and-bounds description, “and not ‘to the lake shore at high water’ or any other point on the water’s edge” did not convey riparian rights). Additionally, the plats describe the drainage easement as lying “20’ within the property and 40’ *towards* the lakes.”<sup>13</sup> (R. pp. 79, 281 (emphasis added).) This language confirms that the Respondents’ property is not contiguous with the waterline but rather that there is dry land—*i.e.*, the buffer strip—between Respondents’ property and the waterline.

Moreover, Respondents have *never* claimed ownership of the buffer strip. No such claim is found in any Respondent’s answer to the complaint. Each Respondent denies that Raven’s Run owns the buffer strip, but none claims ownership of the buffer strip for themselves. (R. pp. 104-107 (Kinlaw Answer to Am. Compl.); R. pp. 108-110 (Kubu Answer to Am. Compl.); R. pp. 65-67 (Johnson Answer to Compl.)<sup>14</sup>.) During the

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<sup>12</sup> The deeds to Johnson and Kinlaw reference Plat BP-160 to -161. (R. p. 387 (MSJ Ex. 3(C)); R. p. 291 (MSJ Ex. 4(C)).) The deed to the Kubus references Plat BN-176 to -177. (R. p. 282 (MSJ Ex. 2(C)).)

<sup>13</sup> Thus, the master erred in describing the easement as “extend[ing] 20 feet onto the lot owners property and 40 feet *into* the lake.” (R. p. 11 (MSJ Order, at 3).)

<sup>14</sup> It does not appear that Johnson ever answered the amended complaint.

summary judgment hearing, counsel for each Respondent made abundantly clear that they *do not* claim ownership of the buffer strip:

- Counsel for Kinlaw: “[T]here is a strip of land right here between our lot line and the water. That’s the question of ownership, who owns that.” (R. p. 138 (MSJ Tr. at 10).)
- Counsel for Johnson: “[O]ur three clients own exactly what’s depicted on this plat. There’s no question that there’s a property line in their backyard and that beyond that property line is property that belongs to somebody else. If they were to step over that line they would be on the property of somebody else.” (R. p. 158 (MSJ Tr. at 30).)
- Counsel for the Kubus: “The trouble is here, the strip between my client’s rear lot line and the body of water – it’s about 12 feet.” (R. p. 176 (MSJ Tr. at 48).)

### **III. RAVEN’S RUN IS ENTITLED TO A DECLARATORY JUDGMENT THAT IT OWNS THE BUFFER STRIP**

In addition to reversing the order granting summary judgment to Respondents, this Court should remand with instructions for the master to enter a declaratory judgment stating that Raven’s Run has fee simple title to the buffer strip. The 1985 and 1987 Deeds clearly demonstrate the intent of the grantor, RAC Enterprises, to convey the both the lake and the buffer strip to Raven’s Run.

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.” *Wayburn v. Smith*, 270 S.C. 38, 41, 239 S.E.2d 890, 892 (1977). Each deed “must be construed as a whole and effect given to every part if it can be done consistently with the law.” *Gardner v. Mozingo*, 293 S.C. 23, 25, 358 S.E.2d 390, 391–92 (1987).

“When a deed is unambiguous, any attempt to determine the grantor's intent when reserving the easement must be limited to the deed itself and using extrinsic evidence to contradict the plain language of the deed is improper.” *Penza v. Pendleton Station, LLC*, 404 S.C. 198, 204–05, 743 S.E.2d 850, 853 (Ct. App. 2013). Nevertheless, extrinsic documents referenced in a deed become part of the deed for the purposes of determining the scope of the property conveyed by the deed. *See, e.g., Bennett v. Inv’rs Title Ins. Co.*, 370 S.C. 578, 594, 635 S.E.2d 649, 657 (Ct. App. 2006) (“When a deed describes land as shown on a certain plat, such plat becomes part of the deed for the purpose of showing the boundaries ... of the property conveyed.”). This principle includes references in a deed to tax map numbers. For example, in *Millvale Plantation v. Carrison Family Limited Partnership*, 401 S.C. 166, 736 S.E.2d 286 (Ct. App. 2012), this Court held that “the parties’ decision to include tax map references in their deeds is significant and *reflects their intent* to convey the specific acreages described thereon.” *Id.* at 175, 736 S.E.2d at 290 (emphasis added).

**A. RAC Enterprises Clearly Intended to Convey the Raven’s Run Lake and the Buffer Strip to Raven’s Run**

The 1987 Deed clearly demonstrates the intent of the grantor, RAC Enterprises, to convey the lake and the buffer strip to Raven’s Run. That deed conveys:

ALL those certain roads, streets and street rights-of-way, walkway, sewer pump station site, and *any and all lakes or bodies of water, saving and excepting those that are excluded within specific residential lot lines* ... All of said above described parcels of land

and/or water are shown on an a certain plat of Raven's Run Subdivision ... duly recorded ... in *Plat Book BL at page 57*.

(R. p. 118 (emphasis added).) The 1987 Deed also references and incorporates tax map number 561-01-00-093. (R. p. 118.) As the evidence in the record clearly shows, the property covered by tax map number 561-01-00-093 clearly includes the lake and the buffer strip. (R. p. 117.)

The master concluded that the 1987 Deed could not convey the buffer strip to Raven's Run because Plat BK-2 was earlier recorded and conveyed title to Crown Pointe. For the reasons discussed in Part II, *supra*, this conclusion was wrong. Plat BK-2 dedicated a drainage easement. It did not, and could not, convey title. Consequently, title to the buffer strip remained with RAC Enterprises until it was conveyed to Raven's Run in the 1987 Deed.

**B. The Intent of the 1987 Deed Is Confirmed by Overwhelming Evidence**

The intent of the 1987 Deed is overwhelmingly confirmed by the evidence in the record. First, the 1987 Deed is consistent with the earlier-recorded 1985 Deed. The 1985 Deed conveys:

ALL those certain pieces , parcels or strips of land, bodies of water, roadways and marsh, below described, all of which are shown on a certain plat entitled "Phase I, Raven's Run ..." recorded on December 3, 1985 ... [in] Plat Book BG at pages 52, 53 and 54.

ALL lakes, fingers, coves, and other bodies of water, saving and excluding those bodies of water which are included within specific residential lot lines[.]

(R. p. 268.) Like the 1987 Deed, the 1985 Deed specifically references tax map number 561-01-00-093.

Second, the Crown Pointe Covenants, which were recorded in 1986—between the 1985 Deed and the 1987 Deed—clearly recognize that Raven’s Run owns the buffer strip:

No use may be made by any owner, family member, or invitee of lake systems of Raven’s Run Subdivision which abut Lots 37E through 66E of Crown Pointe; this total prohibition of use shall specifically include boating, swimming, and fishing. *The portion of land between the rear Lot lines of such lots and the water line of the Raven’s Run lakes is owned by the Raven’s Run Homeowners Association, Inc.*

(R. p. 44 (emphasis added).) It is not disputed that Raven’s Run has paid the property taxes on the real property identified by tax map number 561-01-00-093, which encompasses the lake and the buffer strip, since at least 1985. (R. p. 351 (Recons. Ex. 7).)

Third, the 2001 Quitclaim Deeds clearly convey *different* property than was conveyed by the 1985 and 1987 Deeds. They convey the “common area, including any ‘lake’ and ‘green area’, *located in* East Crossing Subdivision,” as shown on Plat BK-3, and the “common area, including any ‘lake’ and ‘green area’, *located in* Crown Pointe Subdivision,” as shown on Plat BK-2. (R. pp. 84, 332 (emphasis added).) This description is followed by a reference to tax map number 561-05-00-145. (R. p. 85.) Tax map number 561-05-00-145 denotes water and land abutting the East Crossing Subdivision and lots on the *western* side of the Crown Pointe Subdivision. (R. p. 358 (Recons. Ex. 11).) It clearly does not include water and land abutting any lots on the *eastern* side of the Crown Pointe

Subdivision, including Lots 37E through 66E, the lots abutted by the buffer strip.

RAC Enterprises is the grantor for *all* of the foregoing conveyances and the Crown Pointe restrictive covenants. The 1987 Deed is sufficient, by itself, to establish that the grantor intended to convey the buffer strip to Raven's Run. When the 1987 Deed is considered in light of the 1985 Deed, the Crown Pointe restrictive covenants, and the 2001 Quitclaim Deeds—all of which are from the same grantor, RAC Enterprises—the grantor's intent is unmistakable.

Aside from all of this, the deeds conveying the lots owned by Respondents reference and incorporate plats that plainly show Raven's Run's ownership of the lake and the buffer strip. The deeds to Johnson and Kinlaw reference and incorporate Plat BP-160 to -161. (R. pp. 339-340.) Johnson's and Kinlaw's lots (40E and 45E, respectively) appear on Plat BP-161, recorded on December 18, 1987 (*after* the 1987 Deed). This plat shows that the property beyond Johnson's and Kinlaw's rear lot lines—*i.e.*, the buffer strip and the lake—is owned by "Raven's Run Homeowners Assoc." The deed to the Kubus references and incorporates plat BN-176 to -177. (R. p. 282.) The Kubus own Lot 39E, which appears on Plat BN-177. Like Plat BP-161, Plat BN-177 shows that the property beyond the Kubus' rear lot line—*i.e.*, the buffer strip and the lake—is owned by "Raven's Run Homeowners Association."

#### **IV. THE COURT SHOULD REMAND THE TRESPASS AND NUISANCE CLAIMS FOR FURTHER PROCEEDINGS**

Raven's Run's amended complaint asserts claims for trespass and nuisance. (R.

pp. 101-103 (Am. Compl. ¶¶ 70-80).) These claims are based on evidence of misconduct by each Respondent. (R. p. 99 (Am. Compl. ¶¶ 48-50 (alleging that Kinlaw's property manager hired a service to cut down trees on the buffer strip)); R. p. 50 (Aff. of Daniel Hause) (attesting that the Kubus and Johnson cut down greenery in the area behind their lot lines); R. p. 56 (Aff. of Joseph R. Pettit, Jr.) (attesting that James Kubu removed survey flags from the buffer strip and canoed on the lake)).) Raven's Run's motion for summary judgment was supported by photographic evidence, showing that Respondents' removal of the trees and greenery destroyed the purpose of the buffer between the waterline and the lots in Crown Pointe, which was to create the sense that the lots in Raven's Run were surrounded by woodland. (R. pp. 300-328 (MSJ Ex. 11).)

For the reasons explained in Parts II and III, *supra*, this Court should reverse the order granting summary judgment to Respondents and should remand with instructions for the master to grant summary judgment to Raven's Run on the declaratory judgment claim for ownership of the buffer strip. Ownership of property includes "the rights of exclusive possession and use and enjoyment," which are enforceable through actions for trespass and nuisance. *Babb v. Lee Cty. Landfill SC, LLC*, 405 S.C. 129, 141, 747 S.E.2d 468, 475 (2013).<sup>15</sup> Accordingly, this Court should also reverse summary judgment as to the

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<sup>15</sup> See also *Morris*, 253 S.C. at 634, 172 S.E.2d at 822 ("We conclude that the defendant, as owner in fee simple of his land, clearly has the exclusive right to use and control that part of the lake which lies above his own land, and has the right to exclude plaintiffs and all other persons claiming by, under or through them, from any use whatsoever of the defendant's lands and water above said lands."); see also *White's Mill Colony, Inc. v.*

trespass and nuisance claims and remand for further proceedings on their merits.

### CONCLUSION

For the reasons set forth above, this Court should reverse the master's order granting summary judgment to Respondents and remand with instructions to grant a declaratory judgment that Raven's Run owns the buffer strip. Additionally, the Court should reverse summary judgment on the trespass and nuisance claims and remand them for further proceedings.

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*Williams*, 363 S.C. 117, 609 S.E.2d 811 (Ct. App. 2005) (holding that an "abutting property owner is free to bargain with the owner of the pond or lake for the conveyance of an easement or some other right of access to its waters").

Respectfully submitted,

s/William W. Wilkins

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August 3, 2020

Greenville, South Carolina

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**Aug 03 2020**

**SC Court of Appeals**

**CERTIFICATE OF COUNSEL**

The undersigned certifies that this **Final Opening Brief of Appellant/Respondent** complies with Rule 211(b), SCACR.

August 3, 2020

s/Kirsten E. Small

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SC Court of Appeals

CERTIFICATE OF SERVICE

I certify that the foregoing **Final Opening Brief of Appellant/Respondent** was served on Respondent/Appellant and Respondents by depositing a copy in the United States Mail, postage prepaid, addressed to their counsel of record as set forth below.<sup>16</sup> Additionally, a copy was transmitted to counsel's AIS email addresses, as shown below, in accordance with Supreme Court Order 2020-03-20-1.

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<sup>16</sup> Respondents James B. Kubu and Melissa F. Kubu are currently *pro se* pursuant to the Court's order of July 28, 2020. If new counsel for the Kubus files a notice of appearance by the Court's deadline of August 27, 2020, a copy of this document will be served on counsel.